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The Law of Contracts & Tenders

With a Special Chapter on
E.Contracts

Foreword by
Hon'ble Justice **B. Sudershan Reddy**
Judge, Supreme Court of India.



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with a Special Chapter on
E-CONTRACTS

(A Complete Exposition and a Comparative Study of the English and Indian Law together with commentaries on the Indian Contract, Sale of Goods and Partnership Acts.)

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OM BHUR, BHUVAH, SVAH
TAT SAVITUR VARENYAM
BHARGO DEVASYA DHIMAHI
DHIYO YO NAH PRACHODAYAT.

Om, Who is dearer than our breaths, is Self-subsistent, All knowledge and All Bliss We meditate upon that adorable effulgence of the resplendent Vivifier of the Universe, Savita : May He illumine our intellects unto the right path.

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XXXXXXXXXXXXXXXXX

THE LAW OF CONTRACTS & TENDERS

THE INDIAN CONTRACT ACT, 1872

[IX OF 1872][1]

Preamble

WHEREAS it is expedient to define and amend certain parts of the law relating to contracts; it is hereby enacted as follows:

PRELIMINARY

1. Short title.—This Act may be called the Indian Contract Act, 1872.

Extent and Commencement.—It extends to the whole of India[1] [except the State of Jammu and Kashmir]; and it shall come into force on the first day of September 1872.

Enactment repealed.—[2] [x x x] Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

Sec. 1—Purpose and origin of Law of Contract.—Time was when Rex was lex. We know, all the world over seek to say lex is Rex. The evolution

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1. Subs. by Act 3 of 1951 for "except Part B States".
2. The word 'the enactments mentioned in the Schedule hereto are repealed to the extent specified in the third column therof; but' repealed by Act 9 of 1914, S. 3.

of the law of contract shows man's desire to be governed by law in his mundane affairs. In the history of mankind, Constitutional law is indispensable for the governance of a nation, while the law of contract is essential for the people in their day to day living. One may ask one, if, what is a need for a law of contract? And what does that law of contract provide for man in his life? A man agrees to do a particular thing to another man and if he fails to perform his part, what is the remedy of the other man? The law of contract interposes and directs the man who promised to perform what he had agreed and attempts to do justice between the parties. If the law of contract were not there, man will be inclined to act at his own whims and fancies and the human relations will be put to great chaos and confusion. Law of contract attempts at uniformity and brings orderliness in society. Before we study about the birth, as it were, of the Contract Act, it is of interest to note the events anterior thereto culminating in the passing of the Act and how those events and experience of great men - who were destined to shape the law dealing with the law could get their ideas crystallized to give us the Act in the present form. More than a century has elapsed since the Act was brought into the Statute Book. The provisions of the Act do offer solutions to the various problems that arise today. And the Law Lords of England and learned Judges of our country over the years have interpreted the provisions of the Act giving life and meaning to them.

In India before the advent of Moguls, the law handed down by the great Hindu saints covered the field. There did not appear to have been any well-laid principles governing contracts in general. For example, the law of specific performance was unknown to Hindu Law. The principles we came across and noticed by the authors on Hindu Law, is the rule of Damdupat by which no greater arrears of interest can be recovered at any one time than what will amount to the principal sum at that time. There was no period of limitation fixed for the recovery of money under Hindu Law. The invasion of Moguls did not bring out any change in the situation. However, Mohammedans were governed by their rules and the Mohammedans Law did not contain any specific rules, governing transactions between Muslims. Same was the position under Christian Law. In India, there were many kingdoms each having its own system of administration of Justice depending on the wisdom and virtues of the Kings reining the territory, People were free to have their systems. A student of law knows that law was developed and experimented in Rome in its initial stages. The law of Twelve Tables as applied to Roman citizens came to be called the '*Jus Civile*'. But as people grew civilised and trade developed, the '*Jus Civile*' was found not adequate to offer solutions to the problems pertaining to contracts made in foreign countries and therefore, the Jus Genitium was then developed as a body of legal principles. It is said that the *Jus Genitium* was the forerunner of the Law of Merchants, which defined principles to regulate transactions of merchants belonging to different countries on principles of equity.

It is a matter of history that the British, first came to India for the purpose of trade through the East India Company. That Company was formed in the year 1600 in the reign of Queen Elizabeth I. The Charters granted to the Company "Powers to them to make, order and constitute such and so many reasonable laws, constitutions, orders and ordinances as to them-shall seem necessary—so always that the said laws, orders, constitutions, imprisonments, parties were Hindus, the Mohammedan Law where both the parties were Mohammedans and the Law of the defendant where one of the parties was a Hindu and the other a Mohammedan. This was the rule in the Presidency Towns. Outside the Presidency Towns, it was entirely the rule of 'justice, equity and good conscience.' Subsequently, Parliament enacted Acts which were extended to the other parts of India. The Governor-General in Council also passed regulations. Similarly regulations were passed by the Madras Council and in other Presidency Towns. That resulted in confusion and led to the appointment of the Law Commissions. Lord Macaulay who was responsible for the appointment of the Law Commission observed that India needed a Code of Law more than any other country and the principle he enunciated was "Uniformity when you can have it, diversity when you must have it, but in all cases certainty". Later, Law Commissions were constituted to frame the law of Contract and eventually the Bill for the Contract Act was introduced in the Imperial Legislature by the Rt. Hon'ble Mr. W.N. Murrey, with the omission of the clauses relating to specific performance and with some minor alterations and the additions of the interpretation clause and the provisions relating to repeal and savings. The Bill was piloted through the Legislative Council by Sir Thomas Fitz Stephen and was passed into an Act in 1872. The Act is acknowledged to be unique piece of legislation. In the symmetry of its structure—like the Indian Evidence Act—clarity and fulness of its outlines, in the terseness of its expressions the work stands out non-pareil in the field of legislation in the history of mankind.

Previous Law.—The law of contracts in force in India prior to the Indian Contract Act was neither uniform nor satisfactory. The Statute of 1726 introduced the English Common and Statute law so far as they could be applied in India. The application of the English principles gave rise to difficulties in practice; it was found that native law had also to be taken into account. Accordingly, the Statutes of 1781 and 1797 provided that the Hindu law was to be applied where both parties were Hindus, the Mohammedan law where both the litigants were Mohammedans, and the law of the defendant, where one of the parties was a Hindu and the other a Mohammedan. This was the rule in the Presidency towns. Outside the Presidency towns, it was entirely the rule of "justice, equity and good conscience." This state of things continued till the passing of the Act.

Act, if retrospective.—The Act is not retrospective and applies only to contracts entered into subsequent to 1st September 1872.

Act, if exhaustive.—The Preamble shows that the Act is intended only to define and amend certain parts of the law relating to contracts. The question whether the Act is an exhaustive code with reference to the Law of Contracts and if so, to what extent, has been considered by the Privy Council in three important cases. In *Irrawaddy Flotilla Co.* v. *Bugwandas,*[1] their Lordships said:

> "The Act of 1872 does not profess to be a complete Code dealing with the law relating to contract. It purports to do more than define and amend certain parts of the law.

The question before the Privy Council was whether a common carrier's liability came within Chapter IX (Bailments) of the Indian Contract Act. Their Lordships said:

> "No doubt, the Act treats of bailments in a separate chapter. But, there is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or sub-division of the law relating to contracts."

In *Ramdas* v. *Amerchand & Co.*[2], the point for decision was whether a railway receipt can be termed an "Instrument of title" within the meaning of Section 103 of the Indian Contract Act, and it was argued that the Act having been passed at a time, when the English Law did not recognise railway receipts as instrument of title, the Legislature could not possibly have intended to include railway receipts in the term "Instrument of title". The Judicial Committee said [3]:

"The Indian Contract Act is an amending as well as a Consolidating Act and beyond the reasonable interpretation of its provisions, there is no means of determining whether any particular section is intended to consolidate or

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1. (1891) 18 Cal. 620 : 18 IA 121; approving *Moothora Kanth Shaw* v. *I.G. S.N. Co.*, (1884) 10 Cal. 166 : 13 CLR 342 and disapproving *Kuverji* v. *G.I.P. Ry. Co.*, (1879) 3 Bom. 109 **see also** *Jwala Dutt* v. *Bansilal,* (1929) 53 Bom. 414 : 31 Bom. LR 687 : 33 CWN 705 IC 707 : 29 LW 884 : 56 MLJ 739 : (1929) PC 132; *Keshavalal Hiralal* v. *Pratap Singh,* (1932) 56 Bom. 101 : 34 Bom. LR 167 : (1932) Bom. 168; *Jagjiwandas* v. *King Hamilton & Co.,* (1931) 55 Bom. 677 : 33 Bom. LR 709 : 134 IC 545 : (1931) Bom. 337; *Scott* v. *Keshavlal,* (1930) Bom. 529 : 128 IC 26 : 54 Bom. 862; *Haji Shakoor Gany* v. *Volkart Bros.,* (1931) Sind 124 : 133 IC 77 (common carrier's liability not governed by the Act); *Morarji* v. *Mulji,* (1924) 48 Bom. 20 : 25 Bom. LR 1014 : 77 IC 266 : (1924) Bom. 232 (Ss. 69 and 70 not exhaustive); *Promotha Nath Mullick* v. *Prodymno Kumar Mullick,* (1921) 26 CWN 772 : (1921) Cal. 416 : 69 IC 900; *Acha Ranganayak* v. *Acha Ramanuja,* (1912) 35 Mad. 728 : 21 MLJ 600 : (1911) 2 MWN 285 : 11 IC 570.
2. (1916) 40 Bom. 630; 43 IA 164; (1916) PC 7 : 14 ALJ 1045 : 18 Bom. LR 670 : 24 CLJ 320: 20 CWN 1182 : 31 MLJ 541 : 4 LW 342 : (1916) 2 MWN 110 : 35 IC 954. **See also** *Harilal* v. *Pehladrai,* (1929) 31 Bom. LR 508 : (1929) Bom. 260 : 120 IC 337.
3. (1916) 40 Bom. 630 (636).

amend the previously existing law..... Their Lordships do not see any improbability in the Indian legislature having taken the lead in a legal reform."

In *Mohori Bibi* v. *Dharmodas Ghose*,[1] where it was argued on the wording of the Preamble that the Act did not deal with contracts by infants, their Lordships said:

> "The Act, so far as it goes, is exhaustive and imperative and does provide in clear language that an infant is not a person competent to bind himself by a contract of this description."

Accordingly it was held that an infant's contract is void and not merely voidable.

In *Punjab National Bank* v. *Arura Mal*,[2] it is held that the Act applies to all contracts in India. The Act has however no extra-territorial operation and will not apply to contracts formed outside India with reference to deposits outside India.[3]

Native Law, applicability.—The Act does not deal with the whole law of contracts and therefore, the native law of the land may be applicable in cases in which the Act is silent. For example, the rule of Damdupat that no creditor can recover from a Hindu borrower at any one time any amount by way of interest larger than the principal obtains in the Bombay Presidency and the Presidency Town of Calcutta.[4] But the rule has no application outside the Presidency Town of Calcutta or in the province of Madras.[5] On the question how far the rule has been abrogated in cases of mortgages by the Transfer of Property Act, the High Courts differ. The Madras High Court [6] held that the Act has abrogated the rule, while the Bombay [7] and Calcutta High Court [8] hold that it has not.

Regulations not expressly repealed.—Chief among these are the Acts relating to Interest (XXXIII of 1839); Usury (XXVIII of 1855); Bills of Lading (IX of 1856); Policies of Insurance (V of 1866), Negotiable Instruments (XXVI of 1881); Contracts with Railways (IX of 1890) etc.

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1. (1903) 30 Cal. 539 (PC); *Kalyanji* v. *Tirkaram*, (1938) Nag. 254.
2. AIR 1960 Punj. 632, 635.
3. *Indo-Allied Industry Ltd.* v. *Punjab National Bank Ltd.*, AIR 1970 All. 108, 113.
4. See *Ramachandra* v. *Bhimrav*, (1877) 1 Bom. 577; *Ali Sahib* v. *Shabji*, (1895) 21 Bom. 85; *Nobin Chunder* v. *Ramesh Chander*, (1887) 14 Cal. 781.
5. *Het Narain* v. *Ram Devi*, (1883) 12 CLR 590; *Annaji Rao* v. *Ragubai*, (1883) 6 MHCR 400.
6. *Madhwa S.O. Nidhi* v. *Venkataramanjalu*, (1903) 26 Mad. 662.
7. *Jeewanbai* v. *Manordas Lachmondas*, (1910) 35 Bom. 199 : 12 Bom. LR 992 : 8 IC 649.
8. *Kunja Lal Banerji* v. *Narasamba Debi*, (1915) 42 Cal. 826.

Usages or customs of trade.—The Act again does not affect particular usages or customs of trade, which may be enforced, though they are inconsistent with the express provisions of the Contract Act.[1] Such usages or customs have been recognised with respect to Section 110, (now Section 16 of the Sale of Goods Act), Section 190 and 211 of the Indian Contract Act.

Thus, as pointed out in *Salig Ram* v. *Nathamal,*[2] where an agent sells goods in pursuance of a trade usage permitting such sale, the question of his authority to sell will not be governed by the Contract Act.

In *Sital Prasad* v. *Ranjit,*[3] the Court held that a re-sale in contravention of Section 107 of the Indian Contract Act (now Section 54 of the Sale of Goods Act), was not permissible unless a trade usage was established to that effect.

A usage or custom by which incidents not expressly mentioned in any contract are usually annexed to it may be proved, provided that the annexing of such incidents will not be repugnant to the express terms of the contract.[4]

A mercantile usage or usage of trade does not require the notoriety or antiquity of a custom.[5] But, it must be reasonable and sufficiently established. It must be proved by specific instances.[6]

Special Acts and Regulations.—The general provisions of the Act cannot supersede the provisions of a special later enactment. (*e.g.,*), the Bombay Hereditary Offices Act.[7] Nor is the Contract Act superseded by Art. 299 of the Constitution and Section 72 of the Railways Act prescribing the form of contract.[8]

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1. *Irrawaddy Flotilla Co.* v. *Bugwandas,* (1891) 18 Cal. 620 (627) : 18 IA 121; *Jankidas* v. *Dumanmal,* (1917) 37 IC 241.
2. (1933) Lah. 183 : 145 IC 188 (2).
3. (1931) ALJ 390 : (1931) All. 583 : 136 IC 158.
4. *Chandanmal Bangney* v. *National Bank of India Ltd.,* (1924) 51 Cal. 43 : (1924) Cal. 552 : 79 IC 757; *Rutonsay Raoji* v. *Bombay United Spinning and Manufacturing Co.,* (1917) 41 Bom. 518 : 18 Bom. LR 532 : 37 IC 271 (Custom of trade re. allowance in price if difference in quality between sample, and goods supplied).
5. *Juggmohan* v. *Manikchand,* (1859) 7 MIA 263 ; *Paul Bier* v. *Chotalal* (1906) 30 Bom. 1 : 6 Bom. LR 948 (goods ordered net free godown).
6. *Gurdayal* v. *Jhandu,* (1888) 10 All. 585 : (1888) AWN 342 (pre-emption) *Kishensingh* v. *Fakir,* (1982) Lah. 996 : 112 IC 447; *Price* v. *Browne,* (ILR) 14 Mad. 420 : MLJ 540 following; *Nelson* v. *Dawl* 12 Ch.D. 568; *Chandra Industrial and Banking Syndicate* v. *Ram Chandra,* AIR 1968 Mys. 133 : (1967) 1 Mys. LJ 9; *Volkart Bros.* v. *Vettivelu Nadan,* ILR 11 Mad. 459. Where a passage from Chitty on Contracts 24th Edn. page 93.
7. *Lingo Rooji* v. *Secy. of State,* (1928) 30 Bom. LR 570 : 111 IC 278 : (1928) Bom. 201.
8. *Union of India* v. *S.S.H. Syndicate,* AIR 1976 SC 879 : 1976 (3) SCR 504 :(1976) 3 SCC 108.

Rules of Interpretation:

(a) **Language of the Statute.**—The leading case on the interpretation of a Code is *Bank of England* v. *Vagliano*,[1] where it was said that the proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law. The words of the enactment must have their natural effect given to them, as far as possible, for the construction of an Act depends primarily on its wording. A construction, which requires for its support additions or substitution of words, has to be avoided.[2] It is a recognised rule of interpretation of Statutes that the expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the Statute and which effectuate the object of the Legislature. In interpreting a Statute the Court cannot ignore its aim and object.[3] A new and pragmatic approach was suggested by Denning, M.R. in *Seaford Court Estates Ltd.* v. *Aswer*.[4] In this case the rent of a flat had been increased from £ 175 a year to £ 250 a year. The increase was because the Landlord agreed to provide hot water for the flat. The tenant freely agreed to pay the £ 250 but then tried to get it reduced to £ 175. The question for decision was, what was the meaning to be given to the word 'burden' in the Rent Act, 1920.

The Master of the Rolls observed—

> "The question for decision in this case is whether we are at liberty to extend the ordinary meaning of 'burden' so as to include a contingent burden of the kind I have described. Now this Court has already held that this sub-section is to be liberally construed so as to give effect to the governing principles embodied in the legislation.....and I think we should do the same.

Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts, which may arise, and even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of

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1. (1891) AC 107 (144); *Ramanandhi* v. *Kalavati*, (1928) 7 Pat. 221; *Brojodurlabh Sinha* v. *Ramanath Ghose*, (1897) 24 Cal. 908; *Mercantile Bank of India* v. *Official Assignee*, (1933) 56 Mad. 177 : 37 LW 32 : (1933) Mad. 207 : 64 MLJ 320.
2. *Mohammed Muzaffar* v. *III Addl. Dist. Judge, Muzaffar Nagar*, 1978 AWR 293 : (1978) 4 ALR 413 referring to AIR 1961 SC 1978.
3. *Commissioner of Income Tax* v. *Statillete Engineering Ltd.*, 1978 Tax LR 536 (Guj) : (1978) 1 ITJ 385 (Guj.).
4. (1949) 2 KB 481 affirmed in (1950) 1 All. ER 1018 (HL) : 138 ITR 208 relied on in *New India Sugar Mill* v. *Commr. Sales Tax*, AIR 1963 SC 1207 : 1963 Supp. (2) SCR 459 : 1963 (14) STC 316 : See for interpretation of bye-laws of Co-op. Society. *Balubhai Maganlal Ghaswala* v. *State of Gujarat*, AIR 1978 Guj. 63.

mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A Judge believing himself to be fettered by the supposed rule that he must look to the language and nothing else laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the Judges' trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. That was clearly laid down by the resolution of the Judges in *Heydon's* case and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden.....Put into homely metaphor it is this: A Judge should ask himself the question. If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A Judge must not alter the material of which it is woven, but he can and should iron out the creases.

Approaching this case in that way, I cannot help feeling that the legislature had not specifically in mind a contingent burden such as we have here. If it had, would it not have put it on the same footing as an actual burden? I think it would. It would have permitted an increase of rent when the times were so changed as to put a positive legal burden on the landlord.

It is of interest to notice what the Supreme Court had said on the question of interpretation in *Union of India* v. *Sankalchand,*[1] The Supreme Court said :

> "while we agree that judicial interpretation should not be imprisoned in verbalism and words lose their thrust when read *in Vacuo,* we must search for a reliable scientific method of discovery rather than speculative quest for the spirit of the Statute and the cross-thoughts from the legislator's lips or Law Commissioner's pen. They edify but are not edited."

Exposition *Viceribus actors,* is a long recognized rule of construction. Words in a statute often take their meaning from the context of the statute as a whole. They are therefore not to be construed in isolation.[2]

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1. AIR 1977 SC 2328 at page 2374 : (1977) 4 SCC 193 : (1977) 18 Guj.LR. 919.
2. *Superintendent and Remembrancer of Legal Affairs to Govt. of West Bengal* v. *Abani Maity,* AIR 1979 SC 1029 : 1979 (3) SCR 472 : (1979) 4 SCC 85 : 1979 SCJ 176.

(b) **Harmonious Construction.**—It is one of the cardinal principles of interpretation of statutes that the construction which produces the greatest harmony and the least inconsistency between different parts of the same statute should prevail.[1]

(c) **Illustrations.**—Illustrations are of great value in interpreting the sections. Illustrations are part of the statute.[2] They should not be rejected simply on the ground that they do not square with ideas possibly derived from another system of jurisprudence, as to the law with which they or the sections deal.[3] They furnish indications of the presumed intention of the Legislature.

The illustrations, however, cannot have the effect of modifying the language of the section, which alone forms the enactment.[4] So, if there be a conflict between the section and the illustration, the latter must give way.[5]

In his Introduction to the Anglo-Indian Code Vol. I at page xxvii, Mr. Whitley Stokes (Member of the law Commission to draft the Negotiable Instruments Act) appreciated the special feature of giving illustrations thus:

> "There is one salient peculiarity of the Anglo-Indian Codes, viz. use of illustrations. Traces of the idea of adding specific illustrations to general propositions may be found in Bentham and Austin is said to have used them in a draft code of the law of libel, which he prepared for Malta. But however this may be, the first to use them in practical legislation was Macaulay and their

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1. *Rangiah* v. *Appaji Rao,* (1926) 50 Mad. 300 : (1926) MWN 972 : 26 LW 865 : (1927) Mad. 163 : 99 IC 241 : 51 MLJ 719; *Harikisandas Bhagavandas* v. *Bai Dhanu,* (1926) 50 Bom. 566 : 28 Bom. LR 954 : 98 IC 634 : (1926) Bom. 497 (use of word in more than one place—Generally same meaning); *Khan Gul* v. *Lakha Singh,* (1928) 9 Lah 701 : 111 IC 175 : (1928) Lah. 609; *Bahadur Lal* v. *Judges of Allahabad High Court,* (1933) All. 241 : 55 All. 432 : 143 IC 559 (FB).
2. *Balla Mall* v. *Bhad Shah,* AIR 1976 SC 249; **see also** *Faridabad Cold Storage and Allied Industry* v. *Official Liquidator of Ammonia Suppliers Corporation (P) Ltd.,* AIR 1978 Delhi 158 (FB) : 1978 Tax LR 1893 : 48 Com. Cases 432; *Rulia Devi* v. *Raghunath Prasad,* AIR 1979 Pat. 115 : 1979 BLJR 38 : 1979 BBCJ (HC) 4; *Satyanarayana Prasad* v. *State of Bihar,* 1978 Lab. IC 334 (Pat.) : (1978) (I) Service LR 351; *M. Balaram* v. *M.S. Vasanth,* AIR 1978 Karn. 102 : 1978 (1) Karn. LJ 150; *Deo Rao Pandurang Mangarulkar* v. *Collector Chandrapur,* AIR 1978 Bom. 293.
3. *Kandappa* v. *Muthuswami,* (1926) 50 Mad. 94 : (1926) MWN 990 : 24 LW 792 : 99 IC 609 : (1927) Mad. 99 : 15 Mad. LJ 765.
4. *Bengal Nagpur Ry.* v. *Ruttanji Ramji,* (1938) PC 67 : ILR (1938) 2 Cal. 72 : 65 IA 66 : (1938) 2 Cal. 72 : 65 IA 66 : (1938) ALJ 169 : 19 Pat. LT 125 : 1938 OWN 261 : 40 Bom. LR 746 : 42 CWN 985 : 173 IC 15 : (1938) MWN 646 : 47 LW 281 : (1938) 1 MLJ 640.
5. *Satish Chandra* v. *Ram Dayal,* (1920) 48 Cal. 388 : 59 IC 143; (1921) Cal. 1; *Maruti* v. *Bankatlal,* (1933) Bom. 313 : 35 Bom. LR 576; *Kandappa* v. *Muthuswami,* (1926) 50 Mad. 94. **See also** *Jumma Masjid* v. *Kodi Maniandra,* AIR 1962 SC 847 : (1962) 2 SCA 422 : (1962) 2 SCJ 303.

nature and object cannot be stated otherwise than in his own words taken from the letter to Lord Auckland prefixed to the draft Indian Penal Code."

"One peculiarity in the manner in which the Code is framed will immediately strike your Lordship in Council. We mean the copious use of illustrations".

These illustrations will, we trust, greatly facilitate the understanding of the law, and will at the same time often serve as a defence of the law. In our definitions we have repeatedly found ourselves under the necessity of sacrificing neatness and perspicuity and the precision and of using harsh expressions because we could find no other expression, which would convey our whole meaning and no more than our whole meaning. Such definitions standing by themselves might repel and perplex the reader and would perhaps be fully comprehended only by a few students after long application. Yet such definitions are found and must be found in every system of law, which aims at accuracy. A legislator may, if he thinks fit, avoid such definitions and by invoking them, he will give a smoother and more attractive appearance to his workmanship, but in that case he flinches from duty which he ought to perform, and which somebody must perform. If this necessary but most disagreeable work be not performed by the lawgiver once for all it must be constantly performed in a rude and imperfect manner by every Judge in the empire and will probably be performed by no two judges in the same way. We have therefore thought it right not to shrink from the task of framing these unpleasing and indispensable parts of a Code. And we hope that when each of these definitions is followed by a collection of cases falling under it and of cases, which though at first sight they appear to fall under it do not really fall under it, the definition and the reasons which led to the adoption of it will be readily understood. The illustrations will lead the mind of the student through the same steps by which the minds of those who framed the law proceeded and may sometimes show him that a phrase which may have struck him as uncouth or a distinction which he may have thought idle was deliberately adopted for the purpose of including or excluding a large class of important cases. In the study of geometry, it is constantly found that a theorem, which read by itself, conveyed no distinct meaning to the mind becomes perfectly clear as soon as the reader casts his eye over the statement of the individual case taken for the purpose of demonstration. Our illustrations, we trust, will in a similar manner facilitate the study of the law.

There are two things which a legislator should always have in view while he is framing laws, the one that they should be as far as possible precise, the other that they should be easily understood. To unite precision and simplicity in definitions intended to include large classes of things and to exclude the others very similar to many of those, which are included, will

often be utterly impossible. Under such circumstances it is not easy to say what is the best course. That a law and especially a penal law should be drawn in words, which convey no meaning to the people who are to obey it, is an evil. On the other hand, a loosely worded law is no law, and to whatever extent a legislature uses vague expressions to that extent, it abdicates its functions and resigns the power of making law to the Courts of justice.

On the whole, we are inclined to think that the best course is that which we have adopted. We have in framing our definitions thought principally of making them precise and have not shrunk from rugged or intricate phraseology when such phraseology appeared to us to be necessary to precision. If it appeared to us that our language was likely to perplex an ordinary reader, we added as many illustrations as we thought necessary for the purpose of explaining it. The definitions and exempting clauses contain the whole law. The illustrations make nothing law which would not be law without them. They exhibit the law in full action and show what its effects will be on the events of common life."

Illustrations, however, have been omitted in the new Sale of Goods Act (III of 1930) and the new Partnership Act (IX of 1932).

(d) **Headings and Marginal Notes.**—The headings prefixed to sections or sets of sections in some modern Statutes are regarded as preambles to those sections. They cannot control the plain words of the statute but they may explain ambiguous words. If there is any doubt in the interpretation of the words in the section, the headings certainly help the Court to resolve the doubt.[1]

Lord Macnaghtan stated[2] :

> "It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated is a mistake and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament."

The Supreme Court after referring to the judgment of the Privy Council approved and observed: "Marginal notes in an Indian Statute, as in an Act of Parliament cannot be referred to for the purpose of construing the statute.[3]

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1. *Bhinka* v. *Charan Singh,* AIR 1959 SC 960 : 1960 SCJ 892 : 1959 Cr. LJ 1223.
2. *Balraj Kunwar* v. *Jasatpat Singh,* ILR 26 All. 393 (PC).
3. *I.T. Commr.* v. *Ahmed Bhai Umar Bhai & Co.,* AIR 1950 SC 134 : 1950 SCJ 374 : 1950 SCR 335 : 1950 (18) ITR 472.

There can be no justification for restricting the section by the marginal notes.[1] And the marginal notes cannot affect the construction of the language used in the body of the section, if it is otherwise clear and unambiguous.[2]

Though the principles relating to interpretation or construction of contracts have been laid down in various cases, each case presents its own difficulties in resolving the question that arises for consideration by Court. It is therefore necessary to formulate the general and fundamental principles that a student of law can bear in mind while dealing with the construction of a contract.

(i) While construing a contract the intention of the parties has to be gathered from the words employed in the contract. The cardinal rule of interpretation for deeds as well as for other instruments is to gather the intention from the words of the document and for that purpose the language of the entire deed or document should be taken into consideration. The interpretation to be adopted should be one, which gives effect if possible to all the parts and does not reject any of them.[3]

(ii) There is no principle of construction which permits a document contrary to its actual wording to be read as though it followed a proposed precedent unless between the parties, it has been rectified or at least is such as would by the Court be rectified. In construing a power of attorney, plaintiff sought to read the word 'accept' in a certain clause suggesting that it had been omitted by a copyist's error in copying the clause from the power of attorney given to another man, which contained this word. It was held by the Court that the omission was intentional.[4]The intention has to be gathered from the terms and conditions, which are agreed upon by the parties.[5]

(iii) Contract should not be thwarted by narrow pedantic interpretation.[6]

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1. *Emperor* v. *Sadashiv,* AIR 1947 PC 82.
2. *Western India Theatres* v. *Municipal Corporation,* AIR 1959 SC 586 : 1959 Supp. (2) SCR 71.
3. *Purnanthachari* v. *Gopalaswami,* AIR 1936 PC 281.
4. *Adaikappa* v. *Thomas Cook & Son,* AIR 1933 PC 78.
5. *State of Gujarat* v. *Variety Body Builders,* AIR 1976 SC 2108 : (1976) 3 SCC 500 : 1976 Supp. SC 131; *Modi Co.* v. *Union of India,* AIR 1969 SC 9 : 1968 (2) SCR 565.
6. *Abdullah Ahmed* v. *Animendra Kissen,* AIR 1950 SC 15 : 1950 SCR 30 : 1950 SCJ 153.

(iv) It is not advisable to interpret a document with reference to another document, unless the language of the two documents is identical.[1]

(v) When parties have entered into a formal contract, that contract must be construed according to its own terms and not to be explained or interpreted by the antecedent communications, which led up to it.[2]

(vi) When the words in a document are clear the subsequent conduct of parties is an irrelevant consideration.[3]

(vii) The conduct of parties to a contract reduced into writing which is capable of several meanings, may not vary or alter it but their conduct may help to explain or elucidate a contract open to different meanings.[4] There is no such rule of general application that the same meaning ought to be given to an expression in every part of the document in which it appears. A difficulty or ambiguity may be solved by resorting to such a device, but it is only in such cases, that it is necessary or permissible so to do.[5]

The fact that a clause in a document is not binding on the ground that it is unauthorised cannot *ipso facto* render the whole document void unless it forms such an integral part of the transaction as to render it impossible to sever the good from the bad.[6]

When the words are clear and unambiguous, there is no scope for drawing upon hypothetical consideration or supposed intentions of the parties.[7] It is a well settled rule of interpretation that if there be admissible two constructions of a document, one of which will give effect to all the clauses therein while the other will render one or more of them nugatory, it is the former that should be adopted on the principle expressed in the maxim "*ut res magis valeat quam pereat*" (that the thing may rather have effect than be destroyed). If there is a conflict between an earlier clause and the later clauses and it is not possible to give effect to all of them, then the rule of construction is well-established, that it is the earlier clause that must override the later clauses and not *vice versa*.[8]

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1. *Union of India* v. *D.N. Revri & Co.*, AIR 1976 SC 2257 : 1976 UJ 793 : (1976) 4 SCC 147.
2. *Bomanji* v. *Secy. of State*, AIR 1929 PC 34.
3. *Baraboni Coal Concern* v. *Gokulanand*, AIR 1934 PC 58.
4. *Ma Thaung* v. *Ma Than*, AIR 1924 PC 88.
5. *Waston* v. *Haggit*, AIR 1928 PC 115.
6. *Karanpura Development Co. Ltd.* v. *Kamakshya Narain Singh*, AIR 1956 SC 446.
7. *Union of India* v. *Kishorilal*, AIR 1959 SC 1362 : 1960 (1) SCR 493 : 1960 SCJ 1101.
8. *Radha Sunder* v. *Mohd. Jahadur Rahim*, AIR 1959 SC 24 : 1959 SCR 1309.

While interpreting a commercial contract, a broader outlook has to be adopted and care should be taken to avoid an artificial and unrealistic approach in the matter of understanding the meaning and purpose of such documents. In such cases, the Courts should occupy the chair of the contracting parties and reasonably understand their minds and intents. If after such an approach the instrument still presents circumstances, which the conscience of a reasonable and prudent person cannot accept, and if *ex facie* the terms are so unconscionable, illegal and designed to avoid or evade law, then only the doctrine of public policy will intervene, and will not implement such bargains.[1] Where an agreement between the parties has once been interpreted in a certain way by the Privy Council, in a subsequent litigation, that interpretation would be binding on the parties and it will not be open to the parties to invite the Court to reconsider the document.[2]

Generally speaking, marginal notes are not part of the statute. It has been held in *In re Natesa Mudaliar* [3] that reference to the marginal note is not a legitimate canon of interpretation. In the case of Indian enactments, the marginal note should not be held to control the clear meaning of the section.

(e) **Punctuation marks**—It has been held by the Privy Council in *Lewis Pugh* v. *Ashotosh Sen,*[4] that commas are no part of a statute.

2. Interpretation clause—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context—

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;

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1. *Kamala Sugar Mills Ltd.* v. *Ganga Bishen Bhajan Singh,* AIR 1978 Mad. 178 : (1977) Mad.LJ 149 : ILR 2 Mad. 232.
2. *Habibullah* v. *Janakinath,* AIR 1930 PC 38.
3. (1927) 50 Mad. 733 : (1927) MWN 6 : 26 LW 890 : 99 IC 324 : (1927) Mad. 156 : 51 MLJ 704; *Balran* v. *Jagatpal,* (1904) 26 All. 393 (406).
4. (1929) 8 Pat. 516 : 114 IC 605 : 1929 ALJ 170 : 33 CWN 523 : 29 LW 449 : 31 Bom. LR 702: 1929 PC 69 : 56 MLJ 517; *Jupiter Insurance Co.* v. *Abdul Aziz,* (1923) 1 Ran. 226 : 76 IC 479 : 1923 Ran. 185.

(c) The person making the proposal is called the "promisor", and the person accepting the proposal is called the "promisee';

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise;

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;

(f) Promises, which form the consideration or parts of the consideration for each other are called reciprocal promises;

(g) An agreement not enforceable by law is said to be void;

(h) An agreement enforceable by law is a contract;

(i) An agreement, which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others is a voidable contract;

(j) A contract, which ceases to be enforceable by law, becomes void when it ceases to be enforceable.

Clause (a)—Proposal—Proposal is called an offer in English Law. A proposal may consist either of an act or forbearance. Such act or forbearance may be already done, or promised to be done in future. **[29]** Every offer or proposal must satisfy the following requisites—

(1) The offer must be intended to create legal relations. **[31]** If two parties agree on certain things but provide that any rights under the agreement should not be enforced in a Court of law, it has been held that since the parties did not contemplate legal relations no enforceable contract can arise.[1] **[32].**

Gentlemen's Agreement.— In case of an agreement of Gentlemen's understanding in addition to the existence of an agreement and presence of

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1. *Rose Frank & Co.* v. *Crompton Bros.*, (1923) 2 KB 261 on appeal (1925) AC 445; *Jones* v. *Vernons Pool Ltd.*, (1938) 2 AER 626 (Gentlemen's agreement); *Appleson* v. *Littlewood*, (1939) 1 AER 464 (Rule in football pool making it binding in honour only is valid); *Muthukaruppa* v. *Kathapudayan*, (1914) 27 MLJ 249 : (1914) MWN 706 : 25 IC 726 (Letter recommending a loan to bearer).

consideration there would also be a third element in the form of intention of the parties to create legal relations and such an agreement which is incapable of yielding to legal obligation cannot be enforced.[1]

(2) Again, the offer or proposal must be capable of creating legal relations. **[34]** A casual statement in the course of a conversation or in a letter as to the offeror's intentions will not, on being acted upon, give rise to a contract,[2] nor will a promise made by a husband to his wife to send a monthly remittance for expenses create *per se* an enforceable contract.[3] But an agreement of betrothal made by a Hindu parent for his minor son, such agreement to be carried out on the attainment of majority by the latter, may be an enforceable contract giving rise to legal obligations.[4]

From the conduct of the doctor in approaching a doctor to seek medical assistance no interference can be drawn on the part of patient to execute any agreement with regards to the treatment. The professional service rendered by doctor does not give rise to any contractual liability but however action for negligence can be found in torts.[5]

(3) The terms of the offer, must be certain and not loose, vague or ambiguous,[5] **[36]** An offer to purchase a horse if the one previously purchased proved lucky;[6] an offer to furnish a building in the latest style;[7] a promise to pay such remuneration as shall be deemed right;[8] a promise to renew the contract if the previous one was performed satisfactorily;[9] have all been held to be unenforceable. On the other hand a promise "to pay something substantial" or "to make it worth your while", though uncertain, has been construed to be capable of being made certain, since a reasonable remuneration is what must have been meant.[10] **[37]**

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1. *S.V. Mudaliar* v. *Rajabu F. Buhari,* AIR 1995 SC 1607, 1612 : (1995) 4 SCC 15 : 1995 (3) JT 614 : 1995 (2) SCJ 66 : 1995 (2) Scale 720.
2. *Weeks* v. *Tybald,* (1604) 74 ER 982; *Farina* v. *Fickus,* (1900) 1 Ch. 331; *Narayandas* v. *Ramanuj Dayal,* (1898) 20 All. 209 : 25 IA 46 : 2 CWN 193; *Kasturamma* v. *Venkatasurya,* (1915) 29 MLJ 538 : 2 LW 920 : 30 IC 878 : (1915) MWN 947.
3. *Balfour* v. *Balfour,* (1919) 2 KB 571 (Intention as to future action—expression of no legal consequences).
4. *Venkata Narsimha* v. *Gobind Krishna,* (1937) MWN 274.
5. *Shri OM Builders P. Ltd* v. *Edward Keventer (Successors) P. Ltd.,* Suit No. 1583 A 89 decided on 4-9-1989 (Del.); *Sharad Vaidya* v. *Paulo Joel Vales,* AIR 1992 Bom. 478.
6. *Guthing* v. *Lynn,* (1831) 109 ER 1130; **see also** *Cooper* v. *Hood,* (1858) 122 RR 119; *Pearce* v. *Watts,* (1875) 20 Eq. 492.
7. *Taylor* v. *Portington,* (1855) 44 ER 128 : 109 RR 147; *Faulkner* v. *Llewellyn,* (1864) 136 RR 413.
8. *Taylor* v. *Brewer,* (1813) 105 ER 108; 21 RR 831;*Way* v. *Latilla,* (1937) 3 All. ER 759.
9. *Montreal Gas Co.* v. *Vasey,* (1900) AC 595.
10. (Cf.) *Whittakar* v. *Oldham Corpn.,* (1937) 2 All. ER 577; *Foley* v. *Classique Coaches,* (1931) 2 KB 1.

(4) Again an offer must be distinguished from quotations as in the case of catalogues[1] or invitation to offer,[2] *e.g.*, an announcement of an examination for the purpose of awarding a scholarship.[3] **[38]** Similarly, announcements of an auction[4] or the time-tables of railways [5] or invitation of tenders for supply of material or award of work [6] are not offers but only proclamations or statements of intention or invitations to offer. **[38-41].**

Where the nationalised banks adopted a voluntary retirement scheme for their employees wishing to retire prematurely, the scheme is merely an invitation to treat and the application so filed by the employees is an offer, which can be revoked before the acceptance.[7]

Where merely an invitation is extended for the purpose of calling tender, it cannot amount to an offer. [8]

Where the respondent made counter suggestions to the proposals of the appellant bank, making suggestions as to the mode of payment and duration of service in connection with the replacement of a power generator, it is only an invitation to an offer and the letter by the appellant bank in response would be an offer but not an acceptance and as such there can be no concluded contract.[9]

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1. *Grainger* v. *Gough,* (1896) AC 325 (334).
2. *Harvey* v. *Facey,* (1893) AC 552; *Spencer* v. *Harding,* (1870) 5 CP 561; *Mylappa* v. *Aga Mahomed,* (1919) 37 MLJ 712 : 54 IC 550; *Durga* v. *Rulia,* (1922) 65 IC 282 : (1922) Lah. 100; *Premji* v. *Tarachand,* (1924) 76 IC 353 : (1924) Sind 64; *Hardandass* v. *Rani Mohori Bibi,* (1914) 23 IC 322. **But see** *Surendranath* v. *Kedar Nath,* (1936) Cal. 87 : 161 IC 224 (Defendant in reply to plaintiff's inquiry says "I shall sell.... I have an offer up to Rs. 6,500. I intend to have Rs. 7,000. If you are willing write" — Held it was a proposal within Section 2(a) and not a mere invitation to offer). **See** *Vithaldas* v. *Moreshwar,* 1954 SCJ 315 : AIR 1954 SC 236 (Catalogue of goods only an invitation to offer) and *Macpherson* v. *Appanna,* 1951 SCJ 238 : AIR 1951 SC 184 (quotation of lowest price for a bungalow not an offer to snatch at and accept).
3. *Rooke* v. *Dawson,* (1895) 1 Ch. 480.
4. *Harris* v. *Nickerson,* (1872) 8 QB 286; *Warlow* v. *Harrison,* (1858) 120 ER 925 : 117 RR 219; *Mainprice* v. *Westley,* (1865) 122 ER 219 1250 : 141 RR 452; *Payne* v. *Cave,* (1789) 100 ER 502 : IRR 679; *Agra Bank* v. *Hamlin,* (1891) 14 Mad. 235; *Raja of Bobbili* v. *A. Suryanarayana Rao,* (1919) 42 Mad. 776 : 37 MLJ 274 : (1919) MWN 784 : 51 IC 805; *Champalal* v. *Jaigopal,* (1922) 45 Mad. 799 : 43 MLJ 132 : (1922) MWN 564 : 16 LW 816: 70 IC 977 : (1922) Mad. 486; *Muthu Pillai* v. *Secy. of State,* (1923) 45 MLJ 67; *Mackenzie* v. *Chamroo,* (1889) 16 Cal. 702; *Kenaran* v. *Kailash Chandra,* (1913) 18 CLJ 53.
5. *Denton* v. *G.N. Ry.,* (1856) 119 ER 701 : 105 RR 335.
6. *Sri Durga Saw Mill* v. *State of Orissa,* AIR 1978 Ori. 41; *Executive Engineer, Sundergarh* v. *Mohan Prasad Sahi,* AIR 1990 Ori. 26.
7. *Bank of India* v. *O.P.Swarnakar,* AIR 2003 SC 858, 877 : (2003) 1 ILD 1028 (SC) : 2003 AIR SCW 313 : 2003 (1) Supreme 842 : (2003) 2 SCC 721.
8. *Anil Kumar Srivastava* v. *State of U.P.,* AIR 2004 SC 4299 : (2004) 8 SCC 671.
9. *United Bank of India* v. *Shyam Sundar Banerjee,* AIR 2007 Cal 87 : 2007 AIHC 273 (NOC) : 2007 (3) AIR BomR 521 (NOC)

(5) An offer is specific when it is addressed to one or more individuals, and it is general when addressed to the whole world; in the latter case, it becomes a contract on being accepted by one or more.[1] **[48]**

(6) A general offer is to be distinguished from tenders [2] or standing offers where the offer is to supply goods at specific rates for a period of time. Such standing offers though accepted do not give rise to a contract unless an actual order is placed. Subject to such an order being executed, it is open to either party to revoke,[3] except where there is consideration for the promise. A new condition not previously known to the tenderer cannot be inserted with retrospective effect in the invitation to tender' as for instance that if the tender is withdrawn, it would result in the tenderer being blacklisted.[4] A standing offer must be distinguished from a completed contract.[5] **[48]**

Where the petitioner submitted the unconditional tender which could not culminate into final acceptance despite of it being highest, is not entitled for letter of acceptance.[6]

Merely because an agreement contains a clause enabling the parties to renew the agreement after the expiry of the stipulated period, it does not give rise to an obligation or right as between the parties for renewal of the agreement.[7]

Clause (b) Acceptance : Promise.—When a person to whom an offer or proposal is made accepts the proposal, a promise arises.[8] The word 'promise' is used in the strictly legal sense of an accepted promise and not in

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1. *Carlill* v. *Carbolic Smoke Ball Co.* (1893) 1 QB 256; *Lancaster* v. *Walsh* (1838) 150 ER 1324 : 51 RR 441; *Har Bhajan* v. *Har Charan* (1925) 23 ALJ 655 : (1925) All. 539 : 88 IC 908. **See also** *Pipraich Sugar Mills* v. *Pipraich Sugar Mills Mazdoor Union,* AIR 1957 SC 95 (Condition not accepted—No agreement).
2. As to tenders, see *Perceival* v. *London County Council,* (1918) 87 LJKB 677; *Kier & Co.* v. *Whitehead Iron & Steel Co.,* (1938) 1 All. ER 591; *Union of India* v. *Maddala Thathiah,* AIR 1966 SC 1724 : 1964 (3) SCR 774.
3. *Offord* v. *Davies* (1862) 142 ER 1336 : 133 RR 491; *Regina* v. *Demers,* (1900) AC 103; *Great Northern Railway Co.* v. *Witham,* (1873) 9 CP 16; *Secretary of State* v. *Madho Ram,* (1929) 10 Lah. 493 : (1929) Lah. 114; *Bengal Coal Co.* v. *Homee,* (1900) 24 Bom. 97 : 1 Bom. LR 407.
4. **See** *Bhim Sain* v. *Union of India,* AIR 1981 Delhi 260, 262 : 1981 Rajdhani LR 52.
5. *Venkatachalam* v. *Sethuram,* (1933) 64 MLJ 354 : 37 LW 349 : (1933) MWN 315 : 142 IC 315 : (1933) Mad. 322;*Sakaloguna* v. *Munisami,* (1928) 51 Mad. 583 : 55 MLJ 198; *Chand Kumar* v. *State,* AIR 1981 Raj. 23; *Chaturbhuy Vithaldas* v. *Moreshwar Parashram,* AIR 1954 SC 236; *Cumiming Diesel Sales Service (India) Ltd.* v. *Director General of Supplies & Disposals, New Delhi,* AIR 1981 Del. 61 : (1981) 83 Pun LR 87 : ILR 1981 Delhi 205.
6. *Alok Enterprises* v. *Rajasthan Financial Corporation,* AIR 2003 Raj 199 : 2004 (1) Bank CLR 341 : 2003 (2) BankCas 564 : 2003 Raj LR 545.
7. *BDA Ltd.* v. *State of U.P.,* AIR 1995 All. 277, 292.
8. *Motilal* v. *Thakorlal,* (1912) 36 Bom. 557 : 14 Bom. LR 648 : 16 IC 696.

the ordinary sense of a promise offered.[1] When the offer any payment is subject to any condition the payment has to be accepted with the condition imposed and it is not permissible in law to accept the payment and ignore the condition.[2] Mere encashment of cheques of proposer insuring his life with Life Insurance Corporation cannot be deemed as implied acceptance unless the proposal is formally accepted by the competent authority to accept. [3] A conditional offer to pay a certain amount made by the management of an industry to the Trade Union lapses when the condition is not accepted. The question whether there was consideration for the promise made by the management arises only if the offer had been accepted by the Trade Union so as to ripen into an agreement.[4] Omission to specify the sum offered in words as well as in figures in the acceptance of tender renders the acceptance invalid.[5] Where a party gives a letter of intent preceding the compliance of certain conditions, the letter of intent can be said to be only at an offer stage and does not give rise to binding and concluded contract.[6]

Acceptance of a tender for grant of mining lease by auction cum tender method, not specifying sum of money offered in words as well as figures is not permissible.[7]

Where a letter of intent awarding the contract of work was communicated to the tenderer a contract is said to have concluded notwithstanding the fact that a formal contract remained to be signed as some minor discrepancies and variations in the terms were being negotiated between the parties.[8]

Where the appellant bank and the respondent were shown to have not agreed to the terms and conditions provided in the memorandum of understanding executed between them and were also shown not to have acted upon the same, no contract in the absence of consensus is said to arise.[9]

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1. **See** *Dhondbat* v. *Atmaram*, (1889) 13 Bom. 669 (A letter requesting that money may be sent through bearer and saying that the sum will be repaid later with interest is a mere proposal). *Bharata* v. *Vasudeva*, (1904) 27 Mad. 1 (FB) : 14 MLJ 65; *Narayanasami* v. *Lokambalammal*, (1897) 23 Mad. 156 (N.).
2. *Union of India* v. *M/s. Gangadhar Mimraj*, AIR 1962 Pat. 372.
3. *Life Insurance Corporation of India* v. *Prasana Dev Raj*, AIR 1995 Ker. 92, 93.
4. *Pipraich Sugar Mills* v. *P.S. Mills Mazdoor Union*, AIR 1957 SC 95; **see also** *Chatturbhuj Vithaldas Jasani* v. *Moreshwar Parashram*, AIR 1954 SC 236; *Thawar Das Pherumal* v. *Union of India*, AIR 1955 SC 468.
5. *Goraknand Yadav* v. *District Magistrate, Gorakhpur*, AIR 1992 All. 340.
6. *Baron International Airways* v. *Haj Committee*, AIR 1997 Del. 247, 249 : 1996 (1) Bank. Cas. 599 : 1996 (37) DRJ 273 : 1996 (62) DLT 255.
7. *Goraknand Yadav* v. *District Magistrate, Gorakhpur*, AIR 1992 All. 340.
8. *Progressive Construction Ltd.* v. *Bharat Hydro Power Corp. Ltd.*, AIR 1996 Del. 92, 94.
9. *United Bank of India* v. *Ramdas Mahadeo Prashad*, (2004) 1 SCC 252 : 2003 (7) Supreme 610 : (2003) 12 ILD 284 (SC) : 2003 (6) SLT 773.

Where a person inviting tenders reserves the power to reject all tender, such power cannot be exercised arbitrarily in the absence of cogent reasons.[1]

Where the promisor has acknowledged the debt owed by him by his letter addressed to the promisee, such acknowledgement amounts to an implied promise to pay.[2]

Where there has been an advertisement from the respondent Bhubaneswar Development Authority promising to allot plots to those persons who pay full consideration on first come first served basis, the application made by the appellant together with full payment of consideration amounts to an offer only and no concluded contract comes into existence unless his offer is accepted.[3]

Clause (c) "Promisor" and "Promisee".—These terms correspond to offeror and offeree in English law. The very definitions suggest that a contract requires at least two persons, a promisor and promisee, for a man cannot contract with himself.[4]

In *Administrator-General, Madras* v. *Jagirdar of Arni,*[5] the court in construing the term "promisee" in Sec. 67, held, applying the opening words of the section (*viz.*) *unless a contrary intention appears,* that the term will include a person interested in the estate of a deceased creditor.

Clause (d)—Consideration.—This interpretation clause not only defines consideration, but practically gives the whole substantive law relating to the doctrine of consideration. As pointed out in a Calcutta case, the definition of the term is wider than under the English Law.[6]

It is not open to a third party to challenge the passing of consideration for a transaction.[7]

HISTORY OF CONSIDERATION.—**[123]** This doctrine has gradually evolved in English Law between the 12th and 16th Centuries. In

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1. *Food Corpn. of India* v. *Kamdhenu Cattle Feed Industries,* AIR 1993 SC 1601 : (1993) 1 SCC 71.
2. *R. Kumar & Co.* v. *Chemicals Unlimited,* AIR 2001 Bom. 116, 118.
3. *Adikanda Biswal* v. *B.D.A. Bhubaneswar* AIR 2006 Ori 36 : 2006 AIHC 885 (Ori) : 2005 (99) Cut LT 595.
4. *Vallabhdas* v. *Pranshankar,* (1928) 30 Bom. LR 1519 : 113 IC 313 : (1929) Bom. 24; *Rustomji* v. *Sheth Purushoth amdas,* (1901) 25 Bom. 606 : 3 Bom. LR 227 (one person common partner in two firms—No action maintainable between them so long as common partner continues). **See also** *Henderson* v. *Astwood,* (1894) AC 150 (158) (A man cannot sell to himself); *Napier* v. *Williams,* (1911) 1 Ch. 361; *Ellis* v. *Kerr,* (1910) 1 Ch. 529 (covenants by one person with himself and others jointly are void); *Hummel* v. *Routledge,* (1904) 2 Ch. 474.
5. (1908) 4 MLT 335.
6. *Kshirode Behari Dutt* v. *Mangobinda Pande,* (1934) 61 Cal. 841 : 38 CWN 682 : 152 IC 351 : (1934) Cal. 682; citing *Dab Narain's case* (1914) 41 Cal. 137 : 7 CWN 1143.
7. *Ramjilal Tiwari* v. *Vijay Kumar,* 1970 MPLJ 50 : 1970 Jab. LJ 20, 26.

English Law, at first, only formal contracts or sealed covenants or specialities as they were called, were enforceable in law. Such contracts had to be in writing, signed, sealed and delivered by the promisor to the other party. There was also another type of contracts known as 'real contracts' which could be enforced by actions of debt or detinue in which liability arose from the fact of one party delivering a chattel to the other, a liability either to return the chattel, failing which an action of Detinue was maintainable, or to pay its value, when the action of debt was maintainable. Similarly, where a person borrowed money, the action of debt was, at first, for the return of the identical coins and later on, an equivalent sum of money. This benefit received by the person and which had to be returned was known as the quid pro quo. With the growth of civilisation, it became necessary to recognise the informal promise, and consideration was adopted as the test to distinguish an enforceable informal promise; and consideration was understood in the sense of detriment to the promisee and benefit to the promisor. The conception of detriment grew out of the action in tort, in which the plaintiff had to allege that, by relying on the defendant's undertaking, he suffered a detriment or injury. Such an action in tort was competent, whether the undertaking had been negligently carried out or even where it had not been carried out. Now this conception of detriment or injury in the law of torts and the conception of the benefit underlying the quid pro quo in the law of contracts were combined together and came to be known by the word "consideration", a technical term used in the law of Real Property. Where a gift of property was made out of natural love and affection, such love and affection was called "good consideration" and when the motive was marriage, money or the like, it was called "valuable" consideration. But the law of contracts did not recognise 'good consideration'. Consideration is here used only in the sense of valuable consideration. Of the two elements, benefit and detriment, it is detriment that is more important.

In Indian law, there are no formal contracts and every contract must be supported by consideration except where a contract is made between persons standing in near relationship, out of natural love and affection and the contract has been reduced to writing and also registered. Now this type of contract partakes of the requirements of a formal contract and the characteristics of good consideration in English Law.

Consideration Essential.—Consideration then in the sense of detriment to the promisee and benefit to the promisor is essential to every contract and no promise without consideration will be enforceable in law.[1]

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1. *Lees* v. *Whitcomb*, (1828) 130 ER 972 : 30 RR 539; *Pilkington* v. *Scott*, (1846) 153 ER 1014 : 71 RR 781; *Sykes* v. *Dixon* (1839) 112 ER 1374 : 48 RR 644; *Elsee* v. *Gatward*, (1793) 101 ER 82; *Wilkinson* v. *Coverdale*, (1793) 53 RR 256; *Skidmore* v. *Bradford*, (1869) 8 Eq. 134.

Qualifying the term consideration by the word "adequate" makes consideration stronger so as to make it sufficient and valuable on the facts and circumstances of the case.[1]

Where a person marries in consideration of a promise, the marriage is valuable consideration within Section 2 (d).[2]

So, a promise to subscribe for a charity is held not enforceable since there is no benefit to the promisor and no detriment to the promisee; but if in reliance on the promise a liability has been undertaken by the promisee then the promise will be enforceable,[3] but if the extent of liability is less than the promised amount then the amount which could be recovered will be limited to the actual amount of the liability incurred.[4] **[127]** However in one Madras case, where the trustees of a temple sought to recover a contribution promised by a subscriber for the repairs of a temple and the plaint alleged that on the faith of the promise, the trustees had incurred liabilities, the Court dismissed the action, observing that the definition of consideration postulates that there must be some bargain between the parties in respect of which the consideration had been given, and that there must have been some request by the promisor to the promisee to do something in consideration of the promised subscription.[5] The Patna High Court has also held a promise to pay sums to a charitable society is not enforceable.[6] Promissory estoppel is not applicable to concluded contracts.[7]

Stranger to consideration.—Since consideration means detriment more than benefit and since the law of contracts was influenced in its development by the law of torts, consideration had necessarily to be furnished by the promisee. In other words rule was that consideration must move from the promisee.[8] This was so in English law because of historical accidents, but

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1. *Sonia Bhatia* v. *State of U.P.*, AIR 1981 SC 1274 : (1981) 2 SCC 585 : 1981 All. LJ 467.
2. *Srinivasa* v. *Parvathiammal*, AIR 1970 Mad. 113, 116 : (1969) 2 MLJ 597.
3. *Kolipatti Taluk Board* v. *Zamindar of Sivagiri*, (1937) 1 MLJ 50 : 44 LW 353 : (1936) MWN 1569 : 164 IC 197 : (1936) Mad. 709 (Promise of contribution for maintenance of hospital after its construction held enforceable).
4. *Abdul Azeez* v. *Masum Ali*, (1914) 36 All. 268 : 12 ALJ 351 : 23 IC 600; *Kedar Nath* v. *Gorie Mahomed*, (1886) 14 Cal. 64; *In re. Hudson*, (1885) 54 LJ 811; *Korati Ramu Pillai* v. *Pulasthiam Pillai*, (1923) 17 LW 321; (1923) Mad. 330 : (1923) MWN 86 : 72 IC 774 (Plff. incurring expenses for festival—Subsequent promise to reimburse part of expense—No liability).
5. *Doraswamy* v. *Arunachala*, (1936) Mad. 135 : (1935) MWN 1203 : 159 IC 345; Cf. *Dr. Lakshmana Swami Mudaliar* v. *L.I.C.*, AIR 1963 SC 1185 : 1963 (33) Com.Cas 420.
6. *Jamuna Das* v. *Ram Kumar*, (1937) Pat. 358 : 169 IC 396.
7. *C.V. Enterprises* v. *Braithwaite & Co. Ltd.*, AIR 1984 Cal. 306 : (1984) 2 Cal. HN 212 : (1984) 88 Cal. WN 840.
8. *Dutton* v. *Poole*, (1688) 89 ER 352; *Tweddle* v. *Atkinson*, (1861) 121 ER 762 : 124 RR 610; *Dunlop* v. *Selfridge*, (1915) AC 847; *Price* v. *Easton*, (1833) 110 ER 518; *Crow* v. *Rogers*, (1726) 93 ER 719.

in Indian Law it is not necessary and there is a deliberate departure from English law since the section says consideration may be furnished "by the promisee or any other person" [1] **[137].**

Stranger to contract.—A promise may be made to one person though for the benefit of another *viz.*, the person suing. In such cases the person suing being a third party or a stranger to a contract, cannot sue upon it. Where the respondent agreed with the owner of a circus to pay the advertisement charges to the appellant advertiser, the appellant being not a party to the agreement and also in the absence of a privity of contract between him and the respondent cannot enforce the agreement.[2] Where India Cements Ltd agreed with STC to undertake the responsibility of loading and shipping of the cement to be supplied and exported by STC, has appointed the appellant Coats Viyella India Ltd as forwarding and handling agent, in a suit for despatch of money towards demurrage for delayed loading by the appellant, the plea that STC is liable cannot be sustained as there is no privity of contract between the appellant and STC.[3] Where a bank, lending loan to a creditor for the purchase of a mechanized boat and hypothecating it in favour of the bank, it cannot file a suit against the insurance company to recover the compensation for the destruction of the boat with which the boat was insured as no privity of contract exists between bank and insurance company.[4] Though the Indian Law differs from the English law and permits a stranger to the consideration to sue, still it follows English law in not permitting a stranger to a contract to enforce it even though it was made for his benefit.[5] But there are exceptions.

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1. *Budavaram Narasimhulu* v. *Subbaraya,* (1923) MWN 237 : 72 IC 95; (1923) Mad. 434 : 44 MLJ 240; *Chinnayya* v. *Rammayya,* (1881) 4 Mad. 137; *Samuel* v. *Ananthanath,* (1883) 6 Mad. 351; *Ramachandra* v. *Gomti Bai,* (1926) 27 Bom. LR 1310 : 91 IC 419 : (1926) Bom. 82. **See** *M.C. Chacko* v. *State Bank of Travancore,* AIR 1970 SC 564; *Subbu Chetti* v. *Arunachalam,* ILR 53 Mad. 270.
2. *Aries Advertising Bureau* v. *C.T. Devraj,* AIR 1995 SC 2251, 2252 : (1995) 3 SCC 250 : 1995 (2) JT 567 : 1995 (2) Scale 103 : 1995 (3) SCJ 120 : 1995 (1) CCC 561 (SC).
3. *Coats Viyella India Limited* v. *India Cement Ltd.,* (2000) 9 SCC 376 : 2000 (4) JT 219 : 2000 (5) Supreme 120.
4. *New India Assurance Co. Ltd.* v. *Lakka Vijaya Gopalareddy,* AIR 2003 AP 465 (DB) : 2004 (1) Bank Cas 149 : 2003 (4) Cur. CC 273 : 2003 (5) ALD 8 : 2003 (3) LS 14 : 2003 (5) ALT 735 (DB).
5. *Mangal Sen* v. *Mohammed Hussain,* (1915) 37 All. 115 : 13 ALJ 73 : 27 IC 737; *Ramchandra* v. *Gomti Bai,* (1926) Bom. LR 1310 : 91 IC 419 : AIR 1926 Bom. 82; *Jiban Krishna* v. *Nirupama,* (1926) Cal. 1009 : 96 IC 846 : 53 Cal. 922; *Krishna Lal Sadhu* v. *Pramilabala,* (1928) 55 Cal. 1315 : (1928) Cal. 518 (mere nominee under insurance policy cannot sue); *Sarma* v. *Phanindranath,* (1931) 35 CWN 593 (Internal arrangement between new and old partners cannot be taken advantage of by a creditor of the old firm); *Jamna Das* v. *Ram Autar,* (1911) 34 All. 63 (PC); *Shankar* v. *Umabai,* (1913) 37 Bom. 471 : 19 IC 736; *British India General Insurance Co.* v. *Janardhan,* (1938) Bom. 217 : 40 Bom. LR 155 (Motor Insurance—Third party who is injured has no right to sue the insurance company); *Subbu Chetti* v. *Arunachalam,* AIR 1930 Mad. 382 (FB) : ILR 53 Mad. 270.

Thus, where the right of the third party does not arise out of contract, but originates in trust the *cestui que trust* or the beneficiary can always sue.[1] Under newly enacted provision of English Law Sec. 1 (1) (b) of Contracts (Rights to Third Parties) Act 1999, a person although he is stranger to the contract can enforce it, when that contract purports to confer a benefit on him. [2] This rule is an equitable corrective of the common law principle, which lays down that a stranger to a contract cannot sue upon it, as there is no legal nexus between himself and the parties to the contract.[3] Even here, pointed out by the Privy Council, the intention to constitute the trust must be affirmatively proved. [4] It was therefore rightly held by the Bombay High Court in a suit on a motor insurance policy by a third party injured in an accident to the vehicle insured that the plaintiff could not be regarded as a beneficiary under a trust created by the holder of the policy.[5] Again, if privity of contract has been established between the promisor and the person suing, whether by part payment or acknowledgment, there is no objection to a stranger suing.[6] This is in accordance with the English law. The doctrine of privity of contract is subject to many exceptions and one of them being that a beneficiary can sue on a contract for the enforcement of the benefit intended to confer on such beneficiary by the contract.[7] In Indian law, however, a few more exceptions are recognised, because of the peculiar circumstances in this country where contracts are entered into by parents and guardians on behalf of minors. Where a charge on immovable property has been created, it is said, following the Privy Council ruling in *Khwaja Mahomed's* case [8] that the beneficiary can enforce the charge,

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1. *Dunlop* v. *Selfridge,* (1915) AC 847; *Shanmugam* v. *Annamalai Chettiar,* (1935) Mad. 141: 153 IC 102 (Plaintiff beneficiary under a deed of settlement, held entitled to sue); *Ram Dhan* v. *Chauth Mal,* (1935) OWN 1001 : 158 IC 46; *Bibhuti Bhusan Ghose* v. *Bai Kuntha Nath,* (1935) 62 CLJ 55; *Jang Bahadur* v. *Umanath,* (1937) Oudh 99 : 165 IC 113 (Cf.) *Sukhdei* v. *Hardwar,* (1934) Oudh 378 : 11 OWN 1053 : 151 IC 440.
2. *Prudential Assurance Co Ltd* v. *Ayres,* [2007] 3 All ER 946 (Ch D).
3. **See** *Hare Krishna Nayak* v. *Fakir Chandra Pal,* (1936) Cal. 260 : 40 CWN 703 : 162 IC 754.
4. *Alice Marie Vandepitte* v. *Preferred Accident Insurance Co.,* (1933) AC 70 : 37 LW 279 : (1933) PC 11 : 143 IC 79 : 64 MLJ 133.
5. *British India General Insurance Co.* v. *Janardhan,* (1938) Bom. 217 : 40 Bom. LR 155.
6. *Nihal Singh* v. *Fateh Chand,* (1922) 20 ALJ 708; *Rameshwar Lal* v. *Jai Narain,* (1934) All. 960 (Liability by estoppel); *Iman Din* v. *Lachman Das,* (1934) 36 PLR 244; *Ramaswami Iyer* v. *Krishna & Sons,* (1935) Mad. 904 (Privity established by subsequent acknowledgment and promise to pay); *Venkata Reddi* v. *Narasimha Rao,* (1935) MWN 45 : 41 LW 123 : 155 IC 302 : (1935) Mad. 115 : 68 MLJ 159.
7. *Klaus Mittelbachert* v. *East India Hotels Ltd.,* AIR 1997 Del. 201, 230 : 1997 (65) DLT 428 : 1997 (1) ACC 1 : 1997 (40) DRJ 147 : 1997 (1) TAC 386.
8. *Khwaja Mohamed* v. *Hussaini Begum,* (1910) 32 All. 410 : 37 IA 152 : 14 CWN 865 : 7 ALJ 871 : 21 Bom. LR 638 : (1910) MWN 313 : 12 CLJ 205 : 20 MLJ 614 : 7 IC 237; *Deb Narayan* v. *Ramsadan,* (1914) 41 Cal. 137 : 7 CWN 1143 : 20 IC 630; *Kshirode Behari* v. *Mangobinda,* (1934) Cal. 682 : 61 Cal. 841 : 38 CWN 682; *Tulsidas* v. *Ganfaram,* (1925) Sind 272 : 86 IC 944 : 18 SLR 96.

but this view has been doubted by Jackson and Walsh, JJ., in a Madras case.[1] Where at a partition or family settlement provision is made for female relations, *e.g.*, maintenance of a mother [2] or marriage expenses of a sister, [3] such relations can sue, though they are not parties to the partition deed. It was at one time thought that the objection to a third party suing might be met if all the parties happen to be before the Court.[4] But the Full Bench judgment in *Subbu Chetty* v. *Arunachallam Chetty* [5] has over-ruled this definitely. The Allahabad High Court also has affirmed this point of view. [6] The principle that a third party to a contract cannot sue on it has been affirmed except for one instance [7] by the Calcutta High Court [8] and by the Bombay [9] and Lahore High Courts. [10] **[129].** The Supreme Court in *Kale* v. *Dy. Director of Consolidation*[11] stated that rights of parties under family arrangements shall be decided taking into consideration the interest in the families.

Past consideration.—Again in English Law, consideration must be present (executed) or future (executory), but never past. In Indian Law past consideration is valid. This clause itself uses the words "*has done*, or abstained from doing" which indicates that consideration may be past. Again, section 25, sub-clause (2) also shows clearly that consideration may be past. In English

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1. *Suryanarayana Rao* v. *Basivireddy*, (1932) 55 Mad. 436 : (1932) MWN 44 : 35 LW 490 : (1932) Mad. 457 : 62 MLJ 533.
2. *Shuppu Ammal* v. *Subramania*, (1910) 33 Mad. 238 : 4 IC 1083 : 19 MLJ 739; *Arumuga* v. *Chinnammal*, (1911) 2 MWN 524 : 12 IC 185 : 21 MLJ 918; *Rakhmabai* v. *Govind*, (1904) 6 Bom. LR 421.
3. *Sundararaja* v. *Lakshmi*, (1915) 38 Mad. 788 : 24 IC 943.
4. *Singarayya* v. *Subbayya*, (1925) 47 MLJ 517 : 20 LW 721 : (1930) 84 IC 962 : (1924) Mad. 861 : (1924) MWN 838.
5. (1930) 53 Mad. 270 : 58 MLJ 420 : (1930) Mad. 382 : 31 LW 371 ; 124 IC 55; *Iswaran* v. *Taragan*, (1915) 38 Mad. 753; *Kasturamma* v. *Venkatasuraya*, (1915) 29 MLJ 538; *Jasthi Anjayya* v.*Gurayya*, (1937) MWN 408.
6. *Rameshwar Lal* v. *Jain Narain*, (1934) All. 960 : 153 IC 224.
7. *Kshirode Behari* v. *Mangobinda*, (1934) 61 Cal. 841 : (1934) Cal. 682 : 38 CWN 682.
8. *Jagadambya Debya* v. *Bibhuti Bhusan*, (1933) 60 Cal. 767 : 37 CWN 447 : 143 IC 723 (2) : (1933) Cal. 407; *Jiban Krishna* v. *Nirupama*, (1926) 53 Cal. 922 : 30 CWN 812 : 96 IC 846: (1926) Cal. 1009; *Krishna Lal Sadhu* v. *Pramilabala*, (1928) 55 Cal. 1315 : 32 CWN 634 : 114 IC 658 : (1928) Cal. 518; *Adhar Chandra* v. *Dolgobinda*, (1936) Cal. 663 : 40 CWN 1037 : 63 Cal. 1172 followed in AIR 1949 Cal. 174.
9. *National Petroleum Co.* v. *Popatlal Mulji*, (1936) Bom. 344 : 38 Bom. LR 610 : 165 IC 338. This case is discussed in AIR 1955 Pat. 442. This is distinguished in AIR 1972 Guj. 255; **see also** *Madhav Trading Co.* v. *Union of India*, ILR (1978) 2 Del. 74 : AIR 1979 NOC 47; *Jaihind Rupavati* v. *Chellaram Garments*, (1979) 92 Mad. LW 73. **See also** *Tarachand* v. *Syed Abdul Razak*, (1939) Sind 125.
10. *Maghi Mal* v. *Darbara*, (1933) 14 Lah. 675 : 143 IC 753 : (1933) Lah. 695. **See also** *Gauri Shanker* v. *Mangal*, (1933) Lah. 178 : 141 IC 490; *Ganesh Das* v. *Banto*, (1935) Lah. 354 : 158 IC 387 : 16 Lah. 118. **See also** *Waliuddin Ahmed* v. *Ram Rakhan Singh*, (1936) Oudh. 313 : 162 IC 451.
11. AIR 1976 SC 807; *W.T. Commissioner* v. *Vijayaba, Dowger Maharani Saheb*, AIR 1979 SC 982.

Law, it was regarded by way of exceptions to the doctrine that past consideration is no consideration, that where the past consideration has proceeded 'at the request of the promisor, or where the act which constituted the past consideration was one which the promisor was compellable to do, it was valid. But these two exceptions are not really exceptions, and are merely cases of implied contracts or of liability implied by law from the circumstances of the case; they have been engrafted in Indian Law also in Section 25, Clause 2 though in truth, they are supererogatory for, according to the definition itself, consideration may be past. **[147].**

Precedent moral obligation.—In English Law, it was at one time held, that past consideration is good, if it is supported by a precedent moral obligation but this is incorrect, since to admit moral obligation as consideration would be to annihilate the doctrine of consideration altogether; and this view has been disclaimed; nevertheless an exception exists, where persons renounce the benefit of a statute intended for their protection and feeling the ties of conscience upon their mind make a promise to pay. At the present day, a promise to pay a barred debt is the only surviving exception under this clause. In Indian Law, it is found in Section 25, Clause 3.

"At the desire of the promisor".—The words 'at the desire of the promisor' are reminiscent of the English case of *Lampleigh* v. *Braethwaite.* In Indian law, past consideration is good, if the act or forbearance was done by the promisee for the benefit of the promisor, but if it is a detriment suffered by a third person, it must have been *at the desire of the promisor.*

A promise made by the defendant to pay a commission to the plaintiff in respect of articles sold in a market constructed by the plaintiff not at the defendant's request, but to please the Collector, was held to be unenforceable, since the detriment suffered by the plaintiff was neither for the benefit of the promisor nor incurred "at the desire of the promisor." [1] Similarly, where the defendant had agreed to bring a Thakur to the plaintiff's house for a festival and the plaintiff had invited a number of guests for the festival and otherwise put himself to expense, the plaintiff's was held not entitled to recover damages for breach of the undertaking by the defendant, since the plaintiff's inviting the guests was not at the desire of the promisor. [2]

Though the consideration has to move at the desire of the promisor, it is not necessary that it must personally benefit the promisor. A Bombay case is an illustration in point. There, the Government had offered to the Corporation

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1. *Durga Prasad* v. *Baldeo,* (1880) 3 All. 221.
2. *Adaitya Dass* v. *Prem Chand,* (1929) 49 CLJ 278 : 120 IC 105 : (1929) Cal. 369; **See** *Sindha* v. *Abraham,* (1896) 20 Bom. 755; *Ganesh Prasad* v. *Bechu Singh,* (1934) All. 271 : 147 IC 443; *Doraswamy* v. *Arunachala,* (1936) Mad. 135 : (1935) MWN 1203 : 159 IC 345.

of Bombay to bear half the charges of a new scheme of primary education put forth by the Corporation and the latter accepted the offer and put the scheme into operation. It was held that there was an agreement supported by consideration, and that the mere fact that the members of the Government were not personally benefited did not detract from the validity and binding character of the consideration.[1]

Consideration paid to one of several joint promisors is enough to support a promise by all of them.[2]

Promisor.—The Lahore High Court has observed in a Full Bench case that the 'promisor' contemplated herein is an adult promisor and that an advance made to a minor on a promise to pay cannot by virtue of Sec. 2 (d) be held to be consideration for a subsequent promise made after the promisor attains majority.[3]

Adequacy.—Consideration whether in the sense of benefit or in the sense of detriment, need not be adequate to the promise.[4] Law requires the presence of consideration, but does not require about the adequacy thereof,[5] unless it is so grossly shocking as to serve as presumptive evidence of want of real consent. **[154]** Adequate consideration implies reasonable equivalent and is an antethens of gift.[6] The stipulation of a maintenance amount is not a consideration.[7] Promise to abstain from buying from any one else during the contract period is adequate consideration.[8]

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1. *Bombay Municipal Corporation* v. *Secretary of State,* (1934) 36 Bom. LR 568 : 152 IC 947 : (1934) Bom. 277. **See also** *Ganesh Prasad* v. *Bechu Singh,* 1934 All. 271 : 147 IC 443; *Union of India* v. *B.C. Nawn (Bros.) Ltd.,* AIR 1961 Cal. 620 (Defendant desiring money to be lent to friend—Plaintiff lending—Defendant signing document—Liability).
2. *Rama Pattar* v. *Viswanath,* (1922) 45 Mad. 345 : (1922) MWN 27 : 15 LW 130 : 66 IC 155: (1922) Mad. 23 : 41 MLJ 567; *Munna Lal* v. *Duklao,* (1926) Nag. 149 : 89 IC 819. **See also** *Fanindra* v. *Kacheman Bibi,* (1918) 45 Cal. 774 : 22 CWN 188 ; 41 IC 673 (Fresh mortgage by several in discharge of prior mortgage by one only); *Sornalinga* v. *Pachai,* (1915) 38 Mad. 680 : (1914) MWN 27 : 22 IC 1 : 26 MLJ 113 (Consideration to one of several promisors is sufficient) distinguishing *Sesha Iyer* v. *Mangaldass,* (1910) 20 MLJ 144 : 5 IC 757.
3. *Gobind Ram* v. *Pirandatta,* (1935) 16 Lah. 546 : 158 IC 243 : (1935) Lah. 561 (FB).
4. *Thomas* v. *Thomas,* (1842) 114 ER 330; *Pilkington* v. *Scott,* (1846) 153 ER 1014 : 71 RR 781; *A.G. of Bengal* v. *Juggeswar,* (1877) 3 Cal. 192; *Banda* v. *Banspath,* (1882) 4 All. 352 (Gross inadequacy will be taken into consideration to determine reality of consent); *Santhappa* v. *Santhiraja,* (1938) 1 MLJ 676 : 47 LW 714 : (1938) MWN 99 : (1938) Mad. 426.
5. *Taluk Board Koilpatti* v. *Chinnathambiar,* (1936) Mad. 709 : (1936) MWN 569 : 44 LW 353 : 164 IC 697.
6. *Sonia Bhatia* v. *State of U.P.,* AIR 1981 SC 1274 : (1981) 2 SCC 585.
7. *Subhash Chandra* v. *Nagar Mahapalika,* AIR 1984 All. 228.
8. *Manickam Chettiar* v. *State of Madras,* AIR 1971 Mad. 221, 225 : 84 Mad.LW. 58.

Inadequacy of consideration can become crucial only when the consent of parties to the contract is alleged to be not genuine and being caused by undue influence, duress or fraud. Short of undue influence or duress, an agreement between the parties cannot be rendered nugatory on the ground that the consideration is not adequate.[1]

Competency.—Nevertheless the consideration, which is offered, must be real, competent, and not illusory. If the consideration offered is physically or legally impossible, vague or loose or ambiguous, courts of law never enforce the contracts.[2] **[159]**

Thus, a promise to pay at some indefinite time will be too vague for enforcement in a Court of law.[3] Again, payment of portion of a decretal debt will be no consideration for a contract by the decree-holder to certify such payment to Court.[4]

Forbearance to sue.—But, forbearance to sue has been held to be a valid consideration,[5] because there is detriment in that a person who is entitled to resort to Court of law, forbears from doing so and there is also a benefit to the other party, who is saved from the vexation and annoyance incidental to legal proceedings. **[160]**

Compromise of disputed claims.—Similarly compromise of disputed claims has been held to be a valid consideration because each party foregoes what he considers to be a sustainable claim and benefits himself by

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1. *Vijaya Minerals Pvt. Ltd.* v. *Bikash Chandra Deb,* AIR 1996 Cal. 67, 74.
2. *Nanjunda* v. *Kanagaraju,* (1919) 42 Mad. 154; *Kalumal* v. *Kessumal,* (1929) Sind 153 : 114 IC 97; *Muthu Karuppa* v. *Krthapudayan,* (1914) 27 MLJ 249 : (1914) MWN 706 : 25 IC 726; *Budavaram Narsimhulu* v. *Subbaraya,* (1923) 44 MLJ 240 : (1923) MWN 237 : (1923) Mad. 434 : 72 IC 95; *Perumal* v. *Sendanatha,* (1918) MWN 173 : 44 IC 479; *Rosher* v. *Williams,* (1875) 20 Eq. 210; *White* v. *Bluett,* (1853) 98 RR 492; *Braybrooke* v. *Meredith,* (1843) 60 ER 106 : 60 RR 339; *Stuckley* v. *Cooke,* (1671) 21 ER 732 (Release of a debt was the consideration; but the debt released already by payment); *Radhe Lal* v. *Kishore Lal,* (1935) Lah. 527 : 157 IC 811.
3. *Vishveshwar* v. *Sadashiv,* (1926) 7 Bom. LR 1456 : 93 IC 930 : (1926) Bom. 54; distinguished in *Asmal Bagas Abharam* v. *Raj Mahijibhai Parbhatsing,* AIR 1974 Guj. 19.
4. *Karim Bux* v. *Debi,* (1933) ALJ 670 : (1933) All. 511.
5. *Alliance Bank* v. *Broom,* (1864) 62 ER 631; *Dadhaboy* v. *Pestonji,* (1893) 17 Bom. 457; *Gulab* v. *Kamal,* (1922) 44 All. 424 : 20 ALJ 285; 67 IC 4 : (1922) All. 260; *Anant* v. *Saraswati,* (1928) 30 Bom. LR 709 : (1928) Bom. 316 : 111 IC 556; *Gajendra* v. *Durga,* (1925) 47 All. 637 : 23 ALJ 561 : 88 IC 768 : (1925) All. 503; *Srinivasa* v. *Ranganatha,* (1919) 36 MLJ 618; *Gopal* v. *Dhani Ram,* (1929) Lah. 689 : 118 IC 646; distinguished in AIR 1960 Raj. 237;*Courts of Wards* v. *Mukund Lal,* (1931) 134 IC 819 : (1931) Lah. 756; *Ranjit* v. *Fateh,* (1931) 32 PLR 632; *Munna Lal* v. *Duklao,* (1926) Nag. 149 : 89 IC 819; *Mohammed Jafer* v. *Ram Charan,* (1923) Oudh 176 : 74 IC 316; *Raj Krishna Prasad* v. *Barabani Coal Concern,* (1935) 62 Cal. 346 : 159 IC 98 : (1935) Cal. 368.

being, saved the annoyance and worry of litigation.[1] **[161]** But, it is necessary that the parties must *bona fide* and honestly believe in the maintainability of their claims.[2] If there is no such belief, it would only amount to blackmail and not a contract with proper consideration. **[162]**

Pre-existing legal obligation.—The question has also arisen whether the performance of what one is already bound to do, under a contract or under the law, can serve as a consideration for a fresh promise. It is said that a pre-existing legal obligation is not a competent consideration.[3] **[163]**

A promise to pay money to a witness who has received a *sub poena*[4] or a promise to pay extra wages to a mariner[5] are not enforceable but a promise of a reward to a police constable who has done extra services[6] or extra wages to mariners who have undertaken hazardous services[7] are enforceable.**[163]**

There seems to be however this difference, that if this consideration is offered to the very same individual who makes a fresh promise it would not be a valid consideration, but if it is offered as a consideration to a third party or a stranger, it is good consideration.[8] **[166-167]**

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1. *Callisher* v. *Bischoffsheim,* (1870) 5 QB 449; *Cooke* v. *Wright,* (1861) 121 ER 822 : 124 RR 649; *Olati Pulliah* v. *Varadarajulu,* (1908) 31 Mad. 474 : 18 MLJ 469; *Jaya Wickreme* v. *Amarasurya,* (1918) AC 869; *Hari Har* v. *Keshav Prasad,* (1925) 93 IC 454 : (1925) Pat. 68; followed in AIR 1963 MP 37; *Jagdam Sahey* v. *Rup Narain,* (1924) 84 IC 208 : (1924) Pat. 736; *Thangavelu* v. *Mukunda,* (1914) MWN 108; *Nathu* v. *Wali Mahomed,* (1933) Lah. 121 : 143 IC 580; *Mangal Singh* v. *Ghasita,* (1929) Lah. 485 : 116 IC 312; *Upendra* v. *Bindeshri,* (1916) 20 CWN 210 : 32 IC 468; *Nagappa* v. *Ramanathan,* (1916) 2 MWN 264 : 4 LW 553; *Raj Krishna Prasad* v. *Barabani Coal Concern,* (1935) 62 Cal. 346 : 159 IC 98 : (1935) Cal. 368.
2. *Pestonji* v. *Meherbai,* (1928) 30 Bom. LR 1407 : 112 IC 740 : (1928) Bom. 539; *Nagappa* v. *Ramanathan,* (1916) 2 MWN 264 : 4 LW 553; *Wade* v. *Simeon,* (1846) 135 ER 1061 : 69 RR 523; *Poteliakhoff* v. *Teakle,* (1938) 2 KB 816 : (1938) 3 AER 686; *Edwards* v. *Baugh,* (1843) 152 ER 962 : 63 RR 702;*Longridge* v. *Dorville,* (1821) 106 ER 1136; *Atlee* v. *Backhouse,* (1838) 150 ER 1298 : 149 RR 769; *Miles* v. *New Zealand Alford Estate Co.,* (1886) 32 Ch.D. 266; *Krishna Chandra* v. *Hemaja,* (1917) 22 CWN 463 : 45 IC 477; *Gopal* v. *Dhani Ram,* (1929) Lah. 689 : 118 IC 646; *Chuni Lal* v. *Maula Baksh,* (1936) Lah. 6 (Promise made on threat of suit known to be false—No consideration).
3. **See** *Narayan* v. *Shajani,* (1889) 22 Cal. 14; (Cf.) *Manna Lal* v. *Bank of Bengal,* (1879) 1 All. 509; *Ramachandra* v. *Kala Raju,* (1878) 2 Bom. 362; *Anglo-Indian Trading Co.* v. *Brierley,* (1910) 8 IC 302 (A consideration operates only once).
4. *Collins* v. *Godefroy,* (1831) 102 ER 1040 : 35 RR 496; *Sashanna* v. *Ramasamy,* (1881) 4 MHCR 7.
5. *Stilk* v. *Myrick,* (1809) 170 ER 1178 : 11 RR 717; *Swain* v. *West (Butchers) Ltd.,* (1936) 3 AER 261.
6. *England* v. *Davidson* (1840) 113 ER 640.; *Neville* v. *Kelly,* (1862) 142 ER 1333.
7. *Hartley* v. *Ponsonby,* (1857) 119 ER 1471.
8. *Shadwell* v. *Shadwell,* (1860) 142 ER 62 : 127 RR 604; *Scotson* v. *Pegg,* (1861) 158 ER 121: 123 RR 516; *King* v. *Sears,* (1835) 150 ER 21.

Where a promisor has promised to pay additional sum of money to ensure the performance of existing contractual obligation by the promisee, the fact that he could avoid payment of penalty to the third party if the work is completed by the promisee in time is the benefit to the promisor forming sufficient consideration for his promise to make it enforceable.[1]

Consideration and discharge of contracts.—In Indian law, consideration is necessary only for the formation of a contract, and it is unnecessary in cases of a discharge or dissolution of a contract. Accordingly in Indian law, the English doctrine of accord and satisfaction with its two limitations (*viz.*,) that an accord must be executed and not executory, and that the payment of a smaller sum cannot be satisfaction of a greater sum, has no place. **[169]**

Clauses (e) and (f) Agreement.—An agreement may consist of a promise supported by consideration given or a promise supported by another promise. In the former case, it is called a unilateral contract or a contract with an executed consideration. In the latter, it is called a bilateral contract, a contract with an executory consideration or sometimes a reciprocal or mutual promise. **[29]**

In *Taluk Board, Kolipatti* v. *Chinnathambiar*,[2] it has been suggested that where a promise by *A* is consideration for a promise by *B*, the former, so long as it remains executory, will not amount to consideration in the eye of the law unless it involves a legal obligation which *A* may be compelled to perform and that even where the promise on one side does not involve a legal obligation, its performance will constitute sufficient consideration, that is as an executed consideration, for the promise on the other side. The statement in the above form would appear opposed to clauses (e) and (f) by which it is clear that in case of reciprocal promise (which are necessarily executory) each promise is a consideration for the other. As has been said "in this case neither promise is of any value by itself but each of them derives its value from the exchange which makes them both binding". Where an instrument contains a stipulation to do something *e.g.*, to pay interest it becomes an agreement.[3] The test of agreement is objective. In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty.[4] No separate consideration is required for enforcing the agreement,

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1. *Williams* v. *Raffey Bros. & Nicholls (Contractors) Ltd.*, (1990) All. ER 512.
2. AIR 1936 Mad. 709 : (1936) MWN 569 : 44 LW 353 : 164 IC 697.
3. *Moolchand* v. *Lachman*, AIR 1958 Raj. 72 : 1956 Raj. LW 558.
4. *Scammel and Nephew Ltd.* v. *Ouston*, (1941) AC 251. This is followed in *Keshavlal Lallubhai Patel* v. *Lalbhai Trikumlal Mills Ltd.*, AIR 1958 SC 512; *Teamco (P) Ltd.* v. *T.M.S. Mani*, AIR 1967 Cal. 168; **see also** *Village Panchayat* v. *Narasayya*, AIR 1965 AP 191 : (1965) 1 An.WR 176; *State of Andhra Pradesh* v. *M/s. Pioneer Construction Co.*, AIR 1978 AP 281; *Surta Singh* v. *Pritam Singh*, AIR 1983 P&H 114.

where such agreement contains reciprocal promises forming consideration for each other.[1]

Clause (g) Agreement void.—An agreement is a contract only when, it is enforceable by law. Otherwise, it is said to be a void contract, though this expression is really a contradiction in terms in as much as we mean by a contract only enforceable contract. **[17]** From an agreement to agree no concluded contract emerges.[2]

The expression "void" has several facets, one type of void acts, transactions, decrees are those which are wholly without jurisdiction *ab initio* void and law does not take notice of the same and other type being a transaction against a minor, whereas voidable act is that which is a good act unless avoided and a voidable transaction is avoided from the date it is set aside but not prior to it.[3]

Clause (h) Contract.—A contract is said to be valid, when it is enforceable by law; sometimes, a contract may not be enforceable if it is barred by limitation or if it is required to be in writing, but does not happen to be in writing. In such cases, it is called an unenforceable contract. **[16]** See for full discussion.[4] Where the question is whether parties have entered into a contract, it depends on the peculiar facts of a particular case, as the execution of a document is only a formality but not a condition precedent for the contract to come into existence between the parties.[5]

Where an oral contract is said to have been entered into for the transfer of immovable property, although an oral contract is permissible under the law, but there must be evidence on record to prove the same for the enforcement of contract.[6]

Where a party pleads the existence of an oral agreement of sale, the alleged oral agreement is put to more stringent test compared to the written

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1. *Varghese Paul* v. *Narayanan Nair,* 1999 (3) CCC 559 (Ker.).
2. *Punit Beriwala* v. *Suva Sanyal,* AIR 1998 Cal. 44, 47 : 1998 (1) Cal.WN 109 : 1998 (37) Bank LJ 360.
3. *Dhurandhar Prasad Singh* v. *Jai Prakash University,* AIR 2001 SC 2552, 2559 (DB) : (2001) 6 SCC 534 : 2001 (5) Supreme 278 : 2001 (5) JT 578 : 2001 (5) SLT 386.
4. *Kodhandaraman* v. *Commr. of Income Tax,* AIR 1967 Mad. 143; *Century Spinning and Manufacturing Co. Ltd.* v. *The Ulhas Nagar Municipal Council,* AIR 1971 SC 1021; *Kollipara Sriramulu* v. *Aswatha Narayana,* AIR 1968 SC 1028 : (1969) 1 MLJ (SC) ; *Hem Chandra Choudhury* v. *Ajoswya Choudhury,* AIR 1969 Assam 43; *D.T. Mali* v. *H.M. Mali,* AIR 1983 NOC 20 : (1982) 2 Guj. LR 305.
5. *J.K. Industries Ltd.* v. *Mohan Investments and Properties Pvt. Ltd.,* AIR 1992 Delhi 305.
6. *Om Prakash Nangalia* v. *Binod Ku Goenka,* 2006 (1) CTLJ 261 (Ori) (DB) : 2006 (41) AIC 528 (Ori) : 2006 (101) CLT 394; *Rakesh Kumar Dinesh Kumar* v. *U.G.Hotels and Resorts Ltd.,* 2006 (2) CTLJ 374 (HP).

agreement and the burden of proving the existence of the oral agreement is heavy on the party pleading it.[1]

Draft Memorandum of Understanding initiated by one of the parties does not lead to the formation of a valid contract between the parties.[2]

Where an invitee submits a tender in response to the invitation fully complying with formalities prescribed, the person submitting the tender shall have contractual right to have his tender opened and considered along with other tenders. Non-consideration of such tender renders the party inviting tenders liable for breach of contractual obligation.[3]

A contract of employment is also being a subject matter of contract is very much governed by the Indian Contract Act.[4]

Clause (i) Agreement voidable.—Where the consent to a contract is not a free or genuine consent, it would be open to the party, whose consent has been so obtained, to avoid the contract, if he is so minded. In such cases, the contract is said to be a voidable contract. But, a voidable contract is good until avoided and if the party entitled avoids it, it becomes void; but if he neglects to avoid, or chooses to affirm, it continues to be valid. It has been held that a contract made by a public body and not in conformity with the statutory requirements cannot be described as a voidable contract within this clause.[5] **[19]**

Clause (j) Agreement when void.—A contract may become void subsequently, *e.g.*, by declaration of war or legislation, and in such cases, the contract becomes void when it becomes unenforceable. **[17]**

The Judicial Committee has held that the word "law" in this clause should be understood to mean substantive law and not a law of procedure like the Civil Procedure Code or the Law of Limitation, and therefore a mere failure to sue within the time specified in the Act or an inability to sue by reason of the provisions of Or. 23, R. 1 of the C.P.C. would not cause a contract to become void.[6]

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1. *P. Prabhakara* v. *P. Krishna,* 2007 (2) ALD 655.
2. *Oberoi Constructions Pvt. Ltd.* v. *Worli Shivshahi Co-operative Housing,* AIR 2007 (NOC) 2404 (Bom) : 2007 (5) AIR Bom R 297.
3. *Blackpool and Fylde Aero Club Ltd.* v. *Blackpool Borough Council,* 1990 (3) All. ER 25.
4. *Bank of India* v. *O.P.Swarnakar,* AIR 2003 SC 858, 874 : (2003) 1 ILD 1028 (SC) : 2003 AIRSCW 313 : 2003 (1) Supreme 842 : (2003) 2 SCC 721.
5. *Bombay Municipal Corporation* v. *Secretary of State,* (1934) 36 Bom. LR 568 : 152 IC 947 : (1934) Bom. 277, discussed in *Union of India* v. *Nawn Ltd.,* AIR 1961 Cal. 620; followed in *Muthukaruppan* v. *Sinnappa Goundan,* AIR 1948 Mad. 130. **See also** *Abdul Rahiman* v. *Sadasiva Tripathy,* AIR 1968 Orissa 84 : 34 Cut. LT 69.
6. *Mahanth Singh* v. *U Ba Yi,* (1939) PC 110; *Ahmed Mohiuddin* v. *Malla Reddy,* AIR 1967 AP 26 : (1966) 1 An.WR 454; *Sai Balani Devi* v. *Dipti Bikash Bhaduri,* AIR 1969 Pat. 322; *Gool Bai* v. *Jugul Kishore,* AIR 1952 Bom. 95 : ILR 1952 Bom. 213 : 53 Bom. LR 870.

CHAPTER I

Of The Communication, Acceptance And Revocation Of Proposals

3. Communication Acceptance and Revocation of Proposals.—The communication of proposals, the acceptance of proposals, and the revocation of proposals, and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal acceptance or revocation, or which has the effect of communicating it.

Scope.—The section deals with the communication of offers or proposals, acceptance, and revocations. Psychologically, a consensus may be said to arise when two minds are agreed about the same subject matter, But, law cannot take note of minds, unless as expressed. In the words of Lord Lindley: "A state of mind not communicated cannot be regarded in dealings between man and man".

Act or omission.—Communication may be made by any act or omission. The offeror may say, "hang out a flag, if you are willing to accept" and such an act will amount to a communication of acceptance and will bind the offeror, even if the offeror does not happen to see the flag. It may be by an omission also, if a person who always keeps a flag, hanging out, is asked not to put up the flag, if he intends accepting. So then, an acceptance may be by words spoken, or written, and by conduct suggested or prescribed by the offeror. But, mere silence can never be made to have the effect of communication. **[60]** The mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at the price to the person making the enquiry. The plaintiff who had made an offer of Rs. 6,000 for the purchase of 'Modern Lodge' owned-by the defendant, wrote to the agent of the defendant asking him whether his offer had been accepted and stating that he was prepared to accept any higher price if found reasonable. To this letter, the agent replied: 'In reply to your letter.....I received yesterday a cable from (the defendant) regarding your offer of Rs. 6,000 which reads as follows: 'Won't accept less than rupees ten thousand.' The plaintiff accepted what he termed this as counter-offer made by the defendant. In a suit brought by the plaintiff for the specific performance it was held that the defendant did not make any counter-offer in his cable but was merely inviting offers, that the plaintiff had made an offer of rupees ten thousand which was subject to acceptance by the

defendant and that as there was no express assent to this offer made by the plaintiff there was no concluded contract.[1]

In order to challenge the election to the Legislative Assembly on the ground of holding an office of profit, it is necessary to prove that the contract of service of such office in the absence of any statutory provisions must be preceded by an offer and acceptance.[2]

The acceptance of an offer made must be communicated to the party making the offer and when there has been no such communication, there can be no completed contract, which can be specifically enforced. Mental acceptance or uncommunicated acceptance has no legal effect.[3] Where an offer is made by a person to purchase a house belonging to a co-operative society, it is necessary that the resolution of the society accepting the offer should be duly communicated to the latter and, unless there is such a communication of the resolution there is no completed contract.[4] Silence to a letter does not amount to an acceptance of the terms proposed.[5] The Supreme Court has considered the question[6] when a contract is concluded when the parties conclude the contract over the phone. The Supreme Court pointed:

> "Authorities in India also exhibit a fairly uniform trend that in case of negotiations by post the contract is complete when acceptance of the offer is put into a course of transmission to the offeror.[7] A similar rule has been adopted when the offer and acceptance are by telegrams. The exception to the general rule requiring intimation of acceptance may be summarised as follows. When by agreement, course of conduct, or usage of trade, acceptance by post or telegram is authorised, the bargain is struck and the contract is complete when the acceptance is put into a course of transmission by the offeree by posting a letter or despatching a telegram.

The defendants contended that the same rule applies in the case of contracts made by conversation on telephone. The plaintiffs contend that the rule, which applies to those contracts, is the ordinary rule, which regards a

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1. *Mac Pherson D.I.* v. *Appanna,* AIR 1951 SC 184 : 1951 SCR 161 : 1951 SCJ 257.
2. *Sultan Sadik* v. *Sanjay Raj Subba,* AIR 2004 SC 1377 : (2004) 2 SCC 377.
3. *Subramania Mudaliar* v. *Ammapet Co-operative Society,* AIR 1961 Mad. 289 : (1960) 2 MLJ 477 : 73 LW 756.
4. *Karan Singh* v. *Collector of Chatrapur,* AIR 1980 HP 89; *Ramji Dayawala & Sons* v. *Invest Import,* AIR 1981 SC 2085 : (1981) 1 SCC 80 : 1981 Mah. LR (SC) 95 : 1981 (1) SCR 899.
5. *M. Bholat* v. *Yakohama Specie Bank,* AIR 1941 Rang. 27; *Alcon Constructions* v. *Board of Trustees Port of Morgorgoa,* AIR 1982 Goa 9.
6. *Bhagwandas* v. *Girdhar Lal & Co.,* AIR 1966 SC 543 : 1966 (1) SCR 656.
7. *Baroda Oil Cakes Traders case,* AIR 1954 Bom. 491 : ILR (1954) Bom. 1137.

contract as complete only when acceptance is intimated to the proposer. In the case of a telephonic conversation, in a sense the parties are in the presence of each other each party is able to hear the voice of the other. There is instantaneous communication of speech intimating offer and acceptance, rejection or counter-offer. Intervention of an electrical impulse, which results in the instantaneous communication of message from a distance, does not alter the communication analogous to that of an offer and acceptance through post or by telegraph.

It is true that the Post and Telegraphs Department has general control over communication by telephone and especially long distance telephones, but that is not a ground for assuming that the analogy of a contract made by post will govern this mode of making contracts. In the case of correspondence by post or telegraphic communication, a third agency intervenes and without that letters of messages cannot be transmitted. In the case of conversation by telephone, once a connection is established in the normal course no further intervention of another agency. Parties holding conversation on the telephone are unable to see each other; they are also physically separated in space, but they are in the hearing of each other by the aid of a mechanical contrivance which makes the voice of one heard by the other instantaneously and communication does not depend upon an external agency.

In the administration of the law of contracts, the Courts in India have generally been guided by the rules of the English common law applicable to contracts where no statutory provision to the contrary is in force. The Courts in the former Presidency towns by terms of their respective letters patents, and the Courts outside the Presidency towns by Bengal Regulation III of 1793. Madras Regulation II of 1802 and Bombay Regulation IV of 1927 and by the diverse Civil Court Acts were enjoined in cases where no specific rule existed to act according to "law of equity" in case of chartered High Courts and elsewhere according to justice equity and good conscience which expressions have been consistently used in common law, so far as they are applicable to the Indian society and circumstances.

In England the Court of Appeal has decided that".....where a contract is made by instantaneous communication, e.g. by telephone, the contract is complete only when the acceptance is received by the offeror, since generally an acceptance must be notified to the offeror to make a binding contract". In *Entores Ltd's case* [1], the plaintiff made offer from London by Telex to the agent in Holland of the defendant Corporation, whose headquarters were in New York,

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1. *Entore Ltd.* v. *Miles Far East Corporation*, (1955) 2 QB 327; *American Pipe Co.* v. *State of U.P.*, AIR 1983 Cal. 186 (Contract by correspondence); *Kalluram Kesharwani* v. *State of M.P.*, AIR 1986 MP 204 : 1986 Cur Civ.LJ. 203 : 1986 Jab.LJ. 372 : (1986) 2 CCC 640.

for the purchase of certain goods, and the offer was accepted by a communication received on the plaintiff's Telex machine in London. On the allegation that breach of contract was committed by the defendant Corporation, the plaintiff sought leave to serve notice of a writ on the defendant Corporation in New York claiming damages for breach of contract. The defendant Corporation contended that the contract was made in Holland. Denning, L.J., who delivered the principal judgment of the Court, observed at p. 332:

> "When a contract is made by post it is clear law throughout the common law countries that the acceptance is complete as soon as the letter is put into the post box, and that is the place where the contract is made. But there is no clear rule about contracts made by telephone or by Telex. Communications by these means are virtually instantaneous and stand on a different footing" and after examining the negotiations made in a contract arrived at by telephonic conversation in different stages, Denning, L.J. observed that in the case of a telephonic conversation the contract is only complete when the answer accepting the offer was made and that the same rule applies in the case of a contract by communication by telex. He recorded his conclusion as follows: ".....the rule about instantaneous communications between the parties is different from the rule about the post. The contract is complete only when the acceptance is received by the offeror; and the contract is made at the place where the acceptance is received."

It appears that in a large majority of European countries the rule based on the theory of *consensus ad idem*, is that a contract takes place where the acceptance of the offer is communicated to the offeror, and no distinction is made between contracts made by post or telegraph and by telephone or telex. In decisions of the State Courts in the United States, conflicting views have been expressed, but the generally accepted view is that by the "technical law of contracts the contract is made in the district where the acceptance is spoken". This is based on what is called "the deeply rooted principle of common law that where the parties impliedly or expressly authorise a particular channel of communication, acceptance is effective when and where it enters that channel of communication". In the text books there is no reference to any decision of the Supreme Court of the United States of America on this question: American Jurisprudence.[1]

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1. *2nd Ed.Vol. 17 Art. 54 p. 392* and *Williston on Contracts 3rd Edn. Vol. 1, p. 271.*

Obviously the draftsman of the Indian Contract Act did not envisage use of the telephone as a means of personal conversation between parties separated in space, and could not have intended to make any rule in that behalf. The question then is whether the ordinary rule, which regards a contract as, completed only when acceptance is intimated should apply or whether the exception engrafted upon the rule in respect of offers and acceptances by post and by telegrams is to be accepted. If regard be had to the essential nature of conversation by telephone, it would be reasonable to hold that the parties being in a sense in the presence of each other, and negotiations are concluded by instantaneous communications of speech, communication of acceptance is a necessary part of the formation of contract, and the exception to the rule imposed on grounds of commercial expediency is inapplicable. This case has been referred to in *Union of India* v. *M/s. Kuppuswamy Naicker.*[1] In *Deep Chandra* v. *Sajjad Ali Khan*[2] the terms in a receipt showing the payment of earnest money were held to be a record of the terms of a validly concluded contract. The receipt was worded as follows, "Received this day Rs.....as earnest money out of Rs.....for the contract of sale of land .....from X through Z and executed a receipt, it is further declared that the sale deed would be executed within three months and in default the contract would be deemed cancelled".

"Or".—The use of the word "or" in the last portion has raised some difficulty. Is it sufficient if there be an act or omission with a mere intention that it should constitute a communication Sir Federick Pollock suggests that the word "and" may be substituted for "or". The Indian Contract Act has been criticised very often as an inelegant piece of draftsmanship. There are several defects of this character, in many places in the Act. The only importance of this section is that communication may be made by an act or omission.

Where there is an agreement for sale of immovable property it is necessary that the property sold and the price fixed as consideration paid or agreed to be paid must be identified with certainty.[3]

The defendant insurance company cannot repudiate the claim of the plaintiff who was the wife of the deceased assured on the ground that the contract of insurance has been cancelled during the life time of the assured, when the letter of cancellation of contract of insurance was not posted on particular date, and when the defendant insurance company retained the premium money, and as such the plaintiff is entitled to recover the sum assured.[4]

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1. AIR 1978 Cal. 211.
2. AIR 1951 All. 93 (FB).
3. *Mirahul Enterprises* v. *Vijaya Srivastava,* AIR 2003 Delhi 15, 22 (DB) : 2002 (49) Arbi. LR 235 : 2002 (100) DLT 290.
4. *Smt. Madhumita Sarkar* v. *Oriental Insurance Company Ltd.,* AIR 2007 Cal 234 : 2007 (1) Cal LJ 395 : 2007 (5) AKAR (NOC) 794.

4. Communication when complete.— The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations

(a) *A* proposes, by letter, to sell a house to *B* at a certain price. The communication of the proposal is complete when *B* receives the letter.

(b) *B* accepts *A's* proposal by a letter sent by post.

The communication of the acceptance is complete—

as against *A*, when the letter is posted;

as against *B*, when the letter is received by *A*.

(c) *A* revokes his proposal by telegram.

The revocation is complete as against *A* when the telegram is despatched. It is complete as against *B* when B receives it.

B revokes his acceptance by telegram. *B's* revocation is complete as against B when the telegram is despatched, and as against A when it reaches him.

Communication.—Every offer, whether general or specific, has to be communicated.[1] **[53]** There can be no consensus, unless the acceptor when accepting knows the offeror's mind. A mere compliance in ignorance of the terms of the offer cannot give rise to a contract. How could there be an acceptance, of that, of which the acceptor does not know? Information supplied without knowledge of a reward offered will not entitle a party to the reward.[2] Motive is irrelevant, provided that the acceptance could be related to the offer of reward. Service done does not necessarily import an obligation to pay for it, if the acceptor had no opportunity of accepting or rejecting those services.[3] Even where an offer consists of several terms, it is necessary that the offeror should take all reasonable steps to communicate those terms to the acceptor.[4] If a document containing those terms is handed to the acceptor, and attention is also drawn to the existence of those conditions and if the acceptor knows that the document contains the terms and conditions, or has signed the document he will be bound by them, even though he never read them or was even ignorant of the language in which they were written.[5] If, however, the offeror has not taken reasonable steps to bring to the knowledge of the acceptor that there are terms and conditions, the acceptor will not be bound by them.[6] **[53-64]** The time at which the party's attention to the terms is drawn is of equal importance. The modern trend is that proof of and opportunity for negotiation is a necessary condition for imposing the rigour of the terms of the weaker party. Just as every offer has to be communicated, every acceptance must also be communicated. **[65]** Otherwise, there can be no consensus. It follows that a revocation of an offer or an acceptance can be effective only if communicated to the other party. **[87]**

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1. *Tinn* v. *Hoffman & Co.*, (1873) 29 LT 271; *Ezekiel* v. *Carew & Co.*, ILR (1938) 2 Cal. 190 : (1938) Cal. 423 (offer may be made alternatively to two persons—Acceptance by either concludes the contract).
2. *Fitch* v. *Snedaker*, (1868) 38 NY 240; *Lalman* v. *Gauri Dutt*, (1913) 11 ALJ 487; *Har Bhajan* v. *Har Charan*, (1925) 23 ALJ 655 : (1925) All. 539 : 88 IC 908; *Gibbons* v. *Proctor*, (1891) 64 LT 594.
3. *Taylor* v. *Laird*, (1856) 25 LJ Ex. 329.
4. *Parker* v. *S.E.R. Co.*, (1877) 2 CPD 416; *Hood* v. *Anchor Line*, (1918) AC 837; *Thompson* v. *L.M. & S.R. Co.*, (1930) 1 KB 41; *Mackillican* v. *Vicompagnic Des Messageries Maritimes*, (1880) 6 Cal. 277; *George Mitchell* v. *Finney Luk Sees*, (1983) 1 All. ER 108 clause inserted by the Seed Merchants Association in then invoices without negotiation with farmers was held not binding. **See also** *Schroeder Music Publish Co. Ltd* v. *Macaulay*, (1974) 3 All. ER 616.
5. *Watkins* v. *Rymill*, (1883) 10 QBD 178; *Ashby* v. *Tolhurst*, (1937) 2 KB 242 : (1937) 2 AER 837; *L'Estrange* v. *Graueob*, (1934) 2 KB 394; *Mackilligan* v. *Compagnie Des Messageries Maritimes*, (1879) 6 Cal. 227; *Madras Railway Co.* v. *Govinda Ram*, (1898) 21 Mad. 172 : 8 MLJ 85; *Thornton* v. *Shoe Lan Parking Ltd.*, (1971) 2 AB 163.
6. *Henderson* v. *Stevenson*, (1875) 2 HLSC 470; *Richardson* v. *Rowntree*, (1894) AC 217.

Communication of acceptance.—Even as an offer has to be communicated, acceptances also should be communicated.[1] Where by agreement, course of conduct or usage of trade, acceptance by post or telegram is authorised, the bargain is struck and the contract is completed as soon as the acceptance is put into the course of communication by the offeree by posting a letter or sending a telegram.[2]

Where a contract is made through the telephone, the place where the acceptance of the offer is communicated is the place where the contract is made.[3]

Strictly speaking a *consensus* does arise, the moment an acceptor decides to accept; but Law cannot take note of states of minds as such, unless as expressed. So it is necessary that this fact of acceptance should come to the knowledge of the offeror. Such communication being for the benefit of the offeror, it is open to him to waive communication, or to prescribe some act instead, which, if complied with, would be sufficient to give rise to a contract.[4] On this principle, where an offeror asks the acceptor to send his reply by post, it has been held that it is sufficient, if the acceptor posts his letter and the contract would be concluded as from that moment.[5] This is so, irrespective of whether the letter of acceptance reaches the offeror late or never reaches him at all. There need not be even an express authority. If the offeror to whom several methods of communication are equally open, starts his negotiations by post, it has been construed to be an implied authority for the acceptor to post his acceptance,[6] and such acceptance concludes the contract irrespective of whether the letter reaches the offeror or not.[7] The next stage in development was to imply authority in cases where, according to the ordinary habits of society or according to the usages of mankind, the post is likely to be resorted to as a method of communication, in which case posting a letter would conclude the contract.[8] But, where the offeror prescribes a method different from

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1. *Brogden* v. *Metropolitan Railway Company,* (1877) 2 AC 666; *Morgan* v. *Ravey,* (1861) 158 ER 109 : 123 RR 494; *Kennedy* v. *Thomassen,* (1929) 1 Ch. 264; *Felthouse* v. *Bindley,* (1862) 142 ER 1037 : 132 RR 774; *Powell* v. *Lee* (1908) 99 LT 284.
2. *Bhagwandas* v. *Girdhari Lal & Co.,* AIR 1966 SC 543, 547, 548 : 1966 (1) SCR 656.
3. *Ibid.*
4. *Carlill* v. *Carbolic Smoke Ball Co.,* (1893) 1 QB 256.
5. *Adams* v. *Lindsell,* (1818) 106 ER 250 : 19 RR 415; **see also** *Shimosa Oil Mills* v. *Radhakrishna Oil Mills,* AIR 1952 All. 111; *Ramdev* v. *Laxmi Insurance Co. Ltd.,* AIR 1962 Punjab 125. (Proposal of assured accepted subject to personal attachment duly completed by director. Risk to commence from data of receipt issued. Held acceptance was no qualified and contract was completed by acceptance of offer.
6. *Dunlop* v. *Higgins,* (1848) 9 ER 805 : 73 RR 98.
7. *Household Fire Insurance Co.* v. *Grant,* (1879) 4 Ex. D. 216.
8. *Henthorn* v. *Fraser,* (1892) 2 Ch. 27.

posting, mere posting of the acceptance will not be sufficient.[1] So posting by the acceptor to his own agent with authority to communicate will not conclude the contract;[2] nor will delivery of a letter into the hands of a postman for being posted.[3] What is required is that there should be a consensus; the acceptor must decide, and do some irrevocable act, for example actually putting a letter into the post so that the letter of acceptance cannot be recalled.

The Contract Act was passed in 1872, when the law had not been completely settled in England as to whether a letter which is posted but which does not reach the offeror and is altogether lost in transit, would conclude a contract or not. It was also not settled in English Law, whether an acceptance could be revoked or not. In this state of the authorities, the authors of the Indian Contract Act thought it prudent to provide for a dual effect, in case of letters of acceptance. An acceptance put into a course of transmission, including thereby posting concludes the contract as against the offeror when it is put in transmission, properly addressed.[4] However, an acceptance binds the acceptor only when it reaches the offeror. This is for the purpose of giving the acceptor only when it reaches the offeror. This is for the purpose of giving the acceptor an opportunity to revoke his acceptance, which is conferred by Section 5. The consequence then is that the acceptor gets a double advantage, in that once he posts the letter, he is freed from further responsibility and at the same time gets an opportunity to revoke that acceptance. **[54]**

Communication of Revocation.—As regards the communication of a revocation, it is very difficult to say why the Indian Legislature should have provided for a dual effect. In English law, a communication of revocation is effective, only if it reaches the other party. Otherwise it is useless and infructuous. On the wording of the Indian Statute, it is possible to maintain that an ineffective revocation being binding upon the party who revokes, would therefore prevent him from enforcing a contract, though the contract may be enforceable by the other party to the contract. **[87]**

Place of Contract.—Where the offer is communicated at a certain place, and accepted there, the contract is deemed to have been made there.[5] Where a proposal for insurance was made to the Madras agent of an insurance company which had its head office at Calcutta and the evidence showed that the Madras agent had authority only to receive and forward the proposals to the head office it was held that the contract was made at Calcutta where the

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1. *Eliason* v. *Henshaw,* (1819) 4 Wheaton 225.
2. *Hebb's case,* (1867) 4 Eq. 9.
3. *In re. London and Northern Bank,* (1900) 1 Ch. 220.
4. *Ram Das* v. *Official Liquidator,* (1887) 9 All. 366 (385) : 1887 AWN 34 (Negligent misdirection of letter of acceptance—No contract).
5. *Kami Setti* v. *Katha Venkataswamy,* (1908) 27 Mad. 335,359; *Sitaram* v. *Thompson,* (1905) 33 Cal. 884; *Hiranand* v. *Gurumukh,* (1923) 73 IC 205 : (1923) Lah. 437.

proposal was accepted and whence the policy was issued.[1] [80] A suit for breach of contract can at the option of the plaintiff be brought either at the place where the contract was made or at the place where the breach was committed.[2] Where offerer and offeree are not at one place and are exchanging the offer and acceptance through post then the contract would be deemed to have been entered into at the place where the offer was received and the acceptance was posted and the place of acceptance is irrelevant for providing any cause of action.[3]

5. Revocation of proposals and acceptances.—A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations

A proposes, by a letter sent by post, to sell his house to *B*.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when *B* posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches *A*, but not afterwards.

Revocation of proposals.—An offer may be revoked at any time before acceptance.[4] [87] In English Law, the posting of a letter of acceptance ordinarily concludes the contract and therefore a revocation of an offer, in

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1. *National Insurance Co.* v. *Seethammal,* (1933) 65 MLJ 455 : (1933) MWN 937 : 38 LW 504 IC 998 : (1933) Mad. 764.
2. *Republic Medico Surgical Company* v. *Union of India,* AIR 1980 Kant. 168 : (1979) 2 Kant.LJ 410.
3. *Progressive Construction Ltd.* v. *Bharat Hydro Power Corpn. Ltd.,* AIR 1996 Del. 92, 95.
4. *Byrne* v. *Van Tienhoven* (1880) 5 CPD 344; *Henthorn* v. *Fraser,* (1892) 2 Ch. 27.

order to be operative, must reach the acceptor before his acceptance is posted. In Indian law, however, a letter of acceptance put into post has a dual effect and that is why this section says that a proposal must be revoked "before the communication of the acceptance is complete as against the proposer," (*i.e.*) before the acceptor puts his acceptance into a course of transmission (*e.g.*) by posting. But inspite of the difference in language, there is no difference on this point between the Indian and English law.

Where a proposer has made a proposal subject to the condition that he will forego some earnest money paid by him in the event of his not entering into a contract or performing some act, he cannot recover the earnest money inspite of his revoking the proposal before it is accepted.[1]

Where applications are called from the bank employees under Voluntary Retirement Scheme by virtue of the rules of VRS framed by State Bank of India with a stipulation that the application once having been made by the employee cannot be withdrawn, it was held by the Supreme Court that the said scheme is only an invitation to offer and therefore the application made by the employee exercising his option can be withdrawn before the application is accepted.[2]

An offer may be revoked even though the offeror has promised to keep the offer open for a certain period. Such a promise unless supported by consideration will not be binding upon the offeror.[3] **[90]** There is nothing inequitable or improper in withdrawing the offer by the offeror as he is in no way bound to keep the offer open indefinitely.[4] Where the promise to keep the offer open is supported by consideration, the offeror is bound by the promise and cannot revoke it.[5]

Auction sales well illustrate the revocability of offers before acceptance. Each bid being only an offer on one side,[6] not binding till assented to, may be

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1. *National Highway Authority of India* v. *Ganga Enterprises,* AIR 2003 SC 3823 : (2003) 7 SCC 410 : 2003 (117) Com Cas 154 : 2003 (6) Supreme 527 : (2003) 10 ILD 434 (SC).
2. *State Bank of Patiala* v. *Romesh Chander Kanoji,* AIR 2004 SC 2016 : (2004) 2 SCC 651.
3. *Cooke* v. *Oxley,* (1790) 100 ER 785; 1 RR 783; *Egala* v. *Muniswamy,* (1923) 46 Mad. 30; (1922) MWN 201 : 15 LW 409 : 65 IC 720 : (1922) Mad. 16 : 42 MLJ 432; *Schonlank* v. *Muthunagamma,* (1892) 2 MLJ 57; *Sharad Trading Co.* v. *State of M.P.,* AIR 1980 MP 91; *Shri Durga Saw Mill* v. *State of Orissa,* AIR 1978 Ori. 41.
4. *N. Sesharatnam* v. *Sub-Collector, L.A., Vijayawada,* AIR 1992 SC 131, 132 : JT 1991 (4) SC 274 : (1992) 1 SCC 114 : 1991 AIR SCW 2824.
5. *Kishnaveni Construction* v. *Executive Engineer, Panchayat Raj, Darsi,* AIR 1995 AP 362, 364.
6. *T. Linga Gowder* v. *State of Madras,* AIR 1971 Mad. 28 : (1970) 1 MLJ 903.

retracted at any time before the fall of the hammer.[1] [41] The actual bids made are all offers, each higher bid superseding the previous bid and when the hammer falls on the last bid there is an acceptance and the contract becomes complete.

No contract is said to have been concluded when the tenderers has revoked their bid before the communication of the acceptance of the bid by the respondents and consequently the respondents shall not have the right to invoke the bank guarantee furnished by the petitioners on the ground of breach of contract for non-performance.[2]

No contract is said to have been concluded when the tenderer has withdrawn the tender before it is accepted, the question of breach of contract does not arise resulting in the forfeiture of the deposit of earnest money.[3]

Revocation of acceptance.—An acceptance cannot be revoked in English law; [96] but the Indian law specifically provides for such revocation. The time for revocation is the time, which the letter of acceptance takes to reach the offeror. A revocation has to be in the same manner and subject to the same rules as apply to the communication or revocation of a proposal.

6. Revocation how made.—A proposal is revoked—

(1) by the communication of notice of revocation by the proposer to the other party;

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

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1. *Agra Bank* v. *Hamlin,* (1890) 14 Mad. 235; *Champalal* v. *Jaigopal,* (1922) 45 Mad. 799 : 43 MLJ 132; *Mackenzie* v. *Chamroo,* (1889) 16 Cal. 702; *Municipal Council* v. *P. Muthuraj,* (1969) 1 MLJ 394.
2. *Sekhsaria Exports* v. *Union of India,* AIR 2004 Bom. 35 (DB) : 2004 (1) Mah. LJ 415
3. *State of Tripura* v. *M/s. Bhowmik & Company,* AIR 2004 Gau. 19 : 2004 (1) CTLJ 523 : 2004 (1) Gau. LR 489.

Lapse of offers—This section deals with the several ways in which an offer lapses or is terminated so that any subsequent acceptance will not give rise to a contract. They are:

(1) By Revocation.—A proposal may be revoked provided such a revocation is communicated to the acceptor before acceptance. **[87]** Revocation may be express, by words spoken or written, or implied from the conduct of the offeror. Any conduct of the offeror inconsistent with the continuance of the offer would amount to a revocation, (*e.g.*) *A* offering to sell a house to *B*, but subsequently selling the same to *C*. It is necessary that this revocation must be communicated *by the offeror* himself or by his agent. The decision in *Dickinson* v. *Dodds* [1] that it is sufficient if, somehow the acceptor comes to know that the offer has been revoked, is not applicable in India. If the acceptance is qualified the new terms introduced would form counter offer; a counter offer is deemed to be the rejection of the original offer.[2] Merely asking for further information must be distinguished from the modified offer. It is a question of fact that courts shall examine in each case whether the query is a cloak for counter offer or merely seeks a clarification on an already agreed term.[3]

(2) By Expiry of Time.—The offeror has got the right to dictate the terms of acceptance. So where the offer prescribes a time for acceptance and if there is no acceptance within that period, the offer lapses.[4] Where no time is fixed, it does not mean that it could be accepted at any time before the offer is withdrawn. The offer will lapse after a reasonable time.[5] **[83]**

(3) By Non-Fulfilment of Condition Precedent.—Where the offeror prescribes a condition to be complied with before acceptance, an acceptance which does not comply with the condition, will not give rise to a contract. But it is difficult to understand what 'a condition precedent to acceptance' means. The language is not quite happy.

(4) By Death or Insanity.—In English law, the death of the proposer puts an end to the offer and an acceptance though in ignorance will not result in contract. **[80]** But the Indian law here differs from the English law and provides that the offer lapses only if the fact of death or insanity is brought to the knowledge of the acceptor before acceptance. Again knowledge of the offeror's insanity will give rise only to a voidable contract in English law while in Indian law there will be no contract at all. **[87]** A person who makes

1. (1876) 2 Ch.D. 463.
2. *Hindustan Aluminium Corporation* v. *U.P. State Electricity Board*, AIR 1973 All. 263, 267.
3. *D.G.S. & D.* v. *Coventry Metal Corporation*, AIR 1984 NOC 153 Del. 70.
4. *Ramsgate Hotel Co.* v. *Montefiore*, (1866) LR 1 Ex. 109; *Indian Ocean & Co.* v. *Padamsey*, (1934) 36 Bom. LR 32 : 150 IC 645 : (1934) Bom. 97.
5. *Central Inland Water Transport Corporation Ltd.* v. *B.N. Ganguly*, (1986) 3 SCC 156 : 1986 (2) SCR 278 : 1986 SC 1571 : 1986 ATC 103.

an offer is entitled to withdraw his offer or tender before it is accepted. The government by merely providing a clause to the contrary in the tender notice cannot take away the legal rights of a person.[1]

Lapse of offer by rejection or counter offer—Acceptance of an offer must be unconditional and an acceptance containing conditions or terms amount to counter offer. Where certain tax concessions are announced by the Government for setting up large-scale industries, the letter written by an industrialist expressing willingness and seeking confirmation of availability of concessions was held to be not a counter offer.[2]

7. Acceptance must be absolute.—In order to convert a proposal into a promise, the acceptance must—

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

Acceptance must be absolute and unconditional—Acceptance must be of the whole and the offeree must assent to the exact terms of the offer. The intention to accept must be conclusive. In service contracts exemption clauses, which are unconscionable, would be void as being opposed to public policy even though the employee who has grossly unequal bargaining power accepted the terms. The Courts adopt the test of reasonableness or fairness of a clause in a contract where there is an inequality of bargaining power. A conditional acceptance is no acceptance. An acceptance with a slight variation

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1. *Suraj Besan & Rice Mills* v. *Food Corporation of India*, AIR 1988 Del. 224 : (1987) 2 Arbi.LR 240 : (1987) 33 DLT 401 : (1988) 14 DRJ 176; *Atma Singh* v. *NTPC*, 1988 (2) ALT 13.
2. *Amrit Banaspati Co. Ltd.* v. *State of Punjab*, AIR 1992 SC 1075 : JT 1992 (2) SC 217 : (1992) 2 SCC 411 : 1992 AIR SCW 953.

in the terms offered is again bad.[1] It is settled fact that every offer and acceptance must possess three components viz. certainty, commitment and communication and when any of one of these components is lacking, such offer or acceptance does not give rise to a valid contract.[2] Seeking clarification of an offer is neither acceptance nor counter offer.[3] A counter offer is no acceptance. An offer once rejected cannot be again accepted; any such acceptance is only a fresh offer.[4] But where a counter offer to buy the material being accepted by the acceptor, the validity of the contract cannot be denied merely because the offeror has made a request to lift the material in three months time.[5] An acceptance subject to further terms being settled or subject to confirmation, will not give rise to a contract unless the further terms are agreed to or the contract confirmed.[6] But an unqualified acceptance, followed up by a further request is not objectionable.[7] **[97]**

Where the acceptor accepts the proposal with a variation or condition, the acceptance amounts to a counter proposal only, and as such, it must be accepted by the original proposer for the conclusion of a contract.[8]

If a tender is given it is merely an offer and only when it is accepted absolutely any contract can come into force; otherwise no right flows from such a contract.[9]

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1. *Routledge* v. *Grant,* (1828) 130 ER 920 : 29 RR 672; *Jordan* v. *Nortan,* (1828) 130 ER 920 : 29 RR 672; *Jordan* v. *Norton,* (1838) 51 RR 580; 150 ER 1382; *Hutchinson* v. *Bowker,* (1839) 151 ER 227 : 52 RR 821; *Haji Mahomed* v. *Spinner,* (1900) 24 Bom. 510 (523); *South British Insurance Co.* v. *Stenson* (1928) 52 Bom. 532 : 30 Bom. LR 745 : 111 IC 904 : (1928) Bom. 260 (Motor insurance proposal accepted, with addition of condition precedent); **see also** *Keshavlal & Co.* v. *I.T. Commr.,* AIR 1954 Mad. 520; *Nirode Chandra* v. *Raja Kirtya,* (1922) 80 IC 308 : (1922) Pat. 24.
2. *Kilburn Engineering Ltd.* v. *Oil & Natural Gas Corpn. Ltd.,* AIR 2000 Bom. 405, 407 : 2000 (3) All. Mah LR 757.
3. *U.P. State Electricity Board* v. *M/s. Goel Electric Stores,* AIR 1977 All. 494, 496.
4. *Hyde* v. *Wrench,* (1840) 49 ER 132 : 52 RR 144; *Motilal* v. *Kishori Lal,* (1930) Lah. 374 : 120 IC 482; *Perala Krishnayya* v. *Padmanabhan,* (1917) MWN 91 : 5 LW 149 : 37 IC 792 (Qualified acceptance is only a counter proposal); *Nihal Chand* v. *Amarnath,* (1926) 98 IC 272 : (1926) Lah. 645.
5. *A.P. Paper Mills* v. *Principal Secretary to Govt., Hyderabad,* AIR 1997 AP 257, 263 : 1997 (3) ALT 649 : 1997 (4) ALD 467.
6. *Appleby* v. *Johnson,* (1873) 9 CP 158; *Jones* v. *Daniel,* (1894) 2 Ch. 332; *Sri Minakshi Mills* v. *T.C. Anantaramier,* (1930) 31 LW 153 : (1930) Mad. 654; *Jugal Kishore* v. *Paras Lal,* (1930) Lah. 325; *Kahn* v. *Jugal,* (1930) Lah. 114 : 123 IC 838; *Kahn* v. *Premsukh,* (1931) Lah. 260 : 134 IC 1110. **See also** *Raguhandhan* v. *State of Hyderabad,* AIR 1963 AP 180.
7. *Sir Mohomed Yusuf* v. *Secretary of State,* (1921) 45 Bom. 8; *O' Grady* v. *Harbert Winn,* (1912) 9 ALJ 285.
8. *Vishwa Industrial Company Pvt. Ltd* v. *Mahanadi Coalfields Ltd.,* AIR 2007 Ori 71 : 2007 (1) Orissa LR 318 : 2007 (103) Cul LT 246.
9. *Veera Property Developments (P) Ltd etc.* v. *Tamil Nadu Slum Clearance Board,* AIR 1999 Mad. 304.

If acceptance is conditional the offer may be withdrawn at any moment until absolute acceptance has taken place.[1]

Where in accepting the defendant's offer to sell manganese ore, the plaintiff sought to add a new term as to sampling, and the defendant refused to consider it and in effect repeated his original offer, it was held that the plaintiff's acceptance, coupled with the reference to sampling was not a counter offer which had been rejected by the defendant and that a contract would arise by plaintiff's subsequent acceptance.[2] In another case, where A offered to buy *B's* business on certain terms and *B* telegraphed, "Terms accepted. Please remit by 5th February. Otherwise acceptance subject to withdrawal. Wire", it was held that there was a concluded contract, which could not be detracted from by reason of the words at the end.[3] Where the letter of acceptance referred to future negotiations for finalisation of more terms of contract for sale, the letter of acceptance cannot give rise to a concluded contract between the parties.[4]

Where a proposal of insurance against burglary was sent, along with the yearly premium and the company sent a cover note to the assured, informing him that they had accepted the proposal, and a burglary took place before the actual issue of the policy, it was held that there was a completed contract, and the company was liable.[5]

Where all the terms are settled, and it only remains to execute a formal document it depends upon the intention of the parties, whether a concluded

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1. *Union of India* v. *Bhimsen Walaiti Ram,* AIR 1971 SC 2295 : 1970 (2) SCR 594 : (1969) 3 SCC 146.
2. *Pacific Mineral* v. *Singhbhum Mining Syndicate,* (1938) Cal. 343 : 177 IC 524; **see** *Moolji Jaitha & Co.* v. *Seth Kirodimal,* AIR 1961 Kerala 21.
3. *Katherina Stiffles* v. *Martin,* (1935) 39 CWN 174 : 164 IC 732; **see** *Bhalchandra* v. *Mahadeo,* AIR 1947 Nag. 193.
4. *Satya Prakash Goel* v. *Ram Krishan Mission,* AIR 1991 All. 343.
5. *Mahomed Sultan* v. *Clive Insurance Co.,* (1934) All. 298 : 56 All. 726 : 148 IC 522; (1934) ALJ 719; followed in *Ramdev* v. *Lakshmi Insurance Ltd.,* AIR 1962 Punj. 125; *Chogalal* v. *Secy. of State,* (1933) Nag. 261 : 29 NLR 333. (Goods delivered to carrier—Receipt not given to consignor—Contract complete when company took the goods into their yard). But see *Ahmedunnissa Begum* v. *L.I.C. of India, Hyderabad,* AIR 1981 AP 50; *Hindusthan Co-operative Insurance Ltd.* v. *Shyamsundar,* AIR 1952 Cal. 691 : 56 CWN 418; *Deviprasad Khandelwal & Sons* v. *Union of India,* AIR 1969 Bom. 163 : 70 Bom. LR 364 : 1969 Mah. LJ 635; *Moolji Jaitha & Co.* v. *Kirodimal,* AIR 1961 Kerala 21. (The question whether the terms added are intended to be part of the contract or are merely in the nature of enquiries for further information has to be decided in particular cases and thereby gathering the intention of the parties); *U.P. State Electricity Board* v. *M/s. Goel Electric Stores,* AIR 1977 All. 494. (The seeking clarification of offer neither amounts to the acceptance of the offer nor to the making of a counter offer).

contract arises or not.[1] In *Currimbhoy* v. *Creet, the Judicial Committee*[2] in reaffirming the rule observed that if the documents relied on as constituting a contract contemplate the execution of a further contract between the parties, it is question of construction whether the execution of the further contract was intended as a condition or term of the bargain, or whether it was a mere expression of the desire of the parties for a formal agreement, and that in the former case, no concluded contract will arise until the condition is fulfilled (*i.e.,*) until the document is executed, and that in the latter case, a binding contract is formed. **[99]** Where as in the case of a sale of property, the acceptance is "subject to the approval of the title" by a solicitor, there arises a concluded contract, unless the solicitor can reasonably disapprove of the title.[3] A condition in a agreement of sale that the vendor should make out a marketable title to the satisfaction of the purchaser's attorneys does not give the solicitor arbitrary and absolute power to reject a title, though good. He is the sole judge only, if he acts reasonably and *bona fide*, and the Court must, in cases of dispute, decide whether he has acted reasonably.[4] If after a contract is concluded, one of the parties starts fresh negotiations with a view to introduce new terms, and this is done under mistake but has no effect in altering the contract, other party then if the subsequent negotiations fail the party which attempted to reopen the concluded contract can enforce it specifically.[5] If the offer made by the plaintiff had been accepted by the defendants without qualification and any further negotiations in which certain other conditions were added, do not affect the original contract, it could not enable either party to get rid of the contract already made.[6]

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1. *Hussey* v. *Horne Payne,* (1879) 4 AC 311; *Ball* v. *Bridges,* (1874) 30 LT 430; *Winn* v. *Bull* (1877) 7 Ch.D. 29; *Rossdale* v. *Denny,* (1921) 1 Ch. 57; *Chillingworth* v. *Esche,* (1924) 1 Ch. 97; *Currimbhoy* v. *Creet,* (1930) 57 Cal. 170; *Harichand* v. *Govind,* (1923) 47 Bom. 335; *Mylappa* v. *Aga Mahomed,* (1919) 37 MLJ 712: 54 IC 550 ; *Krishna Jute and Cotton Mills* v. *Innes,* (1911) 21 MLJ 182: (1911) MWN 17 : 9 IC 104; *Thota Venkatachala* v. *Krishnaswamy,* (1874) 8 MHCR 1; *Seth Hukum Chand* v. *Raja Ram Bahadur,* (1924) 3 Pat. 625; 47 MLJ 562 : 22 ALJ 935; 80 IC 841; *H.G. Krishna Reddy & Co.* v. *M.M. Thimmaiah,* AIR 1983 Mad. 169; *American Pipe Co.* v. *State of U.P.,* AIR 1983 Cal. 186.
2. (1933) 60 Cal. 980 : 37 CWN 265 : 33 ALJ 611 : 35 Bom. LR 223 : 37 LW 253 : (1933) MWN 10 : 141 IC 209 : (1933) PC 29 : 64 MLJ 103 (PC); *Subimal* v. *Radhanath,* (1934) 60 Cal. 1372 : 149 IC 1000 : (1934) Cal. 235. (Mere reference to preparation of formal document does not affect). **See also** *H.G. Krishna Reddy* v. *Thimmiah,* AIR 1983 Mad. 169 : (1983) 96 LW 88.
3. *Eadie* v. *Addison,* (1883) 52 LJ Ch. 80.
4. *Misri Lal* v. *Netai Chand,* (1934) 58 CLJ 513 : 150 IC 389 : (1934) Cal. 372; *Krishnaji* v. *Ramchandra,* (1931) 33 Bom. LR 1377.
5. *Jainarain* v. *Surajmull,* AIR 1949 FC 211; **see also** *Ziaul Haque* v. *Calcutta Vyapar Pratisthan,* AIR 1966 Cal. 605; *Rajram Bhasin* v. *Kartar Singh,* AIR 1975 Delhi 137.
6. *Laxmi Ginning & Oil Mills Ltd* v. *Amrit Banaspati & Co. Ltd.,* AIR 1962 Punj. 56.

Although an offer made in response to the tender notice which is in the nature of invitation to offer, is accepted by the person inviting tender with certain modification, the acceptance cannot be termed as counter offer and a contract is said to have been concluded particularly when for majeure clause was invoked by the offeror submitting the tender which could be invoked only on the basis of a concluded contract.[1]

Communication of acceptance by telex of the offer at old rates when the tenderer has offered revised rates before the communication of the acceptance cannot be said to conclude the contract.[2]

In response to the advertisement published by the Union of India, *A*, submitted a tender for the supply of the required quantity of coconut oil. One of the conditions of contract stipulated that failure on the part of A to make the required security deposit would constitute a breach of contract. It was contended on behalf of *A* that there was no concluded contract when the security deposit was not made. It was held that clause did not intend to make any substantial variation in the contract.[3] Whenever one party makes a composite offer each part thereof being dependent on the other, the other party cannot by accepting a part of the offer compel the other and confine its dispute only to that part not accepted, unless the party offering the composite offer agrees to that course.[4]

A contract to enter into a contract is void.[5] A contract to negotiate a contract is not recognised in law.[6]

Contract is not concluded, when the negotiations ended without reaching a binding contract law.[7] Where the petitioner alleged that the respondent Doordarshan has orally agreed to telecast 500 episodes of T.V. Serials, prior to the execution of written contract between them to telecast 65 episodes, the alleged oral acceptance is deemed only as negotiation and not binding between the parties.[8]

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1. *Gujarat State Fertilisers Co. Ltd.* v. *H.J. Baker & Bros.*, AIR 1999 Guj. 209, 211 : 2000 (1) Guj. LR 159.
2. *Oil & Natural Gas Commission* v. *Balaram Cements Ltd.*, AIR 2001 Guj. 287.
3. *Jawahar Lal* v. *Union of India*, AIR 1962 SC 378 : 1962 (3) SCR 769 : 1962 (1) SCJ 654.
4. *General Assurance Society* v. *L.I.C.*, AIR 1964 SC 892 : 1964 (5) SCR 125 : 1964 (34) CC 10: 1964 (1) SCJ 12.
5. *Jyoti Bros.* v. *Shree Durga Mining Co.*, AIR 1956 Cal. 280.
6. *Courtney Ltd.* v. *Jolani Bros. Ltd.*, (1975) 1 WLR 297.
7. *Rickmers Venwaltung Gmbh* v. *Indian Oil Corporation Ltd.*, AIR 1999 SC 504 : (1999) 1 SCC 1 : 1998 (8) Supreme 464 : 1999 (1) Arbi. LR 1 : 1999 (1) CLT 8 (SC).
8. *Raj Chowdhury* v. *Union of India*, AIR 2000 Cal 232, 237 : 2000 (3) Cal. LT 376.

Usual and reasonable manner.—From the point of view of psychological analysis, consensus may be said to arise the moment the acceptor decides to accept. But in the eye of the law, a consensus springs into existence only with the communication of the acceptance. Such communication may take many forms. The offeror himself may prescribe any method of acceptance and compliance with such a mode would give rise to a contract. Where the acceptor has signified his acceptance to an arbitration clause in the contract without any protest and acted on the same the contract is said to be concluded with such stipulation of arbitration clause, although an acceptance of the offer has to be absolute but however it need not be conditional.[1] In a case where such a method is prescribed, and the offeree resorts to any other mode of acceptance, if the offeror considers it necessary for the acceptor to follow the prescribed method, he must insist on a fresh acceptance in the prescribed manner and if the acceptor again fails, there would be no concluded contract. But if the offeror fails to intimate to the acceptor and demand a proper acceptance in the prescribed manner, he is deemed to have waived his demand and a concluded contract will arise. The English law is different; there will be no contract. Suggesting a method is different from prescribing a method. If it is only a suggestion, any other method may be adopted provided the acceptance reaches the offeror within the time within which the acceptance by the suggested method would reach. If the offeror does not prescribe a method, it is sufficient if the acceptor accepts in some usual and 'reasonable manner'. These words include the use of the post or the telegraph as a method of communication of acceptance. **[76]** Where a vendor had in his letter of offer told the vendee to communicate his acceptance by writing to his (vendor's) agent, and the intending purchaser instead of writing to the agent, put himself into communication with the vendor by sending a messenger, it was held that there was no contravention of Sec. 7(b) of the Contract Act, so as to render the contract not binding.[2]

Where a contract is said to have been concluded by means of correspondence between the parties, it is necessary for the court to gather the intention of the parties from the expressions used in the correspondence in order to ascertain whether there had been meeting of mind of the parties and consequently whether an agreement has been reached between them.[3]

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1. *Union of India* v. *Peeco Hydraulic Pvt. Ltd.*, AIR 2002 Del. 367 : 2002 (3) Arbi. LR 678 : 2002 (65) DRJ 12.
2. *Surendranath* v. *Kedar Nath*, (1936) Cal. 87 : 161 IC 224 : 63 CLJ 86.
3. *Rickmers Verwaltung Gimbh* v. *Indian Oil Corporation Ltd*, AIR 1999 SC 504, 508 (DB) : (1999) 1 SCC 1 : 1999 (8) Supreme 464 : 1999 (1) Arbi. LR 1 : 1999 (2) KLT 25 (SN).

Where the plaintiff with whom the defendants placed an order for supply of cotton sent an agreement requiring the defendants to accept and sign and also asked them to return a duplicate copy of the agreement within seven days stating that failure to send the duplicate copy will be deemed as an acceptance on the part of the defendants, the defendants by not returning the duplicate copy of agreement cannot be said to have accepted and a concluded contract comes into existence only when there is communication of acceptance to the offeror.[1]

Where the respondent employer permitted the petitioner to go on voluntary retirement modifying the conditions proposed by the petitioner, acceptance of voluntary retirement on modified terms by the petitioner completed the contract.[2]

Where, a contract having been concluded relating to the allotment of land between the petitioner and the respondent development authority and also the petitioner having deposited the consideration money, the respondent development authority cannot disown its contractual obligation from approving the building plans on the allotted land.[3]

It has been held in *S.P. Consolidated Engineering Co. (P) Ltd.* v. *Union of India,* [4] that when a case is founded on a contract with the Government that contract must be in a formal document, in compliance with the requirement of the Constitution unless it is a contract by correspondence. In *Spotteswood Ballantle & Co.* v. *Doreen Appliances Ltd.*[5] the offer was accepted subject *inter alia* "to the terms of a formal base to be prepared by the solicitors". It was held that upon the proper construction of the offer there was no binding contract until a formal agreement had been executed. Goddard, L.J. observed, that "the matter is one primarily of construction and although in many cases it is not helpful to construe the words of one contract by reference to another contract....it makes no difference whether the words are "subjected to the terms of a base" or "subject to base to be drawn up by our client's solicitors". In *Kollipara Sriramulu* v. *Aswatha Narayana* [6] it was held that the fact of a subsequent agreement being prepared may be evidence that the previous

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1. *Cotton Corporation of India Limited* v. *Bombay Dyeing & Manufacturing Company Limited,* 2006 (2) CTLJ 439 (Bom) (SN).
2. *Digamber Yewhwantrao Watane* v. *Agricultural Produce Market Committee, Achalpur,* 2005 (1) CTLJ 152 (Bom).
3. *Rochees Hotels Pvt. Ltd.* v. *Jaipur Development Authority,* AIR 2002 Raj. 316 (DB) : 2002 (2) Civil LJ 95 (DB) (Raj) : 2001 (3) Raj LR 349 : 2002 (2) Raj. LW 948.
4. AIR 1966 Cal. 259.
5. 1942 (2) All. ER 65.
6. AIR 1968 SC 1028.

negotiation did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up, does not establish the proposition that they cannot be bound by a previous agreement. Although a formal agreement is not required to be entered into between the parties in any particular form, but the State cannot enter into an oral agreement but the terms of the contract can be negotiated by correspondence.[1]

Though it is open to the offeror to prescribe any method of acceptance, he cannot prescribe silence as a method.[2] In the words of Jenkins, C.J., in *Haji Mahomed* v. *Spinner,*[3] a person making a proposal cannot impose on the party to whom it is addressed the obligation to refuse it under the penalty of imputed assent, or attach to this silence the legal result that he must be deemed to have accepted it. [65]

8. Acceptance by performing conditions, or receiving consideration.—Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

Acceptance by conduct.—The principle behind the Section is that if an offer is made subject to a condition, the offeree cannot accept the benefit under the offer alone divorced from the condition. He cannot take the attitude "I shall accept the benefit but reject the condition".[4] Acceptance may also be by conduct. Where a reward is offered for finding a lost article, the bringing back of the lost article is a sufficient acceptance and imposes an obligation to give the reward. In such cases, notice of acceptance is contemporaneous with the performance of the condition.[5] In the case of specific offers also, *e.g.*, where services not intended to be gratuitous are offered and those services are

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1. *Mittal Pipe Mfg. Co.* v. *Haryana State,* AIR 1992 P&H 244 : 1992 (2) PLR 207.
2. *Felthouse* v. *Bindley* (1862) 142 ER 1037 : 132 RR 774.
3. (1900) 24 Bom. 510; *Domingo* v. *De Souza,* (1928) 50 All. 665 : 26 ALJ 627; 115 IC 616: (1928) All. 481; **see** *Gaddarmal* v. *Agarwal & Co.,* AIR 1968 All. 292; *Union of India* v. *M/s. Bhimsen Walaiti Ram,* AIR 1971 SC 2295 : 1970 (2) SCR 594 : (1964) 3 SCC 146. (One of the conditions of the auction is that the final bid would be subject to the confirmation of the Chief Commissioner. Where the highest bidder in an auction sale of a liquor shop did not deposit one-sixth of the purchase price within seven days of the auction where-upon the resale was ordered without the bid having been confirmed by the Chief Commissioner then the essential prerequisites of a completed sale being missing no liability could be imposed on the auction—Purchaser for payment of deficiency in the price on the resale); *Bishun Padu* v. *Chandi Prasad,* (1920) 42 All. 187 : 18 ALJ 73; *Gaddar Mal* v. *Tata Industrial Bank,* AIR 1927 All. 407 : (1927) 49 All. 674 : 25 ALJ 372 : 100 IC 1023.
4. *Amrit Banspati Co. Ltd.* v. *Union of India,* AIR 1966 All. 104.
5. *Carlill* v. *Carbolic Smoke Ball Co.,* (1893) 1 QB 256; *Kalluram Kesharwani* v. *State of M.P.,* AIR 1986 MP 204.

accepted, a liability to pay for them arises.[1] Acceptance of any consideration offered will constitute acceptance in a bilateral contract.[2]

Where the appellant receiving two cheques from the respondent railways towards the value of undelivered consignment with the condition that either retention or encashment of cheques will amount to full and final settlement of his claim, the conduct of the appellant in encashing the cheques will amount to acceptance of the offer made by the railways.[3]

Where a surety definitely asks a creditor to advance money to a debtor upto certain limit, promising to hold himself responsible, the advancement of money by the creditor is "a performance of the conditions of the proposal." and amounts in law to acceptance.[4]

Where the plaintiff failed to pay balance of consideration money within one month as agreed from the date of offer in connection with the purchase of a quarter under a scheme of hire purchase, the contract due to non-compliance of the condition cannot be said to be concluded and the allotment of the quarter to another who complied with the condition is proper.[5]

9. Promises express and implied.—In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

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1. *(Cf.) Venkayyamma Rao* v. *Appa Rao,* (1916) 39 Mad. 509 : 20 CWN 1054 : 14 ALJ 797 : 34 IC 921 : 4 LW 58 : 31 MLJ 58 (Offer to settle property if donee came and lived with settler); *Gaddar Mal* v. *Tata Industrial Bank,* (1927) 49 All. 674 : 25 ALJ 372 : 100 IC 1023 : AIR 1927 All. 407 (Intimation of increased interest on over-drafts-subsequent borrowings—Acceptance by conduct); *Bishan Pandu* v. *Chandi Prasad,* (1920) 42 All. 187 : 18 ALJ 73 (Quotation of prices by defendant, 'without engagement'—Plaintiff ordering goods, sending money order in advance acceptance of money order by defendant—Contract complete). *Ishaq Abdul Karim* v. *Madanlal,* AIR 1965 All. 34; *Amrit Banaspathi Co. Ltd.* v. *Union of India,* AIR 1966 All. 104; *Ram Saran Das* v. *Shri Kishan Das,* AIR 1961 All. 91; *Union of India* v. *M/s. Babulal Uttam Chand Bhandari,* AIR 1968 Bom. 294 : 69 Bom. LR 843 : 1968 Mah. LJ 35; *Bewari Lal* v. *Radhey Shyam,* AIR 1953 All. 745 : 1952 All. LT 14; *State of Bihar* v. *Bengal Chemicals and Pharmaceutical Works Ltd.,* AIR 1950 Pat. 14.
2. *Gaddar Mal* v. *Tata Industrial Bank Ltd.,* AIR 1927 All. 407 : 1928 Cr.LJ 531.
3. *Bhagwati Prasad Pawan Kumar* v. *Union of India* AIR 2006 SC 2331 : (2006) 5 SCC 311 : 2006 (5) Supreme 85 : 2006 (3) Civ. CR 64 (SC) : 2006 (3) CCC 1 (SC).
4. *Ranga Ram* v. *Raghbir,* (1928) Lah. 938 : 113 IC 780.
5. *Ramesh Ramchandra Neware* v. *Shankar Mahadeo Chefalkar,* 2004 (1) CTLJ 129 (Bom).

Contracts—Express, Tacit and Implied.—Contract are of three kinds, express, tacit and implied; express, if entered into by words spoken or written, tacit, when a contract is inferred as a fact from the conduct of the parties[1] and implied, when from the conduct of the parties and from the circumstances of the case, the law implies a contract even though the parties might never have intended one. A confusion of terminology will arise if the expression 'implied contract' is used to denote a tacit contract and so the Indian Contract Act uses the expression "relationships resembling those of contracts." while English law uses the expression "Quasi Contracts" or "Constructive Contracts' and American Law "Restitution " to indicate the real "Implied Contracts".[2] [28]

Implied contract are as much binding as express contracts.[3] In *Haridas* v. *Mercantile Bank*, [4] an implied contract to pay compound interest was inferred by the Privy Council, from a long course of dealings between the parties. Where the letter proposing the terms by a chartered accountant relating to the payment of professional fee was accepted by the assessee by his positive conduct, it cannot be said that the contract was not concluded between them.[4]

In an auction for the right to collect tolls where the petitioners bid which was second highest bid was accepted after the highest bidder declined to accept the contract, who had no knowledge of the acceptance of bid, no contract is said to have resulted with the petititoner.[5]

There can be implied contract between the Government and another person in view of Art. 299 of the Constitution.[6]

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1. *Indian Overseas Bank* v. *Naranpra-sad*, AIR 1980 Guj. 158. Enjoyment of overdraft facility points to the conduct of the bank though no documents were executed.
2. *Imam Din* v. *Dittu*, (1925) Lah. 174 : 78 IC 445; *Sitaram* v. *Edwards*, (1912) 16 IC 609.
3. (1920) 44 Bom. 474 : 22 Bom. LR 545 : 18 ALJ 359 : 38 MLJ 387 : 12 LW 356 : 55 IC 522: (1920) MWN 312; *Annamalai* v. *Doraisingam*, (1935) Mad. 718 : (1935) MWN 897 : 42 LW 583; *Murugappa Chetti* v. *Official Assignee of Madras*, (1938) 1 MLJ 545 (PC); *Manilal* v. *Keshabje*, AIR 1952 Pat. 33; *Union of India* v. *Vasudeo*, AIR 1960 Pat. 87.
4. *S. Butail & Co.* v. *H.P. State Forest Corpn.*, AIR 2002 HP 1,5.
5. *Sardar Surjeet Singh* v. *State*, AIR 1995 All. 146, 147.
6. *K.P. Chowdhari* v. *State of M.P.*, AIR 1967 SC 203 : 1966 (3) SCR 919.

CHAPTER II

Of Contracts, Voidable Contracts And Void Agreements

10. What agreement are contracts.—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall effect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

Essentials.—It is the essence of a contract that there should be *aggregatio mentium,* the meeting of the minds of the contracting parties.[1] A contract having been defined as an agreement enforceable at law, this section gives those essential elements, which would make an agreement enforceable. Where the two positive elements of consensus as disclosed by an offer and acceptance, which underlies the idea of agreement, and a deliberate intention to enter into a contract, as evidenced by the presence of consideration, are found together, there arises an apparently enforceable contract; but such a contract may still fail by reason of any one or more of the three vitiating elements *viz.,* (1) incapacity of any of the parties to the contract, (2) any flaw in the consent of one or both the parties, and (3) the unlawfulness or illegality of the consideration or the object. A contract is void, voidable or valid by reason of the presence or absence of any of the several elements mentioned above. This section is general and Sections 11 and 12 deal with incapacity, Sections 13 to 22 deals with free consent or flaw in consent, and Section 23 to 30 deals with unlawful consideration or object. It will be seen that the sections are not properly arranged and do not deal exhaustively with several matters found in English Law. **[13]**

Furnishing bank guarantee or paying part of the additional charges imposed by Electricity Board in pursuance of an interim order of the High Court for not disconnecting the connection of consumers, neither constitutes a contract between the consumer and the Board nor it amounts to payment of additional charges in cash.[2]

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1. *State* v. *Hindusthan Development Board,* AIR 1960 Punj. 583, 587.
2. *Modi Industries Ltd. (Steel)* v. *Executive Engineer E Division, Modinagar,* AIR 1991 All. 351, 354.

Formalities.—The Indian law does not require contract to be in writing. Formation of a contract between the parties depends on the peculiar facts of a particular case and execution of a document is only a formality and not a condition precedent.[1] There is no enactment corresponding to the English Statute of Frauds, which requires particular contracts to be evidenced by a memorandum in writing. Again, the Indian Sale of Goods Act III of 1930 unlike the English Act does not contain any provision for contracts to be in writing if they are for the sale of goods above a certain value. But, under Sec. 25 (3) of the Contract Act, certain contracts are required to be in writing (*e.g.*,) a promise to pay a barred debt. A reference to arbitration or the creation of a trust [2] has also to be in writing. However the type of the agreement mentioned in Sec. 25 (1) roughly corresponds to the formal contract of English law. **[132]** Although a document is titled as receipt but if it contains all basic ingredients of an agreement, the document cannot be deprived of its real character rendering it unenforceable.

When the defendant to whom an offer for sale of 500 bales of Brazilian cotton was made, has communicated his acceptance by telex, the contract cannot said to have been not concluded merely because the defendant has not signed and delayed in sending the standard form to the plaintiff.[3] Where the agreement between the parties provided that its terms and conditions are to be ratified by other persons who are not parties to the agreement a conclusive contract cannot said to have been made.[4]

An agreement fixing the price of milk between two companies dealing in dairy business which is in pursuance of the directions of the High Court shall be binding and they are not bound by the notification of the State Government issued in the exercise of Sec. 15 of U.P. Milk Act, 1976 as such notification would nullify the directions of the High Court.[5] Where a clause in the contract relating to the construction of an auditorium complex empowered the government to terminate the contract in the event of the contractor failing to complete the works, work order and items of work and to clear the site on or before the date of completion, the failure must have been not by reason of the acts of omissions and commissions of the government but on the part of the contractor.[6]

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1. *J.K. Industries Ltd.* v. *Mohan Investments and Properties Pvt. Ltd.*, AIR 1992 Delhi 305.
2. **See** *Sohan Lal* v. *Raghubir*, (1930) ALJ 324 : 122 IC 763 : (1930) All. 118. **See** *Construction of Tender Documents. Sanjiv Prakash* v. *N.D.M. Committee*, AIR 1983 Delhi 478.
3. *Cotton Corpn. of India Ltd.* v. *M/s. Alagappa Cotton Mills*, AIR 2001 Bom. 429,432.
4. *M.V. Shankar Bhat* v. *Claude Pinto*, (2003) 4 SCC 86.
5. *Central Dairy Farm* v. *Glindia Ltd.*, (2004) 1 SCC 55.
6. *Union of India* v. *M/s. Pundarikakshdu & Sons*, AIR 2003 SC 3209, 3213 (DB) : 2003 (6) Supreme 898 : (2003) 8 SCC 168.

11. Who are competent to contract?—Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

Who is a minor? —According to English law any person under 21 years, but according to the Indian Majority Act, any person under 18 years, (unless a guardian has been appointed to him under the Guardian and Wards Act, or he is a ward of the Court of Wards in which case the period is extended to 21 years) is said to be an infant or minor. **[189]**

Nature of minor's contract.—A minor's contract was generally voidable in English law in the sense of the minor having an option to affirm or repudiate the contract. **[191]** With the passing of the Infant's Relief Act of 1874, no voidable contract of a minor could be affirmed by him after majority even though there might be a fresh consideration.[1] **[191]** At English Common Law the age of majority, which was originally fixed 21 years, was reduced to 18 year by Sec. 1 of the Family Law Reforms Act, 1969. This Act also replaced the word 'infant' by the word 'minor'. In England now the Minor's Contract Act, 1987, which was enacted in place of Infants Relief Act of 1874, governs the contractual relationship with minors and deal with the legal implications arising out of such relationship. But a minor's contract, if for necessaries, or for the infant's benefit[2] was always binding upon the minor. If it was a contract involving continuous rights and liabilities, as in the case of a lease or partnership or shares in a company, the minor on becoming a major had to disaffirm at the earliest possible time.[3] Otherwise he would be bound by the contract. Any contract by the minors for moneys borrowed, or to be borrowed, or goods purchased or to be purchased, or on an accounts stated is absolutely void. **[200]** The Indian Contract Act simply says that only a person who is major is competent to contract. So whether contracts entered into by minors will be void or voidable was a matter of doubt. The Indian Courts till 1903 held that a minor's contract was voidable, *i.e.*, that it could be ratified on his becoming a major, but the Privy Council in *Mohori Bibi* v. *Dharamodas Ghose*[4], decided that a minor's contract is void and not voidable.**[207]**

A promissory note executed by a minor and another can be enforced against the latter.[5]

1. **But see** (1880) 5 CPD 410.
2. *Roberts* v. *Gray,* (1913) 1 KB 520.
3. *Edwards* v. *Carter,* (1893) AC 360; *Smith* v. *King,* (1892) 2 QB 543.
4. (1903) 30 Cal. 539; *Ganganand* v. *Rameshwar,* (1927) 6 Pat. 388 : 102 IC 449 : (1927) Pat. 271; *Doo Doo Meah* v. *Kasim Ali,* (1924) Rang. 228 : 82 IC 250 (Lease by minors is void); *S.M.A.R.M. Firm* v. *Maung Thaung,* (1934) Rang. 2.
5. *Sulochana* v. *Pandian Bank,* AIR 1975 Mad. 70. **See** *Srinivasan* v. *Kannan Motor Transport,* 1983 MLJ 235 : AIR 1983 NOC 202 (Mah.) (Minor can be a holder of permit).

No ratification.—As a minor's contract is void it is incapable of ratification.[1] **[208]** Where, however, a minor on becoming a major receives fresh consideration and makes a promise in respect also of a debt contracted during infancy, it has been held that the promise could be enforced to the extent to which it is supported by consideration given subsequent to his becoming a major.[2]

In *Rose Fernandez* v. *Joseph Gonsalves,*[3] it was held a minor can on attaining majority sue for breach of contract of marriage, where the agreement for marriage had been made by the guardian.

Liability for Necessaries.—If every contract of a minor is void, the minor might find himself in difficulties, for no one might lend him money. So the law has consistently held that contracts by minors are valid, if for necessaries. The Privy Council pointed out in *Mohori Bibi's case* that under Section 68 any person would be entitled to reimbursement out of the minor's estate, for necessaries supplied to him or to his family. The word 'necessaries' has not been defined in this Act or in the Sale of Goods Act of 1930. So we have to adopt the definition in Section 2 of the English Sale of Goods Act— "Necessaries mean goods suitable to the condition in life of the infant [4] and required by him at the time of sale and delivery."[5] Necessaries include not only food and clothing but also education and instruction. **[192]**

Burden of Proof.—The burden of proving minority is on the person asserting it.[6] In cases of necessaries supplied, the burden is upon the tradesman not only to show that the goods were suited to the infant's status, but were actually required by him at the time of sale and delivery. **[194]**

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1. **See** *Indian Cotton Co.* v. *Raghunath,* (1931) 33 Bom. LR 111 : 130 IC 958 : (1931) Bom. 178; *Bindesri* v. *Chandika,* (1927) 49 All. 137 : 25 ALJ 932 : 100 IC 748 : (1927) All. 242 ; *Suraja Narain* v. *Sukha,* (1929) 51 All. 164 : 26 ALJ 1024 : 112 IC 159 : (1929) All. 443; *Mahendranath* v. *Kailash,* (1929) 55 Cal. 841 : 32 CWN 439 : 109 IC 298 : (1929) Cal. 50; *Bhola Ram* v. *Bhagat Ram,* (1927) Lah. 24 : 99 IC 318; *Arumugam* v. *Dorai Singa,* (1914) 37 Mad. 38; *Indran* v. *Anthappa,* (1906) 16 MLJ 422; *Gobind Ram* v. *Pirandatta,* (1935) 16 Lah. 546 : 158 IC 243 : (1935) Lah. 561. **But see** *Kundan Bibi* v. *Sree Narayan,* (1906) 11 CWN 135; *Hari Satya* v. *Mahadev,* AIR 1983 Cal. 76.
2. *Narendra Lal* v. *Hrishi Kesh,* (1918) 46 IC 765; *Banke Lal* v. *Ram Piari,* (1933) ALJ 1399 : (1933) All. 659. **See also** *Tukaram* v. *Madho Rao,* AIR 1948 Nag. 293.
3. (1925) 48 Bom. 673 : 26 Bom. LR 1035 : 85 IC 587 : (1925) Bom. 97.
4. *Peters* v. *Fleming,* (1840) 151 ER 314 : 55 RR 495; (1868) 4 Ex. 32; *Umed Narain* v. *Equitable Coal Co.,* AIR 1942 PC 1.
5. *Nash* v. *Inman,* (1908) 2 KB 1; *Barnes* v. *Toye,* (1884) 13 QBD 410; *Johnstone* v. *Marks,* (1887) 19 QBD 509; *Bwim Mandal* v. *Masaram,* AIR 1961 Pat. 21; *Sri Ramulu* v. *Pundarikakshayya,* AIR 1949 FC 218; AIR 1956 AP 33; *Narayan Venkat Rao* v. *Ramchandra,* AIR 1957 Bom. 146; *Kasturi Lakshmibayamma* v. *Sabnivis Venkoba Rao,* AIR 1970 AP 440.
6. *Nawab Sadiq* v. *Jaikishore,* (1929) 55 MLJ 88 (PC); **see** *Kandhai Lal* v. *Debi Prasad,* (1925) 87 IC 778 : (1925) All. 399; *Raja of Deo* v. *Abdulla,* (1918) 45 Cal. 909; *Surja* v. *Joti,* (1925) 47 All. 493 : 87 IC 445; *Naram* v. *Chiranji,* (1924) 46 All. 568 : 79 IC 945 : (1924) All. 730; *Bibi Jai Kishori* v. *Ali Ahmed Khan,* (1925) Oudh 487 : 89 IC 108.

Where the defendant alleged to be a minor and executed a sale deed and produced voters list to prove his competency, the plea of the plaintiff questioning his competency in view of the school certificate of the defendant executant is acceptable, since the school certificate acquires higher prominence over the voters list.[1]

Estoppel.—Where, a minor fraudulently represents himself as a major and enters into a contract, it has been held that the minor is not estopped from pleading infancy and therefore the contract will not be enforceable. In *Mohori Bibi's case* the Privy Council did not expressly decide this point. There was a difference of opinion between the several High Courts on this matter, but now all the High Courts are agreed that the minor is not estopped.[2] **[204]**

Restitution for fraud.—Where, however, a minor has obtained property by means of a fraudulent overstatement of age, the minor may be compelled to restore the property obtained by him through fraud. This is called "Restitution for fraud."[3] But under the guise of restitution, the contract itself cannot be enforced. If the identical property obtained by fraud can be traced in the minor's hands the Court orders restitution. But if it is compelling the infant to pay an identical sum of money, then relief will be declined since it would be practically enforcing the void contract. Restitution stops where repayment begins.[4] **[204]**

Refund of benefit.—According to Section 65, a person who has obtained a benefit under a void contract must return the benefit when the contract becomes void. So the question arises whether a minor is bound to return the benefit obtained under any contract made by him. In *Mohori Bibi's case,* the Privy Council said that Section 65 does not apply to a case where the

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1. *Atul Chandra Kalita* v. *Bano Ram Boro,* 2004 (1) CTLJ 360 (Gau).
2. *Nawab Sadiq* v. *Jaikishore,* (1929) 55 MLJ 88 : 28 LW 17 : 30 Bom. LR 1346 : 32 CWN 874: 26 ALJ 685 : 109 IC 387 : (1928) PC 152; *Golam Abdin* v. *Hem Chandra,* (1916) 20 CWN 418; *Manmatha Kumar Saha* v. *Exchange Loan Co.,* (1936) Cal. 567 : 165 IC 363 : 41 CWN 115; *Varadappa Rao* v. *Mahadeviah,* (1932) MWN 1338 : 140 IC 325; *Appaswamy* v. *Narayanaswamy,* (1930) MWN 891; *Ranga Rao* v. *Sai Chowgmal Vardichand,* (1934) Mad. 560 : 40 LW 261: (1934) MWN 672 : 152 IC 262 : 67 MLJ 257; *Ajudhia* v. *Chandan Lal,* ILR (1937) All. 860 : (1937) ALJ 688 : 170 IC 934 : (1937) All. 610; *Radh Kishan* v. *Bhore Lal,* (1929) 50 All. 862 : (1928) All. 626 : 26 ALJ 837 : 110 IC 373; *Kanhaiya Lal* v. *Babu Ram,* (1911) 9 ALJ 1058; *Jagernath* v. *Lalta Prasad,* (1907) 31 All. 21; *Gaddigappa* v. *Balan Gowda* (1930) 55 Bom. 561; *Khan Gul* v. *Lakha Singh,* (1928) 9 Lah. 701 : 111 IC 175 : (1928) Lah. 609 ; (1931) 58 Cal. 224 : (1931) Cal. 393 : 132 IC 94 (Question of refund of benefit also decided); *Gulabchand* v. *Seth Chunilal,* (1929) Nag. 156.
3. *Stocks* v. *Wilson,* (1913) 2 KB 235. **See** *Dyaviah* v. *Shivamma,* AIR 1959 Mad. 188.
4. *Leslie* v. *Sheill,* (1914) 3 KB 607; *Ranga Rao* v. *Sai Chowgmal,* (1934) Mad. 560 : 40 LW 261 : (1934) MWN 672 : 67 MLJ 257.

contract is void *ab initio*, as in the case of a minor's contract. They however added that, under Sections 39 to 41 of the Specific Relief Act, the Court may impose a condition before granting any relief in favour of a minor, by directing him to refund the benefit. Following these observations, the Courts have held that where a minor sues to set aside a transaction he may be directed to return the benefit received by him under the contract.[1]

It may also be mentioned with regard to the question of refund, that the granting of this equitable relief does not depend on who has taken the initiative in bringing the transaction before the Court.[2]

Word 'void' misleading.—The word 'void' when used in relation to a minor's contract is apt to mislead. It has to be understood in the sense of "void as against the minor." Though a contract cannot impose obligations on a minor, he can take benefits under a contract or enforce contracts, which are for his benefit. For instance, he can be a transferee of property under a sale or mortgage.[3] Again, where minor vendees who had been put in possession by their vendor are subsequently dispossessed by a person with paramount title, they are entitled to recover the purchase money paid.[4] Also, where a minor happens to lend moneys on a promissory note, it has been held that he can recover.[5] Similarly a minor plaintiff who has sold goods can recover the price.[6]

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1. *Vaikuntam* v. *Adimoolam,* (1915) 38 Mad. 1071 : 26 MLJ 612 : 23 IC 799 (No refund in the absence of fraud); *Appaswamy* v. *Narayanaswamy,* (1930) MWN 891; *Muhammad Sai* v. *Bishambarnath,* (1923) 45 All. 644 : 85 IC 79 : (1924) All. 156; *Jagarnath* v. *Lalta Prasad,* (1908) 31 All. 21 : 5 ALJ 574 : 1 IC 562; *Kamta* v. *Sheo Gopal,* (1904) 26 All. 342; *Hamida Bibi* v. *Nanhe Mal,* (1933) All. 372 : 141 IC 152.
2. **See** *Manmatha Kumar Saha* v. *Exchange Loan Co.,* 1936 Cal. 567 : 165 IC 363; *Khan Gul* v. *Lakha Singh* (1928) 9 Lah. 701 : (1928) Lah. 609 (FB).
3. **See** *Raghavachariar* v. *Srinivasaraghava,* (1917) 40 Mad. 308; *Munia* v. *Perumal,* (1914) 37 Mad. 390; *Andalammal* v. *Narasimharaghavachariar,* (1914) 1 LW 379; *Thackardas* v. *Putli,* (1924) 5 Lah. 317 : (1924) Lah. 611; *Bharat Bai* v. *Jai Narain,* (1928) 25 ALJ 1102 : 108 IC 129 : (1928) All. 102; *Narain Das* v. *Mt. Dhania,* (1916) 38 All. 154; *Munni Kunwar* v. *Madan Gopal,* (1916) 38 All. 62 : 31 IC 792; *Ulfat Rai* v. *Gauri Shankar,* (1911) 33 All. 657; *Hari Mohan* v. *Mohini Mohan,* (1916) 22 CWN 130 : 33 IC 994; *Sheo Ratan* v. *Kali Charan,* (1925) Oudh 37 : 79 IC 955; *Hanmant* v. *Jaya Rao,* (1889) 13 Bom. 50; *Sharfath Ali* v. *Noor Mohamed,* (1924) 2 Rang. 1 : 76 IC 810; *Sathyadeva* v. *Tribeni,* (1936) Pat. 153 : 161 IC 579; *Pearce* v. *Brain,* (1929) 2 KB 310. **See also** *Padma Vithoba* v. *Moha Multani,* AIR 1963 SC 70 : 1963 (3) SCR 229.
4. *Walidad* v. *Janam Singh,* (1913) 35 All. 370 : 11 ALJ 512 : 19 IC 610.
5. *Rangaraju* v. *M. Basappa,* (1913) 24 MLJ 363 : 18 IC 968.
6. *Abdul Guffar* v. *Piare Lal,* (1934) Lah. 480.

But, a minor cannot obtain a refund of the money's paid by him to a tradesman, on the ground of the contract being void, unless there has been an entire failure of the consideration.[1] **[200]**

Contracts by guardians.—Contracts made by guardians on behalf of minors will be binding only if supported by necessity or benefit. The Privy Council in *Mir Sarwarajan* v. *Fakruddin*[2] held that no specific performance can be had either by or against a minor. This is because specific performance being an equitable remedy, it is not granted unless there is mutuality (*i.e.,*) reciprocal right in both the contracting parties to seek specific performance. The mutuality of the contract, as has been pointed out, must be judged of, as at the time when it is entered into.[3] In a Bombay ruling,[4] the guardian of a minor sole surviving coparcener, carrying on the family business for and on behalf of the minor, had effected a policy of fire insurance in the name of the minor. In a suit by the minor for recovery of the amount payable under the policy, the defendants pleaded that the insurance contract was void as having been made by a minor. The court in repelling the contention observed that the contract sued on was made not by but on behalf of a minor and that he could sue on it.

Liability for Torts.—As the privilege of infancy is only to be used "as a shield and not as a sword," an infant is always liable for a tort.[5] An action arising in contract however cannot be changed into an action in tort to fasten a liability on the infant.[6] **[205]**

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1. *Valentini* v. *Canali,* (1889) 24 QBD 166; *Corpe* v. *Overton,* (1833) 131 ER 109 : 38 RR 422; *Steinberg* v. *Scala,* (1923) 2 Ch. 452. **See** *Jakiuddin* v. *Vithobha,* AIR 1939 Nag. 301; *Hiralal* v. *Fulchand,* AIR 1953 Sau. 89; *Gursaran Lal* v. *Seral Kumar,* AIR 1956 All. 136; *Ramdayal* v. *Prayagdas,* AIR 1954 Nag. 122; *Golconda Industries (P) Ltd.* v. *Registrar of Companies,* AIR 1968 Del. 170; *Jay Kant Harkishandas Shah* v. *Durga Shankar Valji Pandya,* AIR 1970 Guj. 106 (Case of new Insurance by guardian); *Ramchandra* v. *Manik Chand,* AIR 1968 MP 150 : 1968 MPLJ 476 : 1968 Jab LJ 798.
2. (1912) 39 Cal. 232 : 39 IA 1 : 16 CWN 74 : 9 ALJ 33 : 14 Bom. LR 5 : (1912) MWN 22 : 21 MLJ 1156 : 13 IC 331; *Srinivasa Thathacharlu* v. *Neelamma,* (1920) MWN 340 : 11 LW 246: 55 IC 436; **see also** *Gopalakrishna* v. *Tukaram,* AIR 1956 Bom. 566.
3. See observations in *Zebunnissa Begum* v. *Mrs. Dangher,* (1936) Mad. 564 : 59 Mad. 942: (1936) MWN 379 : 43 LW 592 : 163 IC 384 : 70 MLJ 477; **see** *Suganchand & Co.* v. *Laduram,* AIR 1941 Bom. 215; *Ramchandra Sarma* v. *Ayeesha Begum,* AIR 1969 Mad. 470; *Subramanyam* v. *Subba Rao,* AIR 1948 PC 95; *Hashim* v. *Sreenath,* AIR 1946 Cal. 438; *Gujoba Tulsiram* v. *Nilkanth,* AIR 1958 Bom. 202.
4. *Great American Insurance Co. Ltd.* v. *Mandanlal Sonulal,* (1935) 56 Bom. 656 : 37 Bom. LR 461 : 158 IC 564 : (1935) Bom. 353; **see** *Vijayakumar* v. *Newzealand Insurance Co.,* AIR 1954 Bom. 347 (Contracts of insurance by *de jure* guardian binding on the minor).
5. *Jennings* v. *Rundall,* (1799) 101 FR 1419 : 4 RR 680.
6. *Burnard* v. *Haggis,* (1863) 143 ER 360 : 135 RR 593.

Law to which he is subject."—The framers of the Contract Act have adopted the view that the question of personal capacity to enter into any contract is to be decided by the law of domicile.[1]

"Not disqualified from contracting."—It has been held by a Full Bench of the Rangoon High Court that a Buddhist monk is not a person "disqualified from contracting" within the meaning of the present section.[2]

A foreign citizen who is not an Indian citizen or Indian domicile cannot be barred from becoming competent to contract provided he is of the age of majority according to the law to which is subject and not otherwise disqualified from contracting by any court to which is subject.[3]

Other cases of incapacity.—The section mentions only two cases of incapacity, namely, minority and lunacy. When we turn to English Law, we find that there are some other cases of incapacity. For example, incapacity may arise out of status, which may be political as in the case of foreign sovereigns, ambassadors or alien enemies or felons or convicts. Again it may be due to professional status as in the case of barristers or it may be artificial or civic status as in the case of corporations. Again, incapacity arising from mental deficiency will include not only infants and lunatics but also idiots and drunken persons. **[179]** Where the property of lunatic was transferred through the wife of lunatic, in a suit by the next friend of lunatic the transfer was held to be void since the transferee knew the fact of lunacy of transferor at the time of transfer.[4] The property of an adult Hindu, who is of unsound mind, cannot be alienated by a *de facto* guardian even for necessity.[5] Statutory corporations have no power to enter into contracts which are expressly prohibited by law or which are in violation of the enactment under which they are created.[6]

Where the validity of the execution of a sale deed by the appellant in favour of the respondent was challenged on the ground of unsound mind of the executant and which fact was proved by means of a medical certificate from the Mental Hospital, the appeal is allowed on the ground that the sale deed was executed by the appellant when he was of unsound mind and a fraud has been practiced on him at the time of the execution.[7]

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1. Per Farran, J., in *Kashiba* v. *Shripat*, (1894) 19 Bom. 697; (Cf.) *U. Pyinnya* v. *Maung Law*, (1929) 7 Ran. 677 : 121 IC 705 : (1929) Ran. 354 (FB).
2. *U. Pyinnya* v. *Maung Law*, (1929) 7 Ran. 677 : 121 IC 705 : (1929) Ran. 354 (FB).
3. *Shantiniketan Co-op. H.S. Ltd.* v. *Dist. Registrar Co-op. Society*, AIR 2002 Guj. 428 : 2002 (2) Guj. LR 1768 : 2003 (1) GCD (Guj) 145.
4. *Johri* v. *Mahila Draupati*, AIR 1991 MP 340.
5. *Narayan Venkat Rao* v. *Ramachandra*, AIR 1957 Bom. 146 : 58 Bom. LR 917.
6. *Municipal Corporation, Hubli* v. *Jujansa*, (1968) 1 Mys. LJ 352.
7. *Chacko* v. *Makadevan*, AIR 2007 SC 2967 : (2007) 7 SCC 363 : 2007 AIRSCW 5408.

FOREIGN SOVEREIGNS AND AMBASSADORS.—Under English Law foreign sovereigns and ambassadors have the right to contract but they have the privilege of not being sued in British Courts. This privilege can be waived by them and such a waiver is signified by entering appearance after receipt of summons.[1] **[180]**

ALIEN ENEMIES.—Alien enemies cannot contract during the pendency of war, nor can they sue during the war, but they may be sued in respect of contracts entered into prior to the war and if a decree is passed against them, they can appeal.[2] **[182]**

BARRISTERS.—In English Law a barrister is incapable of entering into a contract with respect to professional matters and is incapable of suing or being sued, but in India in consequence of the Bar Council Act, he is in the position of an advocate and so has a right to contract. It has accordingly been held that a Barrister practising as an Advocate in the High Court is not disentitled to sue his client for recovery of fees.[3] **[184]**

FELONS.—Felons or convicts cannot contract and cannot sue so long as they are undergoing sentence. **[184]**

CORPORATIONS.—Corporations are said to be artificial or sometimes incorrectly-fictitious persons. Being artificial persons they are subject to certain limitations. Thus, they cannot enter into certain kinds of contracts like contracts to marry. Again, they have necessarily to contract through an agent and therefore a contract by a corporation must generally be under seal. A contract to be treated as a concluded contract u/s. 2 (a) of the Act, the agreement should be got authenticated by the Electricity Board under the Electricity Supply Act, 1948.[4] They are also subject to other limitations in that they are bound by the memorandum of association or charter and if they contract outside the scope of the memorandum, such a contract will be *ultra vires*.[5] Nevertheless it has been held that a corporation can sue third parties though the contract be *ultra vires*.[6] **[184]**

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1. *Mighell* v. *Sultan of Johore,* (1894) 1 QB 149; *Dickinson* v. *Del Solar,* (1930) 1 KB 376.
2. *Porter* v. *Freudenberg,* (1915) 1 KB 857. **See** *Sovfracht* v. *Van Udens Scheep Vanrts,* (1942) 1 All. ER 76.
3. *Nihal Chand* v. *Dilawar Khan,* (1933) 55 All. 570 : 1933 ALJ 451 : 143 IC 727 : 1933 All. 417 (FB) (Overruling 25 All. 509).
4. *Jindal Strips Ltd* v. *Madhya Pradesh Electricity Board,* AIR 1998 MP 122.
5. *Ashbury Ry. Carriage Co.* v. *Riche,* (1875) 7 H.L. 653.
6. *Ahmed Sait* v. *Bank of Mysore,* (1930) 59 MLJ 28 : 53 Mad. 771 : 32 LW 79 : 125 IC 612 : 1930 Mad. 512; *Nabi Baksh* v. *Muhammad,* 1929 Lah. 330 : 116 IC 552 (Contracts by co-operative society to lend to a non-member is unenforceable but if money is paid by the society, it can recover); *Turner* v. *Bank of Bombay,* (1901) 25 Bom. 52 (Advance contravening S. 37 Presidency Banks Act held recoverable).

12. What is a sound mind for the purposes of contracting.—A person is said to be of sound mind for the purposes of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person, who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

Lunacy.—This section by implication defines who a lunatic is. As the law presumes in favour of sanity till the contrary is shown,[1] the person pleading unsoundness of mind must prove it. The unsoundness must be referable to the time when the contract was formed.[2] In *Mahomed* v. *Abdul*[3] it

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1. *Mohamed* v. *Abdul,* (1923) 68 IC 372 : (1923) Pat. 187; followed in *Indar Singh* v. *Parmeshwardhari Singh,* AIR 1957 Pat. 491.
2. *Ram Sunder* v. *Kali Narain,* (1927) 55 Cal. 285 : 104 IC 527; (1927) Cal. 889; followed in *Talengala Narayana* v. *Narasimha Batta,* AIR 1965 Kerala 189 : 1964 Ker. LJ 724; *Jai Narain* v. *Mahabir,* (1926) 2 Luck. 226 : 95 IC 857 : (1926) Oudh. 470; *Indar Singh* v. *Parameshwardhari Singh,* AIR 1957 Pat. 491; *Kanhaiyalal* v. *Har Singh,* AIR 1944 Nag. 232; *Mohanlal* v. *Vinayak,* AIR 1941 Nag. 251; *Subramanaya* v. *Lakshimi Narasamma,* AIR 1958 AP 22; *Smt. Gopi* v. *Madan Lal,* AIR 1970 Raj. 190; *Bawadur Singh* v. *Bir Bahadur Singh,* AIR 1956 Cal. 213.
3. (1923) Pat. 187 : 68 IC 372; *Ram Sunder* v. *Kali Narain,* (1927) 55 Cal. 285; 104 IC 527: (1927) Cal. 889; *Sarba Mohan* v. *Man Mohan* (1933) 37 CWN 149 : 143 IC 757 : (1933) Cal. 488 (Temporary forgetfulness insufficient to show defective mental capacity).

was pointed out that mere weakness of mind is insufficient to prove unsoundness, and that while it is unnecessary to prove utter mental darkness, it must at least be shown that the person was incapable of understanding business and of forming a rational judgment. The question whether a contract is invalidated by unsoundness of mind of the party does not depend on the beliefs of the witnesses, but on inferences to be drawn from the evidence.[1] In *U Aung Ya* v. *Ma E. Mai*,[2] it was held that where unsoundness of mind had been proved by expert evidence, there must be very strong affirmative proof of a lucid interval if the contract is to be upheld. But in *Subba Naicker* v. *Solaiappa Naicker*[3] the Madras High Court has held that where a person has been found lunatic by inquisition and such inquisition has not been superseded, he cannot, even during a lucid interval, make any contract, and the Court will not embark on an inquiry as to the state of mind of the lunatic at the time of such contract, but will treat it as null and void. Where the conduct of the executants of a sale deed indicates that he was not a normal person and mentally imbalanced at the time of execution, the buyer of the property cannot acquire any right, title or interest.[4]

Necessaries.—After the Privy Council ruling in *Mohori Bibi's case* the contracts of a lunatic must be taken to be void under Indian Law.[5] But, contracts in respect of necessaries supplied to a lunatic or his family are protected by Section 68.

In English Law, however, a contract of a lunatic is voidable and may be avoided, if he can show that he was so far insane as not to understand what he was about and that the other contracting party knew of his insanity.[6] **[210]**

Illustration (b) shows that a drunken person will not be competent to contract unless he was of "sound" mind at the time of the contract. **[213]** The contract of drunken person must be regarded as 'void' in Indian Law though voidable in English Law.[7]

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1. *Tilokchand* v. *Mahandu*, (1933) Lah. 458; 144 IC 741; followed in *Chuni Lal* v. *Srinivasa Rao*, AIR 1953 Assam 94.
2. (1932) Ran. 24 : 137 IC 766.
3. (1933) 56 Mad. 904 : (1933) MWN 514 : 38 LW 135 : (1933) Mad. 624 : 65 MLJ 279; following *Walker, In re.* (1905) 1 Ch. 160; AIR 1962 Punj. 543 **see** *Govindaswami* v. *Srinivasa Rao*, AIR 1940 Mad. 73.
4. *Jyotirindra Bhattacharjee* v. *Mrs. Sona Bala Bora*, AIR 1994 Gau. 99, 104.
5. Cf. *Moothetuth Kanari* v. *Hari Shenoy*, (1916) 19 MLT 245 (Execution sale—J.D. a lunatic—Sale void); *Machiama* v. *Usman Beari*, (1906) 17 MLJ 78; *Amina Bibi* v. *Yusuf*, (1922) 44 All. 748 : 20 ALJ 731 : 70 IC 968 : (1922) All. 449.
6. *Imperial Loan Co.* v. *Stone*, (1892) 1 QB 599.
7. *Mathews* v. *Baxter*, (1873) 8 Ex. 132.

13. "Consent" defined.—Two or more persons are said to consent when they agree upon the same thing in the same sense.

The definition of the word 'consent' is based upon the decision in *Raffles* v. *Wichelhaus.*[1]

Where a party to an agreement (which has been reduced to the form of a document) is told that any stipulation therein will not be enforced, he cannot be held to have consented to it and the document will not be real agreement between the parties.[2]

14. "Free consent" defined.—Consent is said to be free when it is not caused by—

(1) coercion, as defined in section 15, or

(2) undue influence, as defined in section 16, or

(3) fraud, as defined in section 17, or

(4) misrepresentation, as defined in section 18, or

(5) mistake, subject to the provisions of section 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

As long as the free consent of Muslim divorced woman agreeing to relinquish her right to claim mehar against her husband has been given voluntarily and is not induced by duress, fraud, misrepresentation, undue influence or mistake, the relinquishment of her right to claim mehar is not affected.[3]

Absence of Consent.—A contract may be vitiated by the absence of free consent or, as it is termed in English Law, "real consent" or "genuine consent". A consent is said to be not free if it is caused by coercion, undue

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1. (1864) 159 ER 375 : 133 RR 853.
2. *Thyagaraja Mudhaliar* v. *Vedathanni,* (1936) PC 70 : 160 IC 384 : (1936) ALJ 136 : 40 CWN 353 : (1936) OWN 120 : 43 LW 271 : 70 MLJ 232; **see also** *Pertab Chunder* v. *Mohendra Nath,* (1889) 17 Cal. 291. **See** *Suniti Bala* v. *Manindra Chandra,* AIR 1930 PC 21 J; *Devi Awabi* v. *Govind Rao,* AIR 1965 MP 275; *Central National Bank Ltd.* v. *United Industrial Bank Ltd.,* AIR 1954 SC 181 : 1954 SCJ 54 : 1954 SCR 391; *Ningawwa* v. *Byrappa,* AIR 1968 SC 956 : 1968 (2) SCR 797; *Marachi* v. *Dy. Director of Consolidation,* AIR 1978 NOC 92 (All.); *Deo Nandan* v. *Chhote,* AIR 1983 All. 9.
3. *Hasina Bano* v. *Alam Noor,* AIR 2007 Raj 49 : 2007 AIHC 257 (NOC).

influence etc. The consent can be said to be so caused only if it could be shown that but for these factors of the alleged causes the effect would not have ensued.[1] The totality of the circumstances is required to be viewed before a decision one way or the other is reached. The distinction between mistake vitiating a contract and the other four grounds of coercion, undue influence, fraud and misrepresentation vitiating a contract has to be noticed. In the case of a mistake, the contract is void, but in the other cases, the contract is only voidable. The consequence is, that if third parties acquire rights in respect of the subject matter of the contract so vitiated, then if it is a void contract, ownership will not pass though the goods may change hands and the true owner can recover the property; but, if the contract is only voidable, ownership would pass to third parties, provided the contract has not been in the meanwhile set aside.[2] **[215]** A full Bench of the Allahabad High Court considered the provisions of Levy Order, 1959. Therein the provisions of U.P. Wheat Procurement (Levy) Order, 1959 were to be construed so as to take certain transactions outside the meaning of "sale" as the transactions were entered into out of compulsions under the Levy Order. The Court observed, "though levy order emphasis is restriction on the licensed dealer to sell fifty per cent of wheat held by him to the Govt., it leaves open to negotiation of parties all other details *viz.* time and mode of payment of the price and the time and the mode of delivery of wheat. The freedom of contract is not materially impaired merely because the legislation requires a dealer to enter into a contract of sale with another. A sale under the compulsion of statute is still a sale. There is nothing in the levy order which can be accused of vitiating the free consent or the parties as defined under Section 14 of the Contract Act." [3] The Calcutta High Court at page 238 observed that, consent is free when the activity of man by which it is effective works without obstacles to impede its exercise." [4]

15. "Coercion" defined.—"Coercion" is the committing or threatening to commit any act forbidden by the Indian Penal Code (45 of 1860), or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

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1. *Vijaysinh Mohansinh Solanki* v. *Municipal Transport Service,* AIR 1982 Guj. 307 : 1982 Guj.LH. 76 : 1982 (1) 23 Guj.LR 639.
2. *Commissioner, Sales Tax* v. *Ram Bilas Ram Gopal,* AIR 1970 All. 518 : 1969 All.LJ 424.
3. *London & Lancashire Insurance Co.* v. *Elnoy Krishna,* AIR 1945 Cal. 218.
4. *Thammana Peda Thatayya* v. *Bwagwandas Atra Singh,* (1970) 2 An. WR 75; *Andhra Sugar Ltd.* v. *State of A.P.,* AIR 1968 SC 599 : 1968 (1) SCR 705 : 1968 (21) STC 212.

Explanation.—It is immaterial whether the Indian Penal Code (45 of 1860) is or is not in force in the place where the coercion is employed.

Illustrations

A, on board an English ship on the high seas, causes *B* to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code (45 of 1860).

A afterwards sues *B* for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code (45 of 1860) was not in force at the time when, or place where the act was done.

Coercion and Duress.—What the Indian Law calls coercion is called in English Law Duress or Menace. Duress is said to consist in actual or threatened violence or imprisonment of the contracting party or his wife, parent or child, inflicted or threatened by the other party or by one acting with his knowledge and for his advantage. **[299]** But coercion as defined in Section 15 is much wider and includes the unlawful detention of property.[1] Further, it may be committed by any person, not necessarily a party to the contract. Again. it need not be directed against the contracting party or his parent, wife or child but it may be against any person, even a stranger. While in English Law, duress must be such as to cause immediate violence and also to unnerve a person with ordinary firmness of mind, these requisites are not necessary in Indian Law.

A release executed by a principal to an agent under threat of withholding the accounts of the agency,[2] a payment of money under an agreement

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1. *Askara Mirza* v. *Bibi Jai Kishore,* (1912) 16 IC 344; *Karuppayee Ammal* v. *Karuppiah Pillai,* 1987 (II) MLJ 138.
2. *Muttiah Chetty* v. *Karuppan Chettiar,* (1927) 50 Mad. 786 : 105 IC 5 : (1927) Mad. 852 : 26 LW 465 : 53 MLJ 606; **see also** *Banda* v. *Banspat,* (1882) 4 All. 352 (Bond by judgment-debtor arrested under a decree passed without jurisdiction is voidable under the section). Cf. *Bajranglal* v. *Sitaram,* AIR 1949 Cal. 457; *Workmen of Appin Tea Estate* v. *Industrial Tribunal,* AIR 1966 Assam 115; *Swadeshi Industries Ltd.* v. *Its Workmen,* AIR 1960 SC 1258 : 1960 (1) FLR 576 : 1960 (2) LLJ 578; *State of Bihar* v. *Deodaer,* AIR 1958 Pat. 51; *Palamappa Mudaliar* v. *P.T. Kandaswamy Mudaliar.* (1971) 1 Mys. LJ 258.

to stifle a non-compoundable offence,[1] a release obtained from a wife and son under threat of suicide,[2] a consent to adoption under threat of obstruction to the removal of a corpse for cremation;[3] a threat of attachment against the property of a parent to recover a fine due from the son[4]—all these have been held to be cases in which the contract was vitiated by "Coercion" within the meaning of the section. But a refusal by a mortgagee to reconvey the property except on certain terms, does not amount to coercion.[5] Similarly, a refusal to withdraw a prosecution already launched will not amount to coercion.[6]

Where a company held to sell its steel products to another under the orders of the Steel Controller whose directives were confined to narrow limits it was held that there was no coercion.[7] Where by compulsion of law, a factory in one area was bound to accept the sugar cane offered by a cane-grower in that area it is not coercion.[8] A settlement between the husband and wife for payment of maintenance cannot said to be unenforceable on the plea of the husband that the settlement was arrived at not out of his free will when there is no proof to show that the persons on husbands' side were physically and economically weak.[9]

Where the plaintiff was dispossessed of the premises running an open-air restaurant in the central place of Delhi by threatening of his arrest and detention under MISA the act amounts to coercion attracting Sec. 15 of the Contract Act.[10]

Where the plaintiffs alleged to have permitted the defendants to carry the timber after cutting their trees through their property and subsequently withdrawn the permission unless the defendants entered into a suit agreement,

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1. *Muthu Veerappa* v. *Ramaswamy,* (1917) 40 Mad. 285 : 31 MLJ 264 : 34 IC 401; *Sami Ullah* v. *Kalim Ullah,* (1932) Lah. 446 : 137 IC 790 (Compromise of compoundable offence—Charge false—Consideration for compromise unreal); *Widya Wanti* v. *Jai Dayal,* (1932) 13 Lah. 356 : 140 IC 220 : (1932) Lah. 541.
2. *Ammiraju* v. *Seshamma,* (1917) 41 Mad. 33 : 5 LW 735 : (1917) MWN 423 : 40 IC 352 ; 32 MLJ 494.
3. *Ranganayakamma* v. *Alwar Chetti,* (1889) 13 Mad. 214.
4. *Bansraj* v. *Secy. of State,* (1939) AWR 247. Payment of money to another as a result of compulsion is duress; *Mangalore Catholic Co-op. Bank Ltd.* v. *M. Sundara Shetty,* (1988) 25 Reports (Ker.) 25.
5. *Bengal Stone Co.* v. *Joseph,* (1918) 27 CLJ 78 : 45 IC 738.
6. *Rameshwar* v. *Upendranath,* (1926) 29 CWN 1029 : 90 IC 463 : (1926) Cal. 455.
7. *Indian Steel and Wire Products Ltd.* v. *State of Madras,* AIR 1968 SC 478 : 1968 (1) SCR 479 : 1968 (21) STC 138.
8. *Andhra Sugars Ltd.* v. *State of A.P.,* AIR 1968 SC 599 : 1968 (1) SCR 705 : 1968 (21) STC 212.
9. *Manali Singhal* v. *Ravi Singhal,* AIR 1999 Delhi 156, 160 : 1999 (3) Civil LJ 401 : 1999 (1) Cur. CC 356 : 1999 (77) DLT 693 : 1999 (1) DMC 355 : 1999 (1) Hindu LR 648.
10. *Kishan lal Kalra* v. *N.D.M.C.,* AIR 2001 Delhi 402,407.

Sec. 15 is not attracted when the act complained of is not punishable under the Penal Code or any other illegal activity.[1]

Economic duress as a factor would render a contract voidable provided it amounts to a coercion of will, which vitiates consent. In *Atlas Express Ltd.* v. *Kafco (Importers and Distributors) Ltd.*,[2] the plaintiffs a national road carrier entered into a contract with the defendants to carry the goods of the defendants @ £ 1-10 per carton. But subsequently the plaintiffs refused to carry the goods unless the defendants agreed to pay £ 440 per load. As the defendants were heavily dependent on the plaintiff's service and was unable to find an alternative carrier, had to agree to the new terms. When the defendant refused to pay at new rates the plaintiff filed a suit. It was held that where a party to a contract was forced by the other party to renegotiate the terms of the contract to his disadvantage and had no alternative but to accept the new terms offered, his apparent consent to the new terms was vitiated by economic duress. In India it has been decided that economic duress may arise in cases of forced labour that is labour or service, which a person is forced to provide. It may be physical force, which may compel a person to provide labour, or service to another or it may be force or compulsion arising from hunger and poverty want and destitution. While entering into a contract of service or labour, the employee by reason of his economically helpless condition may have been faced with, the choice, either to starve or to submit to exploitative terms dictated by the powerful employer. Article 23 prohibits forced labour and no one shall be forced to provide labour or service against his will even though it be under a contract of service.[3]

In a proceedings for the enforcement of a compromise agreement relating to an inheritance dispute which was destroyed as agreed between the parties under the compromise agreement, the defence raised by the defendant that it was obtained under duress is not tenable and also the rescission of the contract is not permissible, since a party cannot rescind a contract obtained under duress in view of the fact that there is no possibility of the other party being put in the same position had the contract not been entered into.[4]

Where a borrower signed a deed of modification agreeing to pay enhanced rate of interest to the State Finance Corporation dependant upon rate at which refinance made available to the Corporation by the Industrial Development Bank, enhancement of interest is a bilateral act of parties through

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1. *Thresia* v. *Johny*, 2003 (1) Cur. CC 154 (Ker).
2. 1989 (1) All. ER 641.
3. *Peoples Union for Democratic Rights* v. *Union of India*, 1982 Lab. IC 1646.
4. *Halpern* v. *Halpern*, [2007] 3 All ER 478 (CA).

deed of modification signed by borrower with open eyes and plea of coercion or duress cannot be sustained. [1]

However extending categories of duress to encompass 'Lawful Act duress' in a commercial context in pursuant of a bonafide claim would have far reaching implication introducing an element of uncertainty. [2]

With the intention, etc.—The word "coercion" appears also in Section 72. But, it has been held by the Privy Council that to constitute coercion under Section 72, an intention *to cause any person to enter into an agreement,* is not necessary.[3]

Proof.—Where coercion is alleged, full particulars must be given in the pleadings and the parties should be strictly confined to that state of facts.[4]

16. "Undue influence" defined .—(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the forgoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the

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1. *Gunjan Cement Pvt. Ltd.* v. *R.S.I. Devl. & Investment Corpn. Ltd.,* AIR 1996 Raj. 88, 90.
2. *C.T.N. Cash & Carry Ltd.* v. *Gallaher Ltd.,* (1994) 4 All. ER 715 (C.A).
3. *Kanhaya Lal* v. *National Bank of India,* (1913) 40 Cal. 598 (611); (Cf.) *Jugdeo Narain* v. *Raja Singh,* (1888) 15 Cal. 656.
4. *Purushotham* v. *Pandurang,* (1915) 39 Bom.149 : 17 Bom.LR 157. **See also** *Kambi Bhashan* v. *Nayan Kunvarbu,* AIR 1953 Sau. 53; *Barton* v. *Arastrans,* (1975) 2 All. ER 465 (PC).

transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872).

Illustrations

(a) *A*, having advanced money to his son, *B*, during his minority, upon *B's* coming of age obtains, by misuse of parental influence, a bond from *B* for a greater amount than the sum due in respect of the advance. *A* employs undue influence.

(b) *A*, a man enfeebled by disease or age, is induced, by *B's* influence over him as his medical attendant, to agree to pay *B* an unreasonable sum for his professional services. *B* employs undue influence.

(c) *A*, being in debt to *B*, the money lender of his village, contracts a fresh loan terms which appear to be unconscionable. It lies on *B* to prove that the contract was not induced by undue influence.

(d) *A* applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. *A* accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

What is Undue Influence.--"Undue influence" or as it is sometimes called Moral Coercion as distinguished from physical coercion, according to Sir Frederick Pollock, "consists in any influence brought to bear upon a person entering into an agreement or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment." [305] Two things have to be

proved in order to raise a presumption of undue influence. *Firstly,* that the relationship between the contracting parties was such, that one was in a position to dominate the will of the other. *Secondly,* that the position was used to obtain an unfair advantage. Where a transaction is sought to be avoided on the ground of consent being caused by undue influence two basic elements provided under Sec. 16 must be cumulatively present viz., first relations subsisting between the parties are such that one of them is able to dominate the will of the other and second the party in dominating position used that position to obtain unfair advantage over the other. Both of these conditions have to be pleaded with particularity and the burden of proving them will be on the person seeking to avoid the transaction.[1] If these two are proved, then a presumption of undue influence arises and the burden is cast upon the party to show that he has not taken advantage of his position and that the other party has had independent legal advice in the matter. Such advice must be proved to have been given before the transaction.[2] If this be proved, the transaction will stand. Otherwise, it will be avoided. Where the document on its face is a deed of sale duly executed and registered, onus will be on the vendor to show that the vendee is in a position to dominate over the will of vendor.[3] Where a party does some act freely and on his or her volition although as result of persuasion of other party, the consent cannot be said to be induced by undue influence.[4]

Whenever a person holding real or apparent authority over another person or standing in fiduciary relationship with such person enters into contract with him or where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress, Sec.16 (2) enables to draw a presumption of deemed position of dominance of the will of another.[5]

Where an agreement is entered into to sell immovable property, merely because the seller who was in necessity to sell the property and also sale consideration was inadequate, the agreement cannot be said to be vitiated by fraud or undue influence unless it is shown that the purchaser was in a position to dominate over the mind of the seller.[6]

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1. *Maria* v. *Sripad Vishnu,* AIR 1998 Bom. 46, 52 : 1998 (31) Bank LJ 446 : 1998 (1) Bom.LR 860; *Shaik* v. *Suleman Bibi,* AIR 1976 SC 163.
2. *Jean Mackenzie* v. *Royal Bank of Canada,* (1934) AC 468 : (1934) PC 210 : (1934) ALJ 763: 151 IC 981 : 40 LW 400; *Deota Prasad* v. *Tri Bhawan,* AIR 1983 All. 139; *Takri Devi* v. *Rama Dogra,* AIR 1983 HP 11.
3. *Premnarayan* v. *Kunwarji,* AIR 1993 MP 162.
4. *Shrimathi* v. *Sudhakar R. Bhatkar,* AIR 1998 Bom. 122, 125 : 1997 (4) Bom CR 237 : 1997 (2) Civil Court C 490 : 1997 (3) Mah.LJ 293 : 1997 (3) Bom.LR 287.
5. *Shyamlal* v. *Chameli Bai,* 1994 (1) Civil LJ 415, 417 (MP).
6. *K.M. Madhava Krishnan* v. *S.R. Swami,* AIR 1995 Mad. 318, 325.

> Sale deeds can be cancelled as fake and for want of any consideration by drawing adverse inference when the opposite party failed to enter witness box and substantiate the correctness.[1]

The Privy Council in *Raghunath Prasad* v. *Surja Prasad* [2] has pointed out the essentials of this section:

> "By that section, three matters are dealt with. In the first place, the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated, the second stage has been reached (*viz.*) the issue whether the contract has been induced by undue influence. Upon the determination of this issue, a third point emerges, which is that of *onus probandi*. The burden of proving that the contract was not induced by undue influence is to lie on the person who was in a position to dominate the will of the other. Error is almost sure to arise, if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relation of the parties. Were they such as to put one in a position to dominate the will of the other?"

The same principles have been re-affirmed and attention drawn to the order of the propositions in the pronouncement of the Judicial Committee.[3]

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1. *Kartik Prasad Gorai* v. *Neami Prasad Gorai*, AIR 1998 Cal. 278.
2. (1924) 3 Pat. 279 : 82 IC 817 : 19 LW 470 : 26 Bom. LR 395 : 28 CWN 834 : (1924) PC 60 : 46 MLJ 610; **see also** *Gafur Mohammad* v. *Mohammad Shariff*, (1932) PC 202 : 34 Bom. LR 1194 : 36 CWN 994 : 36 LW 210 : 56 CLJ 55 : 137 IC 893 : 63 MLJ 54 (PC); *Santhappa* v. *Santhiraja*, (1938) 1 MLJ 676 : 47 LW 714 : (1938) MWN 99 : (1938) Mad. 426; *Bulaqi Mal* v. *Abdul Karim*, (1933) Lah. 682 : 145 IC 432; *Ma Yun* v. *Maung Thin*, (1935) Ran. 174 : 160 IC 223; *Bahore Mohton* v. *Juro Sahu*, (1936) Pat. 78 : 160 IC 1073; *Ladli Prasad* v. *Karnal Distillery Co.*, AIR 1963 SC 1279 : 1964 (2) SCJ 12 : 1964 (1) SCR 270 : 1963 (33) CC 593; *Bullock* v. *Lloyd's Bank Ltd.*, (1954) 3 All. ER 726; *Zamet* v. *Hyman*, (1961) 3 All. ER 933; *Chinnamma* v. *Devanga Sangha*, AIR 1973 Mys. 338. For a detailed treatment on the "essentials of undue influence **see** *Bhupendrakumar R. Parikh* v. *M.K. Lakshmi*, AIR 1990 Mad. 46.
3. *Homeshwar Singh* v. *Kameshwar Singh*, (1935) 39 CWN 1130 : 37 Bom. LR 800 : 157 IC 1 : (1935) OWN 851 : 42 LW 286 : (1935) MWN 1139 : (1935) PC 146 : 69 MLJ 335 (Mere finding of unfair advantage is insufficient); **see also** *Tirath Ram* v. *Harbhajan Singh*, (1935) Lah. 479 : 158 IC 257 (Landlord holding ejectment decree against tenant—execution of fresh lease on enhanced rent—No presumption of undue influence release); *Lingo* v. *Dattatreya*, (1938) Bom. 97 : 39 Bom. LR 1233 : 173 IC 817; *Tulsiram Khirchand* v. *Chunilal*, (1938) Nag. 391; *Anupa Bai* v. *Bhagwant*, (1938) Nag. 470; *Abdur Rauff* v. *Aymora Bibi*, (1937) Cal. 492; *Palanivelu* v. *Neelavathi*, (1937) 1 MLJ 719 : 45 LW 355 : (1937) MWN 615 : 41 CWN 677 : 39 Bom. LR 720 : (1937) ALJ 575 : (1937) PC 50.

Quantum of Proof.—In *Someshwar Dutt* v. *Tribhawan Dutt*,[1] the Judicial Committee has pointed out that to establish a case of undue influence it is not sufficient to raise an atmosphere of suspicion, but that there must be clear and definite evidence of the case propounded.

A transaction cannot said to be induced by undue influence merely on the ground that the relation of the parties have been such that one naturally relied upon for advice and the other was in a position to dominate the will of the first in giving it.[2]

For the purpose of showing a transaction to have been induced by undue influence, it is necessary to prove that the party who is in a position to dominate the will of another has exercised undue influence in order to obtain an unfair advantage.[3]

In case of a document executed by an old, illiterate and ailing person, what is necessary to be established is not only mere physical act of the executants involved, but should also be prove about the mental act.[4]

Where a Gift Deed as well as Will are alleged to have been executed by an illiterate person on the same day in favour of the defendant, the execution of said documents is said to be on account of undue influence and fraud in the absence of any reason coming from the defendant.[5]

Where an old man aged 90 years is said to have put his left hand impression on the two documents relating to immovable property although he was a graduate but his fingers were trembling because of old age, there is a

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1. (1934) 61 IA 224 : 9 Luck 178 : 149 IC 480 : (1934) PC 130 : (1934) MWN 647 : 36 Bom. LR 652 : 38 CWN 806 : 67 MLJ 7 : 40 LW 5; *Chandravati* v. *Janti Prasad*, (1938) Lah. 333; See the following cases also; *Ladli Pershad* v. *Karnal Distillery Co.*, AIR 1963 SC 1279 : 1964 (2) SCJ 12 : 1964 (1) SCR 270; *Subhas Chandra* v. *Ganga Prasad*, AIR 1967 SC 878 : 1967 (1) SCR 331; *Jans Bahadur* v. *Nawal Kishore*, AIR 1966 All. 342; *Khadr Bujakuer* v. *Jans Bahadur*, AIR 1963 SC 1203; *Mastanamma* v. *Adinarayana*, AIR 1966 AP 104 : (1966) 2 An. LT 405; *Afsar Sheikh* v. *Soleman Bibi*, AIR 1976 SC 163 : 1976 (2) SCR 327 : (1976) 2 SCC 1420; *Hemchandra* v. *Sureshdhani*, AIR 1940 PC 134; *Settemma* v. *Subbi Reddy*, AIR 1963 AP 72; *Karnal Distillery Co.* v. *Ladli Pershad*, AIR 1958 Punj. 190; *Mahaboob Khan* v. *Abdul Rahim*, AIR 1964 Raj. 250; *Bishendeo Narain* v. *Seoseni Rai*, AIR 1951 SC 280; *Thrasia* v. *Varkey Mathai*, AIR 1951 TC 42; *Sajadhar* v. *Baidhyanath*, AIR 1950 Pat. 379; *Takkadi Syed Mohd.* v. *Ahmed Pathuntal*, (1972) 2 ALT 630.
2. *Habeeb Khan* v. *Valasula Devi*, AIR 1997 AP 53, 64 : 1996 (2) ALD 822 : 1996 (1) An. WR 655.
3. *Inum Beevi* v. *K.S.Saiad Ahmed Kabir*, 2001 (1) MLJ 307.
4. *Krishna Mohan Kul* v. *Prathima Maity*, AIR 2003 SC 4351 : 2003 (7) Supreme 105 : (2003) 10 ILD 831 (SC).
5. *Virendra Singh* v. *Kashiram*, 2006 (1) CTLJ 378 (Raj).

justification to show, that the execution of documents is free from undue influence.[1]

In a case of sale deed executed by an old illiterate and blind tribal woman in favour of her relative with whom she was living till her death, onus lies on the purchaser to show that the transaction is not affected for the want of free consent.[2] A settlement between the husband and wife for payment of maintenance cannot said to be unenforceable on the plea of the husband that the settlement was arrived at not out of his free will when there is no proof to show that the persons on husbands' side were physically and economically weak.[3]

Where a testator of advanced years executed a gift deed of his property in favour of the defendant while canceling the will executed by him earlier in favour of the plaintiff, the gift deed cannot be set aside on the ground of undue influence unless the plaintiff proves that the defendant was in a position to dominate over the will of the testator and used that position in getting the gift deed executed in his favour.[4]

Where the defendant got a transfer deed in respect of the entire property of the plaintiff appellant aged over 70 years staying with his nephew defendant excluding his three daughters, the defendant is considered to be in dominating position and the initial burden will be on the defendant to prove that the deed in question was valid and it had been executed in all fairness and bonafide and not otherwise influenced by means of fraud or misrepresentation.[5]

Where the validity of the Deed executed by an old illiterate ailing person of 106 years, was questioned on the ground of undue influence, taking the age and capacity of person confirming the benefits, and nature of benefits into consideration the onus of proving factors like fairness, adequacy and equity is on the person in whom confidence has been reposed.[6]

"Constructive fraud" is an expression used in some English cases, to describe undue influence in circumstances where the relationship between the parties is such that one owes a duty to the other, (*e.g.*,) solicitor and client,

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1. *Rampati Biswas* v. *Chandra Sekhar Biswas,* 2007 (1) CTLJ 254 (Cal) : 2006 (44) AIC 860 (Cal) : 2006 (2) Cal.LT 341.
2. *Vinaya Krishna* v. *Keshav Chandra,* AIR 1993 SC 957 : 1993 Supp. (1) SCC 215.
3. *Manali Singhal* v. *Ravi Singhal,* AIR 1999 Delhi, 156, 160 : 1999 (3) Civ. LJ 401 : 1999 (1) Cur. CC 356 : 1999 (77) DLT 693 : 1999 (1) DMC 355 : 1999 (1) Hindu LR 648.
4. *Roshan Lal* v. *Kartar Chand,* AIR 2002 HP 131 : 2002 (4) Cur. CC 270.
5. *Ramu Mahabir* v. *Ghurhoo Samu,* AIR 2006 All. 273 : 2006 AIHC 3038 (All) : 2006 (2) CTLJ 508 (All) (SN) : 2 006 (73) AllWC 1927.
6. *Krishna Mohan Kul* v. *Pratima Maity,* AIR 2003 SC 4351 : (2004) 9 SCC 468 : 2004 (2) CTLJ 68 (SC).

or trustee and beneficiary. The fact that the parties to a contract stand in a near relationship is not a sufficient ground to raise the presumption of undue influence.[1] The relationships, which usually raise a presumption of undue influence, are: **[312]**

1. **Parent and Child.**—See Illustration (a) see for a fuller discussion.[2]

2. **Guardian and Ward.**

3. **Medical Advisor and Patient.**—See Illustration (b)

4. **Solicitor and Client.**—It is the duty of the solicitor to guard the interests of his client, and where the client suffers damage by reason of a misrepresentation or breach of duty by the solicitor, the latter must make restitution.[3] And in cases of gifts from the client to his legal adviser, the burden lies heavily upon the solicitor to prove that he has not taken any advantage of his position and that the client had competent and independent advice in the matter.[4] **[312]**

5. **Trustee and *Cestui que trust.***—Similarly a duty is cast upon a trustee, when he enters into a transaction with the *cestui que* trust. Thus, a mortgage by the beneficiary in favour of the creditor of a trustee was set aside as induced by undue influence.[5]

6. **Spiritual Adviser and Disciple.**—Where a person transferred his property to his spiritual adviser in the belief that his soul would attain salvation but subsequently sought to set aside the transaction, the Court awarded relief, holding that the defendant (Guru) had not discharged the onus that lay under the section.[6]

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1. *M. Rangasamy* v. *Rengammal,* AIR 2003 SC 3120 : (2003) 7 SCC 683 : 2003 (6) Supreme 30 : 2003 (5) SLT 6.
2. *Abdul Mallick* v. *Muhammad Yosuf,* AIR 1961 Mad. 190; *Mariam Bebi* v. *Cassim Ebrahim,* AIR 1939 Rang. 278; *Bullock* v. *Lloyds Bank Ltd.,* (1954) 3 All. ER 726. *Rehana Khatun* v. *Iftikaruddin,* AIR 1943 All. 184.
3. *Nocton* v. *Ashburton,* (1914) AC 932.
4. *Vasi Reddy* v. *Unnava Subbayya,* (1929) MWN 360 : (1930) Mad. 317 : 120 IC 882; *Shamaldone Dutt* v. *Lakshimani Debi,* (1909) 36 Cal. 493 (Re-opening of settled account); *Hari Vallabhdas* v. *Bhai Jivanji,* (1902) 26 Bom. 689 (Solicitor's clerk and client); *Raja Pappamma* v. *Sitarammayya,* (1895) 5 MLJ 234. **See also** *Amritlal* v. *Ramkumar,* AIR 1962 Punj. 325 (SD); *Bireswar* v. *Ashalata Shase,* AIR 1969 Cal. 111; *Nisar Ahmed* v. *Mohan Manncha,* AIR 1940 PC 194.
5. *Narayandass* v. *Buchraj Chordia,* (1927) 53 MLJ 842 : 106 IC 315 : (1928) Mad. 6; *Raghunath* v. *Varjivandas,* (1906) 30 Bom. 578.
6. *Manbhari* v. *Sriram,* (1936) All. 672 : (1936) ALJ 1215 : 165 IC 240; *Mannu Singh* v. *Umadat Pande,* (1890) 12 All. 523; *Sital Prasad* v. *Parbhu Lal,* (1888) 10 All. 535; *Kamini* v. *Krishnachandra,* (1912) 39 Cal. 933; *Allcard* v. *Skinner,* (1889) 36 Ch.D. 145.

7. **Husband and wife.**—There is no presumption of undue influence as between husband and wife in English Law,[1] but a recent case suggests that undue influence might exist between a couple engaged to marry.[2] The Judicial Committee has in a case, which came on appeal from Canada, pointed out that a wife, does not fall within the class of "protected" persons in respect of whom, in certain relationships, there is a presumption of undue influence.[3] **[313]** In India, however, if the wife is a pardanishin, the presumption might arise, but there is no presumption that a young wife is in a position to dominate the will of an old husband.[4]

Creditor and debtor.—As between money-lenders and borrowers [5] a presumption arises in cases where long indebtedness exists coupled with unfair and unconscionable terms [6] but the mere fact of the rate of interest being high[7] or the borrower being in urgent need [8] is not enough to justify a finding that the lender was in a position to dominate the will of the borrower. In *Rama Pattar* v. *Manikam* [9] where two co-debtors persuaded their nephew by the exercise of undue influence, and in abuse of their fiduciary relationship to him, to make himself jointly responsible with them to the plaintiff (creditor) and the plaintiff was shown to have had knowledge of the exercise of undue influence, it was held that though Sec. 16 of the Indian Contract Act did not apply in terms to the circumstances, yet on the principle embodied in Sec. 89 of the Trusts Act, *qua* the nephew, the plaintiff stood under the same disability

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1. *Howes* v. *Bishop*, (1909) 2 KB 390.
2. *Bomze* v. *Bomze*, (1931) 1 Ch. 289.
3. *Jean Mackenzie* v. *Royal Bank of Canada*, (1934) AC 468 : (1934) ALJ 763 : 151 IC 981 : (1934) PC 210 : 40 LW 400.
4. *Ghazanfar* v. *Ahmadi*, (1930) ALJ 109 : 123 IC 369 : (1930) All. 169 : 52 All. 368; *Tungabai* v. *Yeshvant*, AIR 1945 PC 8.
5. *Permanent Trustee* v. *Bridgewater*, (1937) 2 MLJ 87 : 46 LW 291 : (1937) PC 14; *Rameshwar* v. *Upendra*, (1926) 29 CWN 1029 : 90 IC 463 : (1926) Cal. 455; *Davis* v. *Manug Shwe*, (1911) 38 Cal. 805; *Kesavulu* v. *Arithulai*, (1913) 36 Mad. 533; *Maneshar Bakshi* v. *Shadi Lal*, (1909) 31 All. 386.
6. *Rukmina* v. *Mohib Ali Khan*, (1934) All. 938; *Poosathurai* v. *Kannappa*, (1919) 43 Mad. 546; *Diala* v. *Sarga*, (1927) 102 IC 707 : (1927) Lah. 536.
7. *Lala Balla* v. *Ahad Shah*, (1919) 21 Bom. LR 558; *Dhanipal* v. *Raja Maneshar*, (1904) 28 All. 570 (583); *Sitaram* v. *Ram Rao*, (1931) Nag. 91; 130 IC 817; *Ibney Hasan* v. *Gulkhand*, (1936) All. 611 : (1936) ALJ 919 : 164 OIC 325.
8. *Sunder Koer* v. *Rai Sham Krishen*, (1907) 34 Cal. 150 (PC); *Barkatunnissa* v. *Debi Baksh*, (1927) 25 ALJ 314 : (1927) MWN 381 : 101 IC 29 : 31 CWN 693 : 26 LW 147 : (1927) PC 84; *Ram Prasad* v. *Khusal*, (1929) 1 Luck 354 : (1926) Oudh 408; *Chota Nagpur Bank* v. *Bhagwat*, (1922) 1 Pat. 263 : 69 IC 697 : (1922) Pat. 491; *Khaga Ram* v. *Ramsankar*, (1915) 42 Cal. 652 (665).
9. (1935) 58 Mad. 454 : (1935) MWN 146 : 41 LW 228 : 158 IC 485 : (1935) Mad. 726 : 69 MLJ 104; **See** *Hiralal* v. *Fulchand*, AIR 1953 Sau 89; *Sewtil* v. *Rattan*, AIR 1951 HP 54.

as the co-debtors, and that therefore the nephew was not liable to the plaintiff [See also Illustrations (c) and (b)].

Pardanishin ladies.—The above relationships are not exhaustive [1] and courts have considered themselves free to set aside contracts on the ground of undue influence in every case in which confidence has been reposed but betrayed, or influence gained and abused.[2] **[312]** Amongst such transactions are those entered into with pardanishin ladies. These persons, generally illiterate, always living in seclusion, are easily subject to the undue influence of the few people who come into contract with them. The law, therefore, protects their interests and casts a burden on any person claiming the benefit of a transaction with them to prove that there was no exercise of undue influence and that the executant exercised her volition in the matter, and understood thoroughly the nature and details of the transaction.[3] Proof of independent advice is one mode of rebutting the presumption.[4] **[316]** The principle adumbrated above would apply to the relations like, master and servant, principal and agent, employer and manager and any other relationship where one of the parties was in a position to dominate the will of the other.

The fact that the executant lady of sale deed was an illiterate Harijan childless widow employed in Railway on compassionate ground on the death of her husband in the absence of anything on record to show that she was suffering from any ignorance or illiteracy or mental deficiency cannot be put on par with a pardanashin lady.[5]

Pardanashin ladies have been given a special protection in view of the special conditions of the time. They are presumed to have an imperfect

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1. *Maung Aung Bwin* v. *Maung Than Gyaung,* (1933) Ran. 90 : 144 IC 673 (Elderly invalid transferring entire property to people nursing him—Heir excluded—Presumption drawn).
2. (Cf.) *Sital Prasad* v. *Prabhu Lal,* (1888) 10 All. 335; *Shivgangawa* v. *Basangowda,* (1938) Bom. 304 : 40 Bom. LR 132 : 176 IC 187.
3. *Purna Chandra* v. *Sarojini,* (1934) 60 CLJ 25; *Tara Kumari* v. *Chandra,* (1931) PC 303 : 34 LW 829 : 134 IC 1076; *Faridunnissa* v. *Mukthar Ahmed,* (1925) 52 IA 342 : 47 All. 703 : 1922 PC 201 : 89 IC 649; *Sunitibala* v. *Dhara Sunderi,* (1919) 46 IA 272 : (1919) PC 24 : 47 Cal. 175 : 37 MLJ 483 : 11 LW 227 : 53 IC 131; *Kali Baksh* v. *Ram Gopal,* (1914) 36 All. 81; *Shan Sunder* v. *Achan Kunwar,* (1899) 21 All. 71 ; *Shambati Koer* v. *Jago Bibi,* (1902) 29 Cal. 749; *Annoda Mohan* v. *Bhuban,* (1901) 28 Cal. 546.
4. *Inche Noriah* v. *Shaik Allie,* (1929) AC 127 : (1929) PC 3 : 29 LW 196 : 33 CWNM 205 : 56 MLJ 349; Cf. *Bank of Khulan Ltd.* v. *Jyoti Prakash,* AIR 1940 PC 147; *Sonia* v. *Moula Baksh,* AIR 1955 Cal. 17; *Chinnamma* v. *Devanga Sangha,* AIR 1973 Mys. 338; *Lakshmi Amma* v. *Telengala Narayana Bhatta,* AIR 1970 SC 1367.
5. *Hans Raj* v. *Yasodan,* AIR 1996 SC 761, 763 : (1996) 7 SCC 122 : 1995 (8) JT 515 : 1996 (1) UJ 443 : 1996 (1) SCJ 213 : 1995 (4) CCC 347 (SC) : 1996 (1) CLT 145 (SC).

knowledge of the world, as, by the purdah system they are practically excluded from social intercourse and communication with outside World. The burden of proof shall always rest upon a person who seeks to sustain a transaction entered into with a pardanashin lady to establish that the said document was executed by her after clearly understanding the nature of the transaction.[1]

Where a transaction is entered into with a Pardanashin or illiterate lady, in order to charge such a lady upon an instrument it has to be proved that the terms are fair and equitable and that she had been given independent advice in the matter and that the document had been explained to and understood by her.[2]

Although in case of an execution of a deed by an illiterate person, the disputed deed must contain an endorsement of certificate that the contents of the written deed were read out and explained to the executants, the absence of certificate of endorsement does not become conclusive or decisive of not doing so and the fact can be proved by other evidence.[3]

Undue influence as a plea in defence.—It is well settled that a defendant may rise undue influence as a plea in defence and that it is not necessary for him to sue to set aside the transaction.[4]

17. "Fraud"defined.—"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract.—

(1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

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1. *Mst. Kharbuja Kuer* v. *Jangbahadur Rai*, AIR 1963 SC 1203 : 1963 (2) SCJ 382 : (1963) 1 SCR 456.
2. *Annapurna Barik Dei* v. *Indira Bewa*, AIR 1995 Ori. 273, 275.
3. *Sita Bewa* v. *Gangadhar Bharati*, AIR 1999 Orissa 154, 156 : 1999 (2) Cur. LJ (CCR) 391.
4. *Rangnath* v. *Gobind*, (1904) 28 Bom. 639 : 6 Bom. LR 592; *Lakshmi Das* v. *Rup Lal*, (1907) 30 Mad. 169 : 17 MLJ 19; *Mahbhari* v. *Pt. Sri Ram*, (1936) All. 672 : (1936) ALJ 1215 : 165 IC 240; *Rama Pattar* v. *Manikkam*, (1935) 58 Mad. 454 : (1935) Mad. 726 : (1935) MWN 146 : 41 LW 228 : 158 IC 485 : 69 MLJ 104.

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations

(a) *A* sells, by auction, to *B*, a horse which *A* knows to be unsound. *A* says nothing to *B* about the horse's unsoundness. This is not fraud in *A*.

(b) *B* is *A's* daughter and has just come of age. Here, the relation between the parties would make it *A's* duty' to tell *B* if the horse is unsound.

(c) *B* says to *A*:— "If you do not deny it. I shall assume that the horse is sound" A says nothing. Here A's silence is equivalent to speech.

(d) *A* and *B*, being traders, enter upon a contract. *A* has private information of a change in prices which would affect *B's* willingness to proceed with the contract. *A* is not bound to inform *B*.

"Fraud" and "Collusion" vitiate even the most solemn proceedings in any civilized system of jurisprudence, it being the concept descriptive of human conduct.[1]

"Fraud" or as it is often called "wilful misrepresentation" or "fraudulent misrepresentation" arises when there is (1) a false representation; (2) of a fact; (3) made with the knowledge that it is false or without belief in its truth, or reckless, careless whether it be true or false; (4) materially inducing a person to act; and (5) who does so act and suffers damage thereby. **[272]**

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1. *Bhaurao Dagdu Paralkar* v. *State of Maharastra,* AIR 2005 SC 3330 : (2005) 7 SCC 605.

Representation.—A representation is a statement or assertion made by one party to the other at, or before the formation of the contract, but such a representation, if it finds a place in the written contract is termed a condition or warranty, according as it is vital and important when a breach thereof would entitle the other party to repudiate the contract,[1] or is only collateral to the main purpose, in which case a breach thereof would not entitle the other party to repudiate but only to claim damages.[2] **[261]** Where a representation does not find place in the contract but has been material in inducing it and turns out to be false, the other party is entitled to rescind the contract and claim damages, if the representation was wilfully or deliberately made. It is this knowledge of falsehood and the right to claim damages that distinguishes fraud from innocent misrepresentation and Sir John Salmond calls the former 'actionable' misrepresentation and the latter 'invalidating' misrepresentation. **[261]**

Silence and inaction.—Silence and inaction also under certain conditions can be regarded as fraudulent representation inasmuch as positive language of conduct of the person provided the person who is under duty to speak and holds his tongue in breach of that duty.[3]

1. False Representation.—It is not necessary that there should be an actual representation, which has become false. Even silence may give rise to an action, if it is under circumstances when there is a duty to speak or where silence is equivalent to speech.[4] **[265]** [See Explanation and Illustration (c)]. Again, a suppression of truth with a suggestion of falsehood or *suppressio veri and suggestio falsi* will amount to fraud.[5] Where a minor under the Court of Wards who would become a major only on attaining 21, represented that he was aged 20 and borrowed monies, the transaction was held to amount to a fraud being a suppression of truth and a suggestion of falsehood.[6] Caveat

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1. *Behn* v. *Burness,* (1863) 122 ER 281 : 124 RR 787.
2. *Bettini* v. *Gye,* (1876) 1 QBD 183.
3. *A.V. Bhagat* v. *W.B. Essential Commodity Supply Corporation Ltd.,* AIR 1992 Cal. 135, 138.
4. *Jogendra* v. *Chandra,* (1915) 42 Cal. 28; *Subramaniam Chetty* v. *Officials Assignee,* (1931) Mad. 603 (2) : (1930) MWN 973 : 133 IC 372; *Brownlie* v. *Campbell,* (1880) 5 AC 925; *Ward* v. *Hobbs,* (1878) 4 AC 13; *Shepherd* v. *Kain,* (1821) 106 ER 1180; *Chartered Bank* v. *Imperial Bank of India,* (1933) 60 Cal. 262 : (1933) Cal. 366.
5. *Peek* v. *Gurney,* (1873) 6 HL 377 (392). **See** for a follow on discussion *Kamal Kant Paliwal* v. *Smt. Prakash Devi Paliwal,* AIR 1976 Raj. 79; *Bains* v. *Ramsahai,* AIR 1940 Lah. 505; *Western India Life Insurance Co. Ltd.* v. *Asima,* AIR 1942 Cal. 412; *Ratan Lal* v. *Metropolitan Insurance Co. Ltd.,* AIR 1959 Pat. 413; *Bappu Rawther* v. *State of Kerala,* AIR 1964 Kerala 109. See the Commentary in Chap. X, under the heading "Suppression of facts".
6. *Budha* v. *Lakmichand,* (1930) 11 Lah. 167 : (1929) Lah. 880.

required.[1] Though a vendor is not ordinarily bound to disclose to the purchaser the defects in the articles he is selling [See Illustrations (a) and (b)], yet, there is a duty on the part of the seller not to conceal the defects, so as not to be visible to the purchaser.[2] Thus, where the defendant, after having sold his property to a third person, sold it again to the plaintiff, with a covenant protecting him from liability for defective title, it was held that there was active concealment within the meaning of this Section.[3] Concealing the identity of the contracting party may also amount to fraud.[4] In *Subramaniam Chetty* v. *Official Assignee*[5], where the brother of an insolvent purchased from the Official Assignee a large number of decrees represented to be worth nothing, it was held that there was no fraud and that the purchaser was under no duty to disclose that one of the decree for a large sum was fully recoverable. [See Illustration (d)]. But where a person in breach of one of the conditions of his employment, secretly joined another firm, and induced a contract between that firm and his employer, the contract was held voidable by the employer because of the active concealment of a material fact.[6]

Merely because a bank customer failed to disclose at the time opening of saving bank account that he his the holder of the money in his own capacity or otherwise, no active concealment of the fact can said to have been made when the banker himself is in a position to demand such information.[7]

2. Representation must be of a fact.—A mere opinion, a mere statement of an intention as to what the other party proposes to do, the mention of his motive in entering into a contract, any hearsay expressions, commendatory expressions, flourishing descriptions, exaggerated statements, or as it is sometimes called dealer's talk, these would not amount to a representation of a fact. **[267]** A representation that certain lands sold will carry 2,000 sheep,[8] a representation that a house is worth Rs. 10,000. A representation that the lands are "very fertile, capable of improvement, have all been held to be mere expressions of opinion or flourishing descriptions. But a statement that vendor gave Rs. 10,000 for the house or that a tenant is a most desirable tenant,[9] have been held to amount to a representation of fact.

3. Made with knowledge of its falsity.—The state of a man's mind in making a representation may fall into one of the following five heads: **—[279].**

1. *Imperial Pressing Co.* v. *British Crown Assurance Corporation,* (1913) 41 Cal. 581 : 21 IC 836.
2. *Morgan* v. *Govt. of Hyderabad,* (1888) 11 Mad. 419; *Jogindra* v. *Chandra,* (1915) 42 Cal. 28.
3. *Akthar Jahan* v. *Hazari Lal,* (1927) 25 ALJ 708 : 103 IC 310 : (1927) All. 693.
4. *Achuta Naidu* v. *Oakley Bowden & Co.,* (1922) 45 Mad. 1005.
5. (1930) MWN 973 : 133 IC 372 : (1931) Mad. 603 (2).
6. *Sedh Mal* v. *Joti Prasad,* (1922) 66 IC 441.
7. *State Bank of India* v. *Jagdish Talkies,* AIR 2008 (NOC) 116 (MP).
8. *Bissett* v. *Wilkinson,* (1927) AC 177.
9. *Smith* v. *Land and House Property Corpn.,* (1884) 28 Ch.D. 7.

(1) A representation made with belief in its truth based upon proper and sufficient grounds;

(2) A representation made with belief in its truth but not based on proper and sufficient grounds;

(3) A representation made, recklessly, carelessly, whether the statement be true or false;

(4) A representation made knowing it to be false but without any intention to deceive; and

(5) A representation known to be false made with intent to deceive.

Of these five, the first is easily a case of Innocent Misrepresentation and the last one of Fraud. The second, for a greater part of the 19th century, was thought to be a case of "Legal Fraud" or "Fraud in law" **[281]** But, with the decision of the House of Lords in *Derry* v. *Peek*,[1] it has been settled that to establish "fraud", moral fraud must be proved **[281]** If a person believes a statement to be true, then he could not be guilty of fraud. If that be so, the second class ceases to exist and must resolve itself into the first category if there be sufficient belief in its truth or into the third class, if there is a total want of reasonable and proper grounds. From this point of view, a reckless or careless mis-statement is also a fraudulent statement, since even though a person does not know the statement to be false, yet the person misrepresents his own state of mind, namely, knowing in his own mind that he is not certain about the fact, yet asserts as if is certain.[2] In the words of Bowen, L.J., "the state of a man's mind is just as much a fact as the state of his digestion." **[283]** Damages cannot be awarded on the basis of recklessness alone since the essence of deceit is dishonesty and in order to establish fraudulent misrepresentation it is necessary to show that the recklessness in making the false representation is such as to amount to a disregard of the truth to the extent that the maker should be regarded as fraudulent.[3] Again, a representation once known to be false, would certainly amount to fraud, even though there is no intention to deceive.[4] **[285]** Thus, where a motor dealer having agreed with the plaintiff, a financier of motor hire purchase transactions to send proposals from prospective customers after taking from them as initial deposit a third of the price of each vehicle in cash, sent up proposals containing recitals that the

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1. (1889) 14 AC 337.
2. *Angus* v. *Clifford*, (1891) 2 Ch. 449; *Smith* v. *Reese River Co.*, (1866) 2 Eq. 264. **See also** *Central National Bank Ltd.* v. *United Industrial Bank Ltd.*, AIR 1954 SC 181 : 1954 SCJ 54: 1954 SCR 391; *Smt. Mani Devi Khenda* v. *State of U.P.*, (1971) All. WR (HC) 82; *Babui Panmato Kuer* v. *Ram Agya Singh*, AIR 1968 Pat. 190.
3. *Witter (Thomas) Ltd.* v. *TBP Industries Ltd.*, (1996) 2 All. ER 573 (Ch. D)
4. *Polhill* v. *Walter*, (1832) 110 ER 34 : 37 RR 344.

deposit had been paid in cash, or cheque—recitals false to the dealer's knowledge, because he had taken promissory notes instead of cash, the court held that the dealer was liable for deceit though he may have honestly believed himself justified in taking promissory notes instead of cash.[1] In the words of Bramwell, B., "Once fraud is proved, the motive of the person is immaterial." It is for this reason that a promise made without any intention to perform is termed fraud.[2]

4. Materially inducing the transaction.—It is also necessary that this fraudulent representation must have induced the other contracting party to enter into the contract.[3] **[286]** If the other party knew the true facts, or was not really misled or if he had an opportunity of knowing the true facts, he cannot complain of the fraud.[4] In this respect, the Indian Law is more strict than the English Law.

Non-disclosure of fact of vasectomy by the widower before the remarriage amounts to fraud vitiating the consent of the remarried wife entitling her to divorce.[5] Where the husband has obtained the assent of his wife for marriage on the false misrepresentation that he is employed in Sugar Factory on a monthly salary of Rs. 1,700/- the wife, who possesses, much higher educational qualification to that of her husband is entitled for a decree for the annulment of marriage.[6]

Where the respondent company indenting to offer dealership to unemployed youth and asked information relating to the status of occupation, not furnishing the information asked for by the appellant amounts to

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1. *United Motor Finance Co.* v. *Romer Dan,* (1937) MWN 1138 : 46 LW 380 : (1937) Mad. 897.
2. **See** *Dagdu* v. *Nana,* (1910) 35 Bom. 93 : 12 Bom. LR 972; *Allahabad Bank* v. *Madan Mohan,* (1917) 39 IC 169 : 14 PR 1917; *Ex. p. Whittaker,* (1875) 10 Ch. App. 446.
3. *Redgrave* v. *Hurd,* (1881) 20 Ch.D. 1; *Smith* v. *Chadwick,* (1883) 9 AC 187. **See also** *Ningawwa* v. *Byrappa Shiddapa Hirekurabar,* AIR 1968 SC 956 : 1968 (2) SCR 797; *Pratap* v. *Puniya Bai,* AIR 1977 MP 108; *Heskell* v. *Continental Express,* 1950 1 All. ER 1033 (where the Court had pointed out that the plaintiff cannot avoid giving the particulars); *People's Insurance Co. Ltd.* v. *Sardul Singh,* AIR 1962 Punj. 543; *Laksmidwar* v. *Sachitkumar,* (1969) 73 CWN 1001; (An expression of opinion by itself does not constitute fraud); *Shri Krishan* v. *Kurukshetra University,* AIR 1976 SC 376 : (1976) 1 SCC 311 : 1976 (2) SCR 722 : 1976 UJ 15; *Nand Kishore* v. *Munni Bai,* AIR 1979 MP 45; *Harbhajan Singh* v. *Brij Balab Kaur,* AIR 1964 Punjab 359; *Kapila Textile Mills Ltd.* v. *Madhava & Co.,* AIR 1963 Mys. 39; *Bimla Bai* v. *Shankar Lal,* AIR 1959 MP 8.
4. *Shri Krishan* v. *Kurukshetra University,* AIR 1976 SC 376; **see also** *Kshatriya* v. *Vice-Chancellor,* AIR 1967 MP 194; *Kamal Kant Paliwal* v. *Smt. Prakash Devi Paliwal,* AIR 1976 Raj. 79 : 1975 WLN 429 : 1975 Raj.LW 363.
5. *Bindu Sharma* v. *Ram Prakash Sharma,* AIR 1997 All 429, 432 (DB) : 1997 All. LJ 2309 : 1997 (31) All. LR 20 : 1997 Marri. LJ 570 : 1997 (2) All WC 1203 : 1997 (1) DMC 631.
6. *P.J. Moore* v. *Valsa,* AIR 1992 Ker. 176 : 1992 (1) ILR (Ker.) 254.

suppression of material information entitling the respondent to rescind the contract of dealership.[1]

Where the appellant applied for the dealership of Indian Oil Corporation Ltd., a retail outlet suppressing the information relating to the three pending criminal cases, the fact that at the time of enquiry he was acquitted in those cases is unacceptable and the action of the authority in refusing the allotment of dealership is proper.[2]

INTENT TO DECEIVE.—The Judicial Committee [3] has pointed out that in an action for damages based on deceit, the intention to deceive is not necessarily an intention to injure or to cheat, and if a person makes a statement to another which he knows to be untrue and he does so with a view to induce such person to enter into the contract, and such person acts in reliance on such statement, sufficient foundation is laid for an action of deceit. Where the validity of consent is questioned on the allegations of fraud having been practised, the allegation is not acceptable when the earlier pleadings or depositions of the person giving such consent are silent about the allegation of fraud.[4]

5. **Causing damage.**—Unless there is damage no action for fraud can be sustained. **[290]**

Action for fraud.—Particulars.—Where a litigant prefers charges of fraud, the tribunal which is called upon to decide the issue should compel the litigant to place on record precise and specific details of the charges.[5] The Code of Civil Procedure (Or. 6, R. 4) provides that particulars of fraud should be given in the pleading. General allegations, however strong, will not suffice.[6] A charge of fraud must be substantially proved as laid, and when one kind of fraud is charged another kind of fraud cannot, on failure of proof, be substituted for it.[7] The party seeking the annulment of decree on the ground of fraud is under an obligation to specifically state the particulars as to how he was kept

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1. *B.R. Chowdhury* v. *Indian Oil Corpn. Ltd.*, (2004) 2 SCC 177.
2. *Sanjay Richharia* v. *Director, Indian Oil Corporation Ltd*, 2004 (1) CTLJ 240 (MP) (DB).
3. *United Motor Finance Co.* v. *Addison & Co.*, (1937) 1 MLJ 432 : (1937) MWN 97 : 45 LW 179 : (1937) ALJ 244 : 41 CWN 482 : 39 Bom. LR 706 : 166 IC 790 : (1937) PC 21; *Thammana Peda Thatayya* v. *Bhagawandas Atma Singh*, (1970) 1 An. WR 75.
4. *Tapan Ranjan Das* v. *Jolly Das*, AIR 1990 Cal. 353 : (1990) 1 Cal. LJ 361.
5. *Bharat Dharma Syndicate* v. *Harish Chandra*, (1937) 2 MLJ 650 : ILR (1937) All. 566 : 41 CWN 746 : (1937) MWN 744 : 46 LW 745 : 39 Bom. LR 963 : (1937) PC 146.
6. *Gunga Narain* v. *Tiluckram*, (1888) 15 Cal. 533; *Tilak* v. *Srinivas*, (1915) 39 Bom. 441.
7. *Abdul Hossein* v. *Turner*, (1887) 11 Bom. 620; **see also** *Bishundeo Narain* v. *Seogeni Rai*, AIR 1951 SC 280; *Narayan Chettiar* v. *Official Assignee*, AIR 1941 PC 93; *Union of India* v. *C.M. Patel & Co.*, AIR 1976 SC 712 : 1976 (2) SCR 902 : (1976) 1 SCC 747 : 1976 SCC (Cr.) 179.

out of knowledge of his rights by the fraudulent acts of the other party and the time when he discovered it.[1] Where the sale deed is alleged to have been executed by the plaintiff as a result of fraud, it is for the plaintiff to prove the same and no burden of proof lies on the defendant to prove that deed in question was genuine and supported by consideration.[2]

Where the plaintiff alleged that in view of the confidence reposed by him in the defendant he gave consent for the execution of power of attorney but the defendant misusing his consent got the sale deed executed, the allegation of the plaintiff stands uncontroverted.[3]

Rescission of contract : Where a rustic illiterate lady is shown to have executed the sale deed as a result of fraud practiced on her, the plea for the rescission of part of contract cannot be allowed unless there is possibility of the part being severable from the rest of the contract and therefore the entire sale deed is liable to be cancelled.[4]

18. "Misrepresentation"defined.—"Misrepresentation" means and includes—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing, which is the subject of the agreement.

Misrepresentation.—Innocent misrepresentation or invalidating misrepresentation must be a positive assertion of a fact, which is not warranted

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1. *Yog Raj* v. *Kuldeep Raj Gupta,* AIR 1991 J&K 26.
2. *Bodugu Venkata Durga Rao* v. *Surneni Lakshmi,* 2001 (1) ALT 115.
3. *Markande* v. *Sudama Chaubey,* AIR 2007 All. 70 : 2007 AIHC 963 :2007 (1) ALJ 556 : 2007 (66) All LR 441.
4. *Jibrail Mian* v. *Lalu Turi,* AIR 2004 Jhar 139 : 2004 (4) Civ LJ 393 : 2004 (3) JCR JHA 139.

by the information of the party.[1] It must not be mere opinion [2] or hearsay or in the nature of commendatory expression. There must be a representation,[3] and in a case of mere silence, it must be under circumstances where there is duty to speak.[4] In *Emperor* v. *Biswan Das*, one *B* sold certain immovable property to Babulal. The purchaser subsequently discovered that the property was mortgaged. The deed was silent as to the prior circumstances. The purchaser sought to prosecute the vendor. The Court observed, "Illustration (a) of Sec. 17 of the Contract Act is as follows. *A* sells by auction to *B* a horse which *A* knows to be unsound A says nothing to B about the horse's unsoundness. This is not fraud in *A*". The same is the law in England. In the case of *Horsfall* v. *Thomas* [5] Bramwell, B says: "The fraud must be committed by the affirmer of something not true within the knowledge of the affirmed or by the suppression of something which is true and which it was his duty to make known". A representation must really induce or influence the party to enter into the contract, or as it was called, (in a case where a quantity of hops was sold on the representation that no sulphur had been used;)[6] a Preliminary stipulation,' in the contract. **[261]**

Sub-section (i).—In *Mohanlal* v. *Shri Gungaji Cotton Mills Co.*[7] where a person on the strength of mere hearsay information, positively asserted that a certain third party was going to be the director of a company to be incorporated and shares were taken on the faith of such statement. The Court held that the assertion was not "warranted.' But in *Hope Prudhomme Ernest Max*[8] a statement by a person that he was well known to a certain bank in the city was held to be only an opinion as to the state of his credit and insufficient to avoid the contract.

The misrepresentation may be as to the legal effect of a clause in a document as in the case of *Pratap* v. *Mohendranath.*[9]

Sub-section (ii).—In the view of Sargent, J, in *Oriental Bank Corporation* v. *Flemming,* [10] this sub-section is meant to embrace what are sometimes called cases of 'constructive fraud' in English Law.

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1. *Peek* v. *Gurney,* (1873) 6 HL 377.
2. *Bissett* v. *Wilkinson,* (1927) AC 177.
3. See the discussion is Vol. I in Chap. X under "Innocent misrepresentation".
4. *Horsfall* v. *Thomas,* (1862) 158 ER 813 : 130 RR 394; followed in *Impure* v. *Bishanlal,* 21 All. 561; *Karachi Municipality* v. *Bhajraj,* 30 IC 994.
5. (1862) 1 H&C 90.
6. *Bannerman* v. *White,* (1861) 142 ER 685; *Redgrave* v. *Hurd,* (1881) 20 Ch.D. 1.
7. (1899) 4 CWN 369; *Currie* v. *Rennick,* (1886) 41 PR.
8. (1915) 29 IC 575.
9. (1889) 17 Cal. 291; (PC) 16 IA 233; *Thiagraja Mudaliar* v. *Vedathanni,* AIR 1933 Mad. 48 : 63 MLJ 707.
10. (1879) 3 Bom. 242.

Sub-section (iii).—In *Oceanic Steam Navigation Co.* v. *Soonderdas* [1] a wrong representation about the tonnage of a vessel was held to have induced a mistake as to the substance of the thing. Similarly, where directors of a company sold certain bills of exchange, signed by them alone, thereby giving the impression that they had power to bind the company, it was held they had made a misrepresentation within the meaning of this clause. [2]

In *Gopinath* v. *Kasinath,* [3] where land contracted to be sold been represented to be leasehold in perpetuity, but was in fact newly assessed land, the Court held the contract voidable. But where the plaintiff sold to the defendant a parcel of land described specifically with reference to boundaries and survey numbers and area, and later on discovered that the area was more than that agreed to be sold, and sued to recover the excess, it was held that the area was not the governing portion of the description so as to come within the meaning of the words, "the substance of the thing."

Where the Financial Corporation advancing loan to the petitioner's deceased husband for an industrial unit has offered to the loanee to clear the loan and to retain the unit in order to prevent the auction of the unit, the payment made by the petitioner widow to prevent auction cannot be forfeited by the respondent corporation as against the loan advanced to her husband when the agreement of loan was not executed by herself.[4]

The respondent LIC having issued life insurance policy after the insured having undergone medical examination by its doctor who found no signs of physical disorder, the respondent on the death of the insured as a result of jaundice cannot wriggle out of the contract stating that the contract is void or voidable on the ground of misrepresentation as to the health of the insured. [5]

Representation means a statement of facts relating to a particular transaction. It implies a *factum* not *faciendun* (doing some act). A statement of law or intention is not representation.[6] The law laid down by the Bench of the Allahabad High Court is in the following terms :

The purchase of shares is governed by the same law as purchase to goods. Even a person who has agreed to become a shareholder of a Company

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1. (1890) 14 Bom. 241; Cf., 15 Bom. 389. **See also** *Kala Mea* v. *Harperink,* (1909) 36 Cal. 323; *Rustomji* v. *Vihayak,* (1910) 35 Bom. 29.
2. *In re. Nursery Spinning and Weaving Co.,* (1880) 5 Bom. 92; (Cf.) *Thomas* v. *Hanuman Prasad,* (1929) ALJ 1122 : (1929) All. 837; *Ratan Singh vs Nanikram,* (1927) Sind 219; 20 SLR 220; *Alla Baksh* v. *Barrow,* (1917) 38 IC 500.
3. (1932) Bom. 51 : 33 Bom. LR 1377.
4. *Sita Devi* v. *Bihar State Financial Corpn.,* AIR 2003 Pat. 92 : 2003 (3) BLJR 965 : 2003 (2) Pat LJR 453.
5. *Meena Sahu* v. *Life Insurance Corporation of India,* AIR 2006 All 156 : 2006 (2) Civ.CR 560 (All) : 2006 AIHC 78 (NOC) : 2006 (4) CivLJ 20 : 2006 (2) ALJ 328.
6. *Shiromani Sugar Mills Ltd.* v. *Debi Prasad,* AIR 1950 All. 508.

is liable to pay the price of the share in accordance with the articles of the Association, unless such person is induced to enter into the contract by fraudulent misrepresentation, in which case, he is entitled to rescind the contract provided he does so within a reasonable time. The misrepresentation must be of a material fact, the shareholders must have been induced by it and he must plead and prove so. The case arose when the Company was wound up and when the official Liquidator instituted proceedings to recover the balance of the allotment of First and Second call monies. The defendant contended, stating that (1) the original contract for the purchase of the shares was procured by the promoters of the Company by fraudulent misrepresentation; (2) that the promises held out to the opposite parties at the time of the purchase were not carried out by the Company and consequently the opposite parties were justified in not making further payment; (3) that the resolutions passed by the Directors allotting the shares to the opposite parties were invalid because the Directors voting for the resolutions had ceased to be Directors and (4) that the resolutions forfeiting the shares also were invalid for the same reason.

The Trial Judge upheld all these contention of the defendants. The Official Liquidator preferred a C.R.P. in the High Court, because the suits were filed in the Small Causes Courts. The Judges relied upon a number of English cases on the point. The legal position has been stated by the learned Judges and to facilitate the work of busy lawyers, the relevant passages are extracted as under:

> "The misrepresentation must be of a material fact, the share-holder must have been induced by it and he must plead and prove so. James, L.J. observed [1] that the misrepresentation 'must be a misrepresentation of a matter of fact.' A share-holder, "cannot obtain relief without distinctly alleging and proving that the particular statement was a material inducement to his purchasing his shares." "The precise misrepresentation must be distinctly stated and also that it formed a material inducement to the plaintiff to take shares in the company",[2] as per Lord Chelmsford, L.C. In that case, the plaintiff did not allege and prove that he "read the prospectus in a sense which involved an untruth, that it led him into an erroneous belief of the existence of a certain state of facts, and that this belief was a material inducement to him to become a purchaser of shares in the company", and the Lord Chancellor dismissed his suit. To adopt his Lordship's

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1. *Eaglestiewl* v. *Marquis of Londonderry,* (1877) 4 Ch.D. 693 at p. 709 (35) LT 822.
2. *Hallows* v. *Fernie,* (1867-68) 3 Ch. A. 467 at p. 477; 18 LT 340.

language "whatever may be the fair meaning of the prospectus and even if the plaintiff's construction of it is correct he can only be entitled to succeed secundum allegate et probata" (page 478).

The learned Judge has relied mainly upon one misrepresentation in the prospectus. It is the sentence, "The Managing Agents with their friends promoters and directors have already promised to subscribe shares worth Rs. 6,00,000" printed in red on the cover of the prospectus. The opposite parties did not specifically plead that it is a misrepresentation and that they were induced by it to purchase the shares. There is no proof, and of course there is no finding of the learned Judge that the Managing Agents with their friends, promoters and directors had not promised to subscribe to shares worth Rs. 6,00,000. I do not know how this statement could be assailed as a misrepresentation of fact. The only fact asserted was of the existence of promise. Unless it were false, there was no misrepresentation of fact. It was not asserted that the Managing Agents etc., had subscribed to shares worth Rs. 6,00,000. When it was said that they had only promised, it meant that they had not carried out their promise, otherwise the statement would have been that they had already subscribed to shares worth Rs. 6,00,000. Nobody should have been misled by this statement and nobody should have understood it to mean that shares worth six lacs of rupees had already been subscribed to. If the opposite parties misunderstood this statement to mean that the shares had already been subscribed to and applied for shares under that misapprehension, they are to blame themselves and not the promoters of the company. In *Smith's case,*[1] the prospectus contained the statement that the property, which the company had contracted for, consisted of 50 acres of land "containing several very valuable claims, some of which are in full operation, and making large daily returns". No claims were in full operation and the statement to the contrary was false. But it was based on a report received and honestly believed by the Directors. Sir G.J. Turner, L.J. held that it was a misrepresentation of fact and observed at page 611 :

"If the company had confined themselves to saying we have received reports from which we believed, have reason to believe that these mines are in full operation and are making daily large returns, it might and no doubt would have been very difficult for Mr. Smith to be relieved from the contract, but the company instead of thus referring to the information received stated the circumstances as fact". What the directors could have said in that case to avoid their liability was stated by the directors in the present case.[2] The prospectus contained statements that

1. (1867) 2 Ch. A 604
2. *Hallows* v. *Fernie,* (1867-68) 3 Ch. A. 467 at p. 477; 18 LT 340.

the company would commence operations with six screw steamships of 20,000 tons and 300 h.p. each and having capacity of 2,000 tons of cargo and that the steamers were guaranteed to steam 10 knots and being full rigged as clipper sailing ships were calculated to perform the voyage regularly from *F* to *R* in 25 days. Actually no steamships were in possession of the company when the prospectus was issued and it had not even entered into any contract for obtaining them. So it was contended that the statements were misrepresentations of fact, but the contention was overruled. Lord Chelmsford, L.C. held that the prospectus did not announce to the public in clear and unequivocal language that the promoters of the company actually possessed, or had contracted for the possession of 6 ships of the description mentioned.

His Lordship observed at p. 475:

"There is a material distinction between the employment of words in a prospectus which can bear only one meaning and of those which are equivocal, and which different persons may interpret differently. In the latter case no prudent person would act upon his construction without some inquiry. In construing a prospectus, the preliminary character of the document must always be taken into consideration. Every one knows that it is intended to usher a company into existence and not to describe its actual formation; no one is surprised to find that a future sense must be given to words in the past or present tense which it contains".

His Lordship further observed at p. 476:

"After the elaborate examination of this first part of the prospectus in the argument before me, its meaning cannot be regarded as so entirely free from doubt, that a person has a right, without inquiry, and acting entirely upon his own views of its proper construction to purchase shares in the company and then complain that he has been deceived. Because, if the words are susceptible of different meanings, he is deceived not by the words, but by his construction of them".

When there is an absence of proof that the Managing Agents etc. had not made the promise the existence of the promise is not falsified by the breaking of it. The Managing Agents etc. might not have kept either promise but the opposite parties are not entitled to say that they were misled by their promising. Every document, as against its author must be read in the sense,

which it was intended to convey. As observed by Lord Chelmsford[1] a prospectus may contain statements, which are perhaps literally true, yet really false in the sense in which the promoters should know, they would be understood by the public. The promoters in the present case could not possibly have intended the impugned statement in the prospectus to mean that shares worth Rs. 6,00,000 had already been subscribed to. Even if it amounted to misrepresentation, there is no proof that it induced the opposite parties to buy the share. The learned Judge has mentioned that the Directors had not paid the application money for the qualification shares. This is immaterial. The Directors had two months within which to acquire the qualification shares. If their names were mentioned in the prospectus without their having acquired the qualification shares, it does not mean that it contained a misrepresentation of fact. Even if the Directors did not acquire the qualification shares within two months, Art. 157 of the articles of Association forced the shares upon them. It is stated in the prospectus that "our shareholders will be highly and satisfactorily benefited by way of dividend."

There is also the evidence of a Director to the effect that the shareholders were told that the company would start its work of producing sugar very soon. These are not representations of fact. Some amount of puffing must be allowed in a prospectus; it must not amount to misrepresentation of fact. It is stated in Palmer's Company Law, 19th Edition, p. 347: "This statement that something will be done is not a statement of an existing fact so much as a contract or promise. It may, however, imply the existence of facts which are non-existent, or it may be a material term in the contract."

The statements in question do not imply the existence of facts, which were really non-existent, and there is no evidence that they formed a material term in the contract.

The learned Special judge has taken notice of certain non-disclosures in the prospectus. Under Sec. 93 Companies Act a prospectus must state the number of shares fixed by the Article as the qualification of Director, the names and addresses of the vendors of any property purchased or acquired by the company, and the debts of, and parties to, every material contract. The prospectus does not contain this information. But there is no penalty prescribed in the Act for non-compliance with the provisions of Sec. 93. When the non-compliance involves misstatement of a material fact, there will, of course, be a right of rescission under the general law. But otherwise the omission of any of the particulars will not *per se* entitle a shareholder to rescission of his contract to take shares. It will not do for promoters of a

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1. *Feek* v. *Gurney,* (1873) 6 HL 377 at p. 386; 43 LJ Ch. 19.

company to plead that every thing, which is stated in the prospectus, is literally true; they must be able to meet the objection.

"Not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted the very concealment of which gives to the truth which is told the character of falsehood" [1] per Lord Chelmsford, L.C. "Half a truth is no better than a downright falsehood [2]". Again [3] if there is such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false, it would form ground for an action for misrepresentation. [4] Avory, J. held the prospectus to be false because—

> "The falsehood in this case consisted in putting before intending investors, as material on which they could exercise their judgment as to the position of the company, figures which apparently disclosed the existing position, but in fact hid it"(p. 448). Judged according to these authorities, the omissions in the present case do not amount to a misrepresentation, what is left out does not make what is stated false."

The Madhya Pradesh High Court had occasion to deal with the same question in a different context.[5] The facts were as follows:

One Haji Zehiruddin of Bhopal held a mining lease dated 29-5-23 of 189.76 acres of land in Chindwara for extracting coal. This lease was transferred on 4th September 1940 to the respondent. The respondent was anxious to acquire some land from two adjacent collieries. After protracted negotiations, the State Government agreed in 1947 to grant their consent to the transfer of the adjacent lands to respondent subject to the condition that the respondents took a consolidated lease for the whole area at an enhanced rate of royalty. The respondent agreed and executed an agreement dated 11th January 1949 (Ex. P-3) by which the royalty rate was raised from Rs. 5 per ton to Rs. 10 per ton. The respondent started working the mines, though no formal mining lease was executed as contemplated. The State Government claimed Rs. 40,865 being the difference between the old and new rates of royalty on the coal removed. The respondent paid the sum on different dates in February and March 1950. He brought this suit for refund of the extra amount so paid with interest.

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1. *Oakes* v. *Turquand,* (1867) 2 HL 325 at p. 342; 36 LJ Ch. 949.
2. *Glucksten* v. *Barnes,* (1900) AC 240 at p. 250.
3. *Peek* v. *Gurney,* (1873) 6 HL 317 : 43 LJ Ch. 19.
4. *Rex* v. *Kylsani,* (1923) 1 KB 442 : 101 LJKB 97.
5. *State of Madhya Pradesh* v. *M. Hassonjee & Sons, Nagpur,* AIR 1957 MP 135.

The case of the plaintiff was that he was liable to pay royalty at the rate of Rs. 5 per ton only as the agreement to pay enhanced rate of royalty was void inasmuch as it contravened Rule 50 of the mining rules then in force and also because it was contrary to the provisions in Sec. 4 and rules made under Sec. 5 of the Mines and Minerals (Regulation and Development) Act, 1943.

It was contended that the agreement was executed on a representation from the State Government that the Mining rules were being amended to raise the rates of royalty. Ultimately the draft amending rules, which had been published for this purpose, was not brought into force.

The agreement was hence pleaded to be void as having been obtained by a misrepresentation. These contentions had been accepted by the trial Court and the suit had been decreed. Hence this appeal.

In para 11 of the Judgment the learned Judges dealt with the contention relating to the higher demand of royalty in the following words:

> "We may refer to the correspondence between the parties regarding the demand for higher rates of royalty. On 4th June 1947 (Ex. P. 8) the Government had informed the plaintiff that they agreed to grant him a lease. "On condition that he will take a consolidated mining lease over the whole area *i.e.*, 51.45+8=59.45 acres on the new rates *viz.*, royalty at 10 per cent of the pit's mouth value subject to a minimum at the rate of Rs. 8 per ton".

On 25th June 1947, the plaintiff wrote (Ex. D-10) that he fully agreed to the 'revised rates of royalty' provided it was charged on 8 acres only. Ultimately on 27-9-47, the plaintiff replied (Ex. D-8) agreeing to 'the revised rates of deed rent and royalty'. Finally on 6-1-1948, the plaintiff accepted (Ex. P-12) the terms of Government and asked for permission to start working pending execution of lease.

The letter Ex. P-8, dated 4-6-47 in which the new rates were proposed is "By order of the Governor'. From this correspondence, it is clear that the Government had deliberately raised the rates of royalty and plaintiff accepted them knowing the full implication. The draft amendments dated 12-7-47 (Ex. D-13) issued 'By order of the Governor' continued the same policy of raising royalty.

It can be presumed from this correspondence between parties that the Governor had sanctioned the higher rates of royalty in this case. It will thus appear that the rates charged are in consonance with the mining rules in view of the specific power given to the Governor in R-1 to depart from the rules whenever he thought it fit to do so".

The effect of the representation was adverted to by the learned Judges in para 19 in the following manner—

> "It is true that in the correspondence reference has been made to the contemplated new policy. At that time, the Government seriously intended to change the rates of royalty as is evident from the publication of draft rules (Ex. D-13). The idea was subsequently given up.
>
> We do not think that this would amount to a misrepresentation about any material term of the contract. The terms of the contract were clear to both the parties and it was entered into voluntarily with full realization about their implications. The reasons which compelled the Government to demand higher rates for royalty may have become non-existent at a subsequent date; but that would not affect any of the terms of the contract."

This judgment of the Madhya Pradesh High Court was affirmed by the Supreme Court in *Hassanji & Sons* v. *State of Madhya Pradesh.*[1]

The vendee under a sale deed sued for damages for breach of express covenant of indemnity, and in that connection, the Division Bench of the Kerala High Court[2] dealt with Sec. 17 and 18 of the Act. The facts as noted in the judgment are:

"The property in question which is scheduled as Item I to the plaint is a garden land 78 cents in extent in Edava Pakuthy in Chirayinkil Taluk. along with other properties it was the subject-matter of a partition suit in O.S. 705 of 1105 [M.E.] on the file of the Attingal Munsiff's Court, among the members of an Ezhava Tarwad, who are represented in this suit as defendants 1 to 34. Defendants 29 to 34 who were the plaintiffs in that suit, claimed the property to be common tarwad property and as such available for partition while the 1st defendant set up the exclusive title of his sakha comprising the defendants 1 to 3.

> According to the 1st defendant it was an acquisition of Kurumpa Nachi whom he put forward as the sister of grandmother of his mother and had developed in due course of succession on his sakha alone. Pending that suit O.S. 705, the first defendant, his mother Chirutha Kali and uncle Raman Sankaran sold the property under Ex. B sale deed dated 4-5-1105 [M.E.] to

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1. AIR 1956 SC 470.
2. *Sayu Mohammed Abdulla* v. *Neelakantan Krishnan,* AIR 1958 Kerala 322.

Navoor Pathummal, deceased and she was accordingly made the 32nd defendant in that suit. The issue as to title, which so arose in O.S. 705 was disposed of by the trial Court in favour of the common tarwad, vide Ex. I Judgment, dated 29-6-1110. [M.E.] The District Judge in appeal held to the contrary and favour of the 1st defendant's sakha but in second appeal S.A. 176 of 1114 [M.E.] the High Court restored the decision of the Munsiff. Vide Ext. II, judgment, dated 8-4-1119. [M.E.] By the final decree in the partition suit 6-3/8 cents alone of Item I was allotted towards the share of the vendors under Ext. B and directions were given for the rest of the item from Navoor Pathummal. The plaint averred that Ex. B sale was taken in the name of Navoor Pathummal for and on behalf of the Muslim Marumakkathayam tarwad of the plaintiffs 1 and 2 and defendants 35 to 46 to which she belonged and that she was persuaded to purchase the Property under Ext. B by false and fraudulent misrepresentation as to title made by the vendors.

The plaint went on to say that as a result of the ultimate decision in the partition suit, Item I except to the extent of 6-3/8 cents was in danger of being lost to the plaintiff's tarwad and that the defendants 1 to 34 were therefore bound to answer for all the plaintiff's loss of the balance of Item I as estimated on the basis of the total sale price of Rs. 3,900 and the value of improvements of Rs. 1500 and also charged on such balance".

The High Court referred to the finding given by the lower Court in para 4 of the judgment namely:

"The Court below found that there was no absolute guarantee as to title made by the vendors in Ext. B sale and further that to the extent they had affirmed therein the origin of their title, they were only acting under a *bona fide* belief. The Court below therefore absolved the vendors of any fraudulent misrepresentation in the matter of the execution of Ext. B. It also found that the clause as to indemnity contained in Ext. B did not cover a loss of title or possession as it actually developed under Exts. I and II Judgments".

Later, the High Court referred to the recitals in the sale deed in question, which was marked as Ext. B in the case. The learned Judges observed:

"The assertion therefore, in Ext. B that the property belonged to the vendors, thereby implying that they could convey good title thereto, cannot but be false to the knowledge of the vendors. They were in fact foisting the property on an innocent

> Muslim lady and that after the controversy as to its partiability as common tarward property had already started. They may not have represented in so many words that they had the fullest rights (original in Malayalam omitted-Ed.) in the property; they may have stoutly asserted their exclusive title during the partition litigation but these, to our mind, can hardly satisfy the test as regards their *bona fides*. Section 18 of the Indian Contract Act defined misrepresentation so as to mean and include: "The positive assertion, in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true". The High Court of Calcutta had held: "that an assertion cannot be said to be warranted" 'for the present purpose where it is based upon mere hearsay'. See *Mohanlal* v. *Shri Gungaji Cotton Mills Co.*[1] That is to say, the person making the representation should entertain the belief as to truth not merely having some reasonable ground but founded on the best information that is available. This decision may have gone further than what the framers of the Act intended. But there can be no doubt in this case that the representation as to title made by the vendors was made recklessly or with gross negligence as to come within the more liberal rule laid down by the House of Lords in *Derry* v. *Peek.*[2] They cannot thus escape the charge of fraud levelled against them. We hold therefore that the plaintiffs have established the case of fraudulent misrepresentation with which they started and are entitled to claim consequential remedy by way of damages".

The Orissa High Court[3] considered a situation, where one of the contracting parties had the means of discovering the truth, with ordinary diligence, of the representation made by the other party. The case arose under the following circumstances—Plaintiff claimed refund of Rs. 1,100 paid as security deposit. He was a forest contractor and gave a bid for Sikerput Selection Coupe No. 4. His was the 2nd highest bid and ultimately his bid was accepted. An agreement (Ex. 5) was executed on 3-11-1954 and the security deposit was made on that date. His work was suspended for sometime by unnecessary interference by the defendant. By the auction sale, 1193 sound and 1874 defective standing trees were sold. Plaintiff felled 500 normal trees and converted those into logs. Out of 1,200 logs, only 175 were sound and the rest

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1. 4 Cal. WN 869 (C).
2. (1889) 14 AC 337 (D).
3. *Governor of Orissa State* v. *Shiva Prasad Sahu,* AIR 1963 Orissa 217.

were found to be hollow or worthless. In consequence of the facts found by the plaintiff that out of 1200 logs, only 175 were sound he came to the conclusion that the trees in the coupe were not upto their specification or making as per the Forest Contract Agreement and that the working of the coupe was certain to land him in utter and ruinous loss and, therefore, he stopped the working of the coupe. The defendant resisted the case contending that the plaintiff was an old forest contractor working in the neighbouring coupe and must have inspected in coupe in question and satisfied himself before bidding in the auction sale. The defence case was that it was not possible to say accurately which tree would turn to be sound and which would be defective from external appearance. Often unsound trees turn out to be sound and the sound trees to be unsound. The sale notice was published giving full and accurate descriptions of the trees intended to be sold and if the trees marked and numbered as sound ultimately proved unsound, the defendants were not to be blamed for it.

The High Court laid down:

> "The learned District Judge's view of misrepresentation is also not correct. Misrepresentation has been defined in Sec. 18 of the Contract Act; Section 18 (1) lays down, Misrepresentation means and includes (1) the positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true".

It is well settled that misrepresentation may be innocent. But such innocent misrepresentation does not cause avoiding a contract unless the representation is made without reasonable ground. The learned District Judge held that there was no misrepresentation on the part of the defendant on the wrong view of law that misrepresentation must be wilful. Even if it is not wilful, yet there will be a cause of action if the misrepresentation is not based on reasonable ground. In this case, the question of misrepresentation does not at all arise. Defendant marked certain trees as sound from the external appearance and therefore it cannot be characterised as misrepresentation at all. Even assuming that it is misrepresentation exception to Section 19 of the Contract Act applies to such a case. The section runs as follows:

> "When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

Exception—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence". It is now well settled by

authorities that the word "fraudulent" does not qualify misrepresentation. In *Niaz Ahmed* v. *Parosottam Chandra,*[1] their Lordships observed:

> "If the expression "fraudulent" within the meaning of Section 17 qualifies "misrepresentation", the result would be that due diligence would be required in the case where misrepresentation became fraudulent, but would not be required when the misrepresentation fell within Sec. 18 and was just short of fraud, for the exception would be confined to the former kind only. This would be a startling result". Their Lordships therefore held that in the case of an active misrepresentation knowing that fact to be false, as distinct from mere silence or concealment, it is not incumbent upon the party defrauded to establish that he had no means of discovering the truth with ordinary diligence. The same view has been taken in *J.M. Apcar* v. *V.N.C. Malchuse,*[2] and *Venkataratnam* v. *Sivaramudu.*[3] I have already held that in this case there was no misrepresentation at all. Even assuming that there was misrepresentation, it was an innocent misrepresentation and exception to Sec. 19 will directly apply to such misrepresentation which is not fraudulent, and the plaintiff had the means of discovering the truth with ordinary diligence. If the plaintiff had addressed a letter to the Department enquiring as to whether they had marked those trees as sound after scientific investigation, he could have easily known that the soundness was determined only with reference to the external appearance. Without doing anything of the sort, plaintiff worked under a hallucination and finding that he would be put to a loss, as good logs were not turned out wanted to avoid the contract under various pretexts unsupportable in law. Moreover in the sale notice the bidders were given warning that they should inspect the growth and area of the coupe before bidding and no objection was entertainable after the confirmation of sale. Plaintiff's case appears to be wholly frivolous".

A release deed was challenged as having been obtained on misrepresentation. The Supreme Court dealt with this aspect of the matter in the following manner[4]:

> "In this appeal, the question is whether a deed of release was vitiated by misrepresentation and if not whether it operated

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1. AIR 1931 All. 154.
2. AIR 1939 Cal. 473.
3. AIR 1940 Mad. 560.
4. *Kuppuswami Chettiar* v. *S.P.A. Armugam Chettiar,* AIR 1967 SC 1395 : 1967 (1) SCR 275.

as a conveyance of the suit properties in favour of the respondents. By a will dated August 9, 1931, their grandfather Ponnuswami bequeathed the immovable properties to his paternal uncle's daughter Kannammal. In January 1952, the respondents instituted OS No. 24 of 1953 against several persons including Kannammal challenging *inter alia* the validity of the bequest made by Ponnuswami. On February 1, 1952, Kannammal died leaving as her heir the appellant who was her husband's brother's son. On February 25, 1952, the appellant executed a deed Ex. B-1 in favour of the respondents releasing the suit properties including certain outstanding due from third parties. On February 26, 1952 the deed was registered. On the same date, the respondents filed an application in OS No. 24 of 1953 asking for an order that in view of the release deed the properties be removed from the scope of the suit and the plaint be amended accordingly. This application was allowed by the Court on January 22, 1953, the respondents instituted OS No. 174 of 1953 for the recovery of one of the outstanding mentioned in the release deed against the debtors. They impleaded the appellant as a defendant to the suit and stated that in view of the release deed they were entitled to recover the debt. The appellant filed a written statement alleging that the release deed was invalid and the suit was not maintainable. The suit was decreed by the Munsif. On January 31, 1955, the appellant instituted the present suit asking for a decree for setting aside Ex. B-1, recovery of the suit properties and accounts. He alleged that Ex. B-1 was vitiated by misrepresentation, fraud, deceit and undue influence. His main contention was that he was induced to execute the deed on the representation that it was a power of attorney authorising the respondents to manage the properties on his behalf. He also submitted that Ex. B-1 being a deed of release could not take effect as a conveyance. The respondents disputed these contentions. The trial Court held that though the release deed was not vitiated by fraud, deceit or undue influence, it was procured by misrepresentation and also that it did not effectively convey the properties. On these findings, the trial Court decreed the suit. The High Court set aside the findings of the trial Court and dismissed the suit. The appellant now appeals to this Court on a certificate granted by the High Court.

The High Court held and in our opinion rightly that Ex. B-1 was not vitiated by misrepresentation and the appellant was well aware of the nature of the deed when he executed it. The appellant is somewhat deaf of hearing. But he is a wealthy and shrewd money lender and capable of managing his affairs. He

took the draft of the deed to his own lawyer and after obtaining legal advice, executed it. He himself presented the deed for registration. He received no consideration for the release. But the motive for the release was the pending litigation and the fact that the properties originally belonged to the family of the respondent. Having regard to the release the respondents immediately applied in the pending suit for removal of the properties from the scope of the suit and for the consequential amendment of the plaint. After the execution of the deed, the appellant never asked for accounts, nor cared to ascertain how the respondents were managing the properties. In the written statement filed in O.S. No. 174 of 1953, he took the plea that the deed of release did not effectively pass title to the outstandings, but he did not then say that it was vitiated by misrepresentation. His present plea that the deed was induced by misrepresentation is an afterthought. In agreement with the High Court, we accept the testimony of the respondent's witnesses and we reject the evidence of the appellant and P.W. 2. The onus is upon the appellant to establish the plea of misrepresentation. He has failed to establish this plea".

The Madras High Court had an occasion[1] to consider the materiality of fact in respect of an Insurance Contract. The relevant portion of the judgment, wherein the learned Judge noticed that the common law principle as to the materiality was applied to Insurance Contracts also, is as follows:

"The plaintiff who was unsuccessful in both the Courts below has filed this second appeal. The suit was filed by him for recovery of a sum of Rs. 3,715.20 against the defendant-insurance company. The plaintiff's lorry M.D.S. 4779 was insured with the defendant against loss or damage by any accident for the period from 11-8-1962 to 10-8-1963. The licenced carrying capacity of the lorry was 5392 tons as admitted in these proceedings. Subsequently on 7-12-1962 the licensed carrying capacity was increased to 6.1742 tons. The proposal for insuring the vehicle was made on 11-8-1962 and this proposal was signed by Parasmal Mahar, who was the financier and who had a hire purchase agreement in his favour. In this proposal form, which is marked at Ex. B-1 in this case, in the column relating to particulars of vehicle to be insured, the licenced carrying capacity of the vehicle was given as 5 tons. The defendant accepted the proposal

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1. *S. Subramaniam* v. *Hindustan General Insurance Society Ltd.*, AIR 1972 Mad. 196 : 85 Mad.LW 10 : (1972) 2 Mad.LJ. 45 :.1972 ACJ 444.

and issued the insurance policy No.12710. CV Ex. A-1 in the case. The policy starts with the following clause:

> "Whereas the insured by a proposal and declaration dated as stated in the schedule which shall be the basis of this contract and is deemed to be incorporated herein has applied to the Society for the insurance hereinafter contained and has or agreed to pay the premium as consideration for such insurance in respect of accident loss or damage occurring during the period of insurance".

Then followed the usual printed terms of exceptions and conditions. In the schedule to the policy under the clause 'limitations as to use' among other things, it is specially provided as follows:

> "Warranted that the weight of the goods carried by within the described vehicle shall at no time exceed 5 tons or the licensed carrying capacity of the vehicle whichever is less".

The vehicle met with an accident on 25-1-1963 at Krishnagiri. The plaintiff intimated the accident by telegram to the defendant and after following the usual procedure the surveyor of the defendant company approved the estimated cost of repair at Rupees 3,715.20. It is admitted by the parties to the proceedings that the vehicle was carrying less than 5 tons of goods at the time when the accident took place.

2. The defendant repudiated the claim on the ground that there was a fraudulent misrepresentation in the proposal as to the carrying capacity of the vehicle and that the licenced carrying capacity of the vehicle is a material fact in fixing the premium. It also contended that the increase in the licensed carrying capacity made on 7-11-1962 was not intimated to the defendant and higher premium paid and that therefore the company was entitled to avoid the contract of insurance.

The point for consideration is whether on the facts of this case, under the terms and conditions of the policy the defendant company is entitled to avoid the contract and refuse payment of the loss or damage to the vehicle.

It is well known that contracts of insurance are *uberrimae fidei* and every fact of any materiality must be disclosed, otherwise, there is ground for rescission. "Material" means 'anything which would influence a prudent insurer as to whether he will accept the offer and if so at what rate of premium'1—vide the Law of Motor Insurance by Shawcross 2nd Edn., page

381. In the same book at page 391 'materiality' as per the English Marine Insurance Act, 1906, is set out as follows:

> "Every circumstance..... which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk".

At page 392, Section 10 (3) of the English Road Traffic Act, 1934 is extracted as follows:

> "The expression 'material' means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and if so, at what premium and on what conditions....." As observed by the learned author, these definitions contained in the Marine Insurance Act and the Road Traffic Act, merely produce the results of the common law authorities as to "materiality" and as such this test is applied to cases of motor insurance policies. It would be seen from the foregoing definitions, 'materiality' is a question of fact in every case and depends on whether a particular fact or circumstance would have influenced the prudent insurer in accepting the risk'.

The Gujarat High Court[1] poised in considering the falsity of representation, it should be found false in substance as well as in fact. In that case, contractors who had undertaken to put up tenements for the Gujarat Housing Board claimed certain amounts, on the basis that there was a misrepresentation as regards the amounts of estimated cost of the items of articles. The Court posed the question for itself whether the plaintiff had successfully proved that it was induced to enter into the suit contracts by fraudulent misrepresentation as regards the amount of estimated cost. The Court observed:

> The point is whether the plaintiff has successfully proved that it was induced to enter into the suit contracts, by any fraudulent misrepresentation as regards the amounts of cost estimates published in tender notices as well as other papers relating to the tender contract. So far as English law is concerned, it contemplates three types of misrepresentations namely (1) misrepresentations which are fraudulent (2) misrepresentation which are negligent ; and (3) misrepresentations which are innocent. The Indian law on the subject is contained in Sections 17 and 18 of the Contract Act. Section 17 defines "fraud", while Section 18 defines 'misrepresentation'. So far as this case is concerned, the plaintiff has made the positive allegations as

1. *R.C. Thakkar* v. *The Bombay Housing Board by its Successors*, AIR 1973 Gujarat 34.

regards the misrepresentation, which according to it was fraudulent. It is therefore first necessary to find out what is fraud and what is its nature. Apart from the statutory definition given to this expression by Section 17 of the Contract Act it should be stated that in the very nature of things, fraud is secret in its origin and methods adopted to make it successful cannot always be proved to the hilt by producing positive and tangible evidence. But sometimes circumstances are eloquent enough to make the suggestion of a fraudulent conduct. It is for this reason that Sec. 17 of the Indian Contract Act has made an attempt to define what can be termed as legal fraud in civil law as distinguished from criminal law. Reference to paragraph 1556 of Halsbury's Laws of England (third edition) Volume 26, shows that a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Therefore, to constitute the falsity of a representation it should be found false in substance as well as in fact.

It is further observed in paragraph 1556 of the said volume as under:

"The standard by which the truth or falsity of a representation is to be judged has been thus expressed. If the material circumstances are incorrectly stated, that is to say, if the discrepancy between the facts as represented and the actual facts is such as would be considered material by a reasonable representee, the representation is false; if otherwise it is not".

Again in paragraph 1571 following observations are found:

"..... and it may now be taken as established beyond all question that whenever a man makes a false statement which he does not actually and honestly believe to be true, that statement is, for purposes of civil liability, as fraudulent as if he had stated that which he did not know to be true, or knew or believed to be false. Proof of absence of actual and honest belief is all that is necessary to satisfy the requirements of the law, whether the representation has been made recklessly or deliberately".

Speaking of the standard of proof required in such case in paragraph 1572 it is observed as under:

"..... the standard of proof applicable is the civil standard of balance of probability and not the criminal standard of proof beyond reasonable doubt but the degree of probability required to establish proof may vary according to the gravity of the allegation to be proved".

In the words of Lord Bramwell in *William Smith* v. *David Chadwick* [1]:

> "An untrue statement as to the truth or falsity of which the man who makes it has no belief is fraudulent for in making it he affirms he believes it which is false".

It is in the light of these general observations as to the nature and character of legal fraud; we shall now proceed to consider the Indian law on the subject of fraud and misrepresentation. As said above, it is contained in Sec. 17 and 18 of the Contract Act. For the purpose of this appeal, we are concerned with clause (1) of Sec. 17 read with the main part of Sec. 17. The same is as under:

> "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce to enter into the contract:

(i) the suggestion as to a fact, of that which is not true by one who does not believe it to be true. Analysis of this portion of the section reveals the following ingredients:

(1) There should be a suggestion as to a fact;

(2) The fact suggested should not be true;

(3) The suggestion should have been made by a person who does not believe it to be true; and

(4) The suggestion should be found to have been made with intent either to deceive or to induce the other party to enter the contract in question".

The Calcutta High Court considered the question,[2] whether a Contract of Insurance is liable to be avoided by an Insurer on account of the fact that there has been a misrepresentation with regard to the quality of the goods insured. It was contended on behalf of the Insurance Company that the contract of Insurance was in respect of Pekoe Dust Tea, whereas Ordinary Dust Tea, had been booked, there has been a misrepresentation and the contract was liable to be avoided. The finding given by the lower Court was that the plaintiff (Insured) was not aware that ordinary dust tea had been booked. The finding was that there had been a misrepresentation with regard to the quality of

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1. (1884) 9 AC 187 at p. 203.
2. *Hindusthan General Insurance Society* v. *Punam Chand Chhajar,* AIR 1971 Cal. 285.

goods at the time of Insurance, but there had not been any fraud on the part of plaintiff in this respect. On these facts, the Court observed:

> "A contract of insurance is nonetheless a contract and provisions of the Contract Act of 1872 would apply to such a contract. The Marine Insurance Act, which had come into operation on 1-8-63, would not obviously apply to this contract. Under Sec. 19 of the Contract Act an agreement was caused by coercion, fraud or misrepresentation is voidable. It is clear therefore, from this Section that the Society is entitled to avoid a contract in case its consent was caused by misrepresentation. At the same time, it cannot be stated that every misrepresentation would render the contract liable to be cancelled. That would be clear from the explanation to Section 19. Under this explanation a fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such a misrepresentation was made, does not render a contract voidable. The phraseology of Section 19 would also indicate that it is only in case where the consent had been caused by misrepresentation that it can be avoided. Of course a contract of insurance is a contract *uberrimae fidei* and every fact of materiality must be disclosed. Otherwise there is good ground for rescission of the contract and if there are any misstatements or suppression of material facts, the policy can be called in question (vide *New India Assurance Co. Ltd.* v. *Sulochana Chowdhurani,*[1]). "There must be utmost good faith on the part of the assured. This imposes a duty and an obligation on the assured to make a full disclosure of all material facts which would affect the mind of the insurer whether to accept the risk or not, and on what terms. The duty is to disclose material facts only. A fact which is the subject-matter of a question in the proposal, which the assured is required to answer, must be considered to be a material fact, so that a false answer will vitiate the policy in terms of the contract itself. But a fact may be a material fact, even though it is not the subject-matter of a question in the proposal, if the knowledge of that fact will affect the mind of an ordinary insurer to accept the risk. If it is so, it is a material fact and non-disclosure or concealment of such a material fact will avoid the policy, even though there is no fraud and the concealment is innocent [1]". (vide *Rohin Nandan Goswami* v. *Ocean Accident and Guarantee Corporation Ltd.,*[2]) incidentally this decision

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1. AIR 1962 Assam 65.
2. AIR 1960 Cal. 696 at page 700.

would also negative the plea raised by Mitter to the effect that it is only when fraud is proved on the part of the assured, that a contract can be avoided. It is clear therefore from the decisions referred to above, that it is not each and every misrepresentation, which would render a contract of insurance liable to be avoided. But if the misrepresentation is on a material fact, only then it can be questioned. Now what would be a material fact would depend on the facts and circumstances of the particular case. In the Calcutta case referred to above, it has been laid down that it would be a material fact if the knowledge of that fact would affect the mind of an ordinary insurer who would not have taken the risk if that had been within his own knowledge. The question in that case which has to be asked is, as to whether, if the insurer had known that the goods in question were ordinary dust tea, would it have accepted the risk for the sum of Rs. 14,000? The answer to this question can only be found from the facts and circumstances of this case. The proposal forms as also the Policy of Insurance have been made exhibits in this particular case. The proposal form is Ex. B. It is in the printed form of the Society and the relevant columns are Marks, Number, Goods, Amount. It should be noted that there is no column for showing the quality of the goods or even the price thereof. There is nothing to show that it was necessary for the insurer (sic proposer?) to mention the particular brand or quality of tea while making the proposal for insurance. As the form stands, it would quite suffice even if the proposer had simply mentioned 'tea' and nothing else. Mr. Lahiri on behalf of the Society has contended that the price of tea has been overvalued and even first class tea would cost much less. That may be a fact. But it being a valued policy, the Society is not entitled to challenge the valuation thereof. As a matter of fact, we do not find that the proper price of the goods sought to be insured has got anything, so to say, to do with the amount for which it is insured. The proposal form, does not as we have already indicated, call upon the proposer to mention the price or the value of the goods sought to be insured with the defendant Society. Moreover, it was quite easy for the Society to find out the price of best quality tea in the market as everything was done by the Society's Agent at Jalpaiguri, which is the centre of tea industries in North Bengal. Even in the written statement it has not been stated that the contract is liable to be set aside or cancelled because the tea which had been booked was not Pekoe Dust Tea but ordinary tea and that if the Society had been aware of that, it would not have insured the consignment for the sum of Rs.

14,000/- When the original written statement was filed the money suit against the Railways was pending and therefore it can be understood that the Society had to leave it a bit vague and could not take a firm stand on the point. But it appears that after the suit against the Railways had been decreed, the Society filed additional written statement and even then the point, which we have referred to above and which would be the most vital point in this case, had not been taken. The evidence adduced also does not show that the Society's consent had been obtained by this misrepresentation, or in other words, that the Society would not have agreed to insure the consignment for the sum of Rs. 14,000, if it had been aware of the fact that it contained only ordinary dust tea. There has been a prolonged correspondence between the parties regarding the liability of the Society to the plaintiff and no such point appears to have been taken. The Society satisfied itself by examining Mr. Das Gupta, its Branch Secretary at Jalpaiguri. Mr. Das Gupta was the gentlemen who did everything for the Society in connection with the issue of this policy or the subsequent prosecution of the suit against the Railways, or the correspondence on behalf of the Society. He no where has stated that he would not have agreed to issue this policy if he had known it contained ordinary dust tea. Taking into account all these facts and circumstances, we are of opinion that the quality of the tea or its real value had nothing to do with the issue of this policy and the mention of the fact that it was Pekoe Dust Tea was a gratuitous one, having been so to say taken bodily out of the railway receipt. In this view of the matter the misrepresentation would not be on a material point at all, and the Society would not therefore be entitled to rely on this misrepresentation to impeach the contract it had entered into. The Society had accepted the premium, issued the policy, and it is a matter of common knowledge that there is always an element of risk in an insurance policy for the insurer and if in this particular case, the risk has materialised, the Society can make no grievances of it.

The result is that we agree with the findings of the learned trial Judge and hold that the Society cannot avoid this contract and that the suit has been rightly decreed".

Another case of interest where the materiality of facts rendered the contract void, was considered by the Division Bench of the Madras High Court.[1]

1. *The Vanguard Investments Ltd., Madras* v. *The Indian Mutual General Ins. Society Ltd.*, AIR 1973 Mad. 147 : 85 Mad.LW 642 : 1973 ACJ 3.

The case arose under the following circumstances:

The plaintiff/ appellant in the case filed a suit for recovery of money due under policy of reinsurance issued by the respondent/ Insurance Society. The plaintiff/appellant had a branch at Colombo. A merchant at Colombo by name Liyanage insured with the appellant his electrical and motor goods against fire for a sum of Rs. 1,00,000 for the period from 27-2-1951 to 26-2-1952. In its turn the appellant took a reinsurance policy with the respondent for the corresponding period, but the appellant covered only 30 per cent of the original risk. On 26-12-1951, the premises of Liyanage were gutted by fire with the result a claim was preferred for the full amount under the policy of insurance. The Colombo courts eventually held that the appellant was liable. The appellant paid a sum of Rs. 77,231.98 to Liyanage and bore its own costs.

2. The suit is resisted by the appellant (sic) (respect.)? and by an additional written statement allowed to be filed on April 10, 1964, it raised the question of non-disclosure by the original assured of material particulars on two matters with reference to which it said that the policy of insurance issued by the appellant was void. On that pleading, additional issue 4 was framed as to whether the original policy of insurance between Liyanage and the appellant was vitiated by non-disclosure of material facts and consequently whether the respondent was entitled to avoid the claim. Venkatraman, J. on the basis of the evidence before him found that there was non-disclosure of two material facts—(1) that the construction on the western side of the insured premises was only a wooden partition and wire mesh and (2) that the adjacent premises were a cafeteria with kitchen and a fire place. The learned Judge found that the non-disclosure of these material facts rendered the policy void at the instance of the appellant.

The learned Judges expressed the view:

> "We find that the terms of the reinsurance policy made the liability thereunder clearly subject to all the terms, conditions and warranties contained in the original policy of the insured. In other words, those terms of the reinsurance policy entitled the respondent when the risk arose to put forward all defences against such as had been open to the appellant itself. As mentioned by Macgillivray on Fire Insurance Law, in cases of reinsurance, representation made by the for the original insurance and forming the basis of the original policy, may in turn be made the basis of the reinsurance policy, so as to entitled the reinsurers to repudiate liability in the event of any statement made by the assured turning out to have been untrue at the date of the issue of the original policy. In our opinion, therefore, the non-disclosure of material facts having rightly found in respect of the original

policy, that automatically rendered the reinsurance policy also void."

The Madhya Pradesh High Court decreed the suit filed by an illiterate woman who had been overreached and a deed of conveyance was taken from her. The facts of the case clearly established that she had been under the influence of the vendee and the High Court referred to the following circumstances, which rendered the document invalid: There was absence of convincing proof about (i) independent advice (ii) payment of sale consideration to her and (iii) urgency to sell the suit property to the vendee-defendant (iv) reading over the sales-deed to the vendor. The suit property constituted her entire property on which her livelihood depended. In the circumstances, the sale-deed was set aside on the ground of undue influence and fraud, the vendee not being able to establish that the sale was fair, reasonable and equitable.[1]

In considering cases under Section 18 and 19 one should bear in mind that there is a basic difference between fraudulent misrepresentation as to the character of a document and as to its contents. The Madhya Pradesh High Court in dealing with a case[2], which arose under the Court-fees Act, 1870, Sec. 7 (IV) (C), had to consider on the pleadings of the parties, whether the transactions were void or voidable. The facts of the case were as follows:

"The case of the plaintiff as laid in the plaint is as follows: She is an old illiterate village woman, residing in the interior of Chhindwara district having no knowledge or experience of the working of Courts and offices. She owns half share in the land in suit. The other half is held by her sister-in-law Defendant No. 1 who is her *uterine brother* resides in a nearby village and the plaintiff seeks his advice from time to time. Thus he wielded considerable influence on her and gained her confidence. In or about 1971, some of the relations of plaintiff's husband interfered with her possession over the lands. Plaintiff, therefore, approached defendant No. 1 for advice. Defendant No. 1 advised the plaintiff that it would be necessary to make an application to the Collector, Chhindwara and this would entail an expenditure of Rs. 200. This amount was accordingly paid by the plaintiff to defendant No. 1. On the aforesaid representation the defendant No. 1 took the plaintiff to Chhindwara and he managed to secure her thumb impression on some papers on the representation that she was merely making a petition to the Collector. Thereafter she was

1. *Smt. Koze* v. *Makhan Sing,* AIR 1973 MP 252 : 1973 MPLJ 610 : 1973 Jab.LJ 671.
2. *Partap* v. *Smt. Puniya Bai,* AIR 1977 MP 108 : 1976 Jab.LJ 703 : 1976 MPLJ 627.

produced before an officer and she said 'yes' to every question put to her directly. Later on the plaintiff came to know that defendant No. 1 had fraudulently obtained her thumb impression on the sale-deed. She immediately sent for defendant No. 1 and accused him of cheating her and thereupon defendant No. 1 expressed regret and agreed to execute deeds of re-transfer. As the defendant No. 1 did not do anything thereafter and on the other hand transferred the lands to defendants 2 to 5 on 1-4-1972, the plaintiff filed this suit. The contention of the learned Counsel for the applicants is that since the non-applicant No. 1 was a party to the sale-deed which was ostensibly for a consideration of Rs. 18,000 it was necessary for her to seek the relief of cancellation of the document and as such she was bound to pay *ad valorem* Court-fees on the sum of Rs. 18,000."

The Court expressed the position of law in the following terms, after referring the judgment of the Supreme Court in AIR 1968 SC 916:

"Voidable transfer remains valid until avoided and, therefore, it is necessary to avoid it by seeking the relief of setting aside. But a transaction, which is void *ab initio*, must be deemed to have never taken place. It is not to be regarded as an alienation which is perfect till it is set aside. There is a clear distinction between a fraudulent misrepresentation as to the character of a document and as to its contents. Where the misrepresentation is both as to contents as well as character of the document, the transaction is wholly void. In *Ningawwa* v. *Byrappa Shiddappa Hirehurabar*,[1] their Lordships held that a contract or other transaction induced or tainted by fraud is not void, but only voidable and until it is avoided it remains valid. Their Lordships, however, pointed out that the legal position is different if there is a fraudulent misrepresentation not merely as to the contents of the document but also as to its character and in such a case the transaction is void. In the instant case, the allegation of the plaintiff is that the transaction is void. In the instant case, the allegation of the plaintiff is that the fraudulent misrepresentation was not only as to contents of the document on which she was asked to affix her thumbmark but also as to its character. She is therefore, merely seeking a declaration that the sale-deed which she never executed and to which she was never a party was void."

1. AIR 1968 SC 956 : 1968 (2) SCR 797.

The Allahabad High Court in *Hawaldar Singh* v. *Aditya Singh,*[1] drew a distinction between void and voidable document, where, the plaintiff came forward with a case that when he intended to execute a sale deed covering some land, in favour of particular person but the defendants practised fraud and got the document covering some other land.

An interesting question was mooted in *Pardhana* v. *Amin Chand*[2] where the Court had to decide if a gift had been induced by fraud and misrepresentation and whether the right to sue for declaration that the gift is invalid would survive to the legal representative on the death of the donor.

The facts were "A suit was brought by one Smt. Ambo for a declaration that she was the owner of the property possessed by her and that the gift executed by her on February 3, 1969 was vitiated by fraud and misrepresentation, and therefore, should be set aside. During the pendency of the suit Smt. Ambo died. An application was made by her daughter's sons praying that they be substituted as legal representatives. By an order dated February 27, 1976, the learned Senior Subordinate Judge, Hamirpur, had held that on the death of Smt. Ambo the right to sue survives to her legal representatives and accordingly he had directed their substitution in place of the deceased.

By a revision petition, the petitioner challenged the validity of that order. It was argued by learned Counsel for the petitioner that the right to sue for a declaration that the gift deed was induced by fraud and misrepresentation was a right personal to Smt. Ambo the donor of the gift, and as that right could not be transferred or inherited, the right to sue for the declaration did not survive. It is truth of this proposition that must now be examined.

Section 126 of the Transfer of Property Act provides *inter alia* that 'a gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.' A gift may, therefore, be revoked for coercion, fraud misrepresentation or undue influence much as a contract may be rescinded. The right to revoke a gift on those grounds is a right conferred by statute. It does not flow from any personal contract between the parties to the case. It is not a right, which is confined in point of time to the individual self of the donor. It is not a right, which dies with him. On the death of the donor, the cause of action survives to his legal representatives. In *Ghumna* v. *Ramachandra Rao,*[3] a Division Bench of the Allahabad High Court repelled the

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1. AIR 1978 All. 266 : (1978) 4 All.LR 206 : 1978 All.WC 344.
2. AIR 1977 HP 94 : 1977 Sim.LC 404.
3. AIR 1925 All. 437.

contention that a voidable gift could not be avoided by the donor's. It was observed:

> "It is not quite correct to say that the right of exercising such an option is like a personal contract which does not survive to the heirs of the promisor. The right is given to the promisor under statute".

A further reason for that view lies in the nature of the transaction, that the gift is more than a mere contract that it is a conveyance. And so it was said by the same learned Judges:

> The present plaintiffs can claim that there was no absolute transfer of the property at all, but it was a qualified transfer that is subject to the right of the transferor to avoid it if he chose to do so. The plaintiffs, therefore, can claim the property by avoiding the deed of gift, which could have been avoided by their predecessor. There does not seem to be any valid ground for the saying that the right does not survive to the present plaintiffs".

Marten, C.J. of the Bombay High Court referred to the provisions in the Indian Contract Act, which contemplated that in certain cases, the benefit and burden of promises should devolve on legal representatives. Referring to Section 19 and Section 19-A of the Contract Act, he said in *Shravan Goba* v. *Kashiram Devji.*[1]

"In this connection it may be pointed out that the appellant is forced in argument to go this length that the representatives cannot take advantage of either branch of Section 19. The result therefore would be that if a man was defrauded or induced to enter into a contract by fraud and died the next day, his representatives could not avoid the contract under the first part of Section 19. Nor could they even under the second branch insist that the contract should be performed on the basis that the representations made were true. On what principle of justice or equity that the construction should be put on Section 19 or on the corresponding Section 19-A, I entirely fail to see. No authority going to this length has been cited to us, and speaking for myself, I decline to be the first Judge to adopt what seems to me a forced, unnatural and unjust construction of this Act".

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1. AIR 1927 Bom. 384.

Under the English Law it is deemed clearly settled that in equity not only may a party to a contract himself bring a suit to set it aside but also that his legal representatives may do so after his death.[1]

In *Gosto Behari Roy* v. *Ramesh Chandra Das,*[2] the Calcutta High Court rejected the contention that the defendant cannot seek to avoid the contract in his written statement.

19. Voidability of agreements without free consent.— When consent to an agreement is caused by coercion, [3][* * *] fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations

(a) *A*, intending to deceive *B*, falsely represents that five hundred maunds of indigo are made annually at *A's* factory, and thereby induces *B* to buy the factory. The contract is voidable at the option of *B*.

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1. *Allcard* v. *Skinner,* (1887) 36 Ch.D. 145; *Mitchell* v. *Homfray,* (1881) 8 QBD 587; *Morley* v. *Longhnan,* (1893) 1 Ch. 736; *Gresley* v. *Monsely,* (1859) 28 LJ Ch. 620 and *Holman* v. *Loynes,* (1854) 4 De. GM & G 270; **see also** *Brijnath Singh* v. *Brijraj Kuar,* AIR 1922 Pat. 514; *Mt. Azizunissa* v. *Siraj Husain,* AIR 1934 All. 507.
2. AIR 1978 Calcutta 235 : (1978) Cal. LJ 186 : 82 Cal. WN 617 : (1978) 2 Ren.CR 545.
3. The words "undue influence" omitted by Act VI of 1889, S. 3.

(b) *A*, by a misrepresentation, leads *B* erroneously to believe that five hundred maunds of indigo are made annually at A's factory. *B* examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this *B* buys the factory. The contract is not voidable on account of *A's* misrepresentation.

(c) *A* fraudulently informs *B* that *A's* estate is free from encumbrance. *B* thereupon buys the estate. The estate is subject to a mortgage. *B* may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(d) *B* having discovered a vein of ore on the estate of *A*, adopts means to conceal, and does conceal, the existence of the ore from *A*. Through *A's* ignorance *B* is enabled to buy the estate at an under value. The contract is voidable at the option of *A*.

(e) *A* is entitled to succeed to an estate at the death of *B*.; *B* dies; *C* having received intelligence of *B's* death, prevents the intelligence reaching A, and thus induces *A* to sell him his interest in the estate. The sale is voidable at the option of *A*.

Conditions of Avoidance.—This section deals with the rights and remedies available in cases of contract in which the consent has been obtained either by coercion, fraud or misrepresentation.

Where the thumb impression of the executants was obtained in a stamped sale deed by fraud on the pretext that the document in question is a Muktharnama, the transaction is voidable. [1]

(1) The contract is voidable as in English Law, and so could be avoided by the party injured. But such avoidance must be at the earliest possible time after obtaining knowledge of the true facts, and when *restitutio in integrum* is possible or where there is no intervening *jus tertii*. If it is not possible to restore the parties to the position which they occupied before the contract was entered into, the contract cannot be avoided. Further, if third parties have bona fide

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1. *Mohd. Jameel Khan* v. *Mithu Lal*, 1999 (2) CCC 406 (MP).

acquired rights in respect of the subject-matter of the contract, the original contract cannot be disturbed. **[291-294]** Under Section 64 of the Indian Contract Act if a voidable contract is avoided, the benefit obtained by the party avoiding must be returned. Before the amendment of the section this was equally applicable to a contract induced by undue influence, but this has been altered, the word "undue influence" is omitted in this section, and a separate Section 19 A enacted, which gives the power to the Court to set aside-the contract even without a refund of the advantage gained.

(2) It is also open to a party to resist a suit for specific performance[1] or for the damages for the price of goods sold.

(3) Again the party injured may, if so minded, treat the contract as valid and insist on performance, and claim that he shall be put in the position he would be in if the representation had been true.[2]

Exception.—The exception states that a contract cannot be avoided on the ground of misrepresentation or silence amounting to fraud where the party had the means of discovering the truth with ordinary diligence. In this respect, the Indian law is stricter than the English law. Again, it does not apply to cases of active fraud.

Explanation.—The Explanation restates that, if the complaining party did, in fact, nor rely upon the statement he cannot avoid the contract. [3] "He cannot complain of having been misled by a statement which did not lead him at all." Thus it has been held that failure to make inquiries, such as an ordinary prudent man would make, may under certain circumstances, be evidence that the person to whom the misrepresentation was made, was not deceived by it.[4]

Construction.—The words "fraudulent within the meaning of Section 17" can apply only to silence and not to misrepresentation and the comma

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1. *Ranganath* v. *Govind,* (1904) 28 Bom. 639; *Lakshmi Das* v. *Rup Lal,* (1907) 30 Mad. 169 : 17 MLJ 19 (Delay a bar to equitable relief); *Gopal* v. *Jaganath,* AIR 1935 Bom. 326; *Shravan Goba* v. *Kashiram,* AIR 1927 Bom. 384 ; See for the question whether the plea of limitation would apply if the point fraud, undue influence or coercion is taken way of defence *Veera Bramacharyulu* v. *Subbamma,* AIR 1961 AP 31; *Chacko Mathew* v. *Ayyappan Kutty,* AIR 1962 Ker. 164 (FB).
2. *Mahomed Haji Wali Mahomed* v. *Ramappa,* 1929 Nag. 254 : 119 IC 684 (FB); *Premchand* v. *Ram Sahai,* 1932 Nag. 148 : 149 IC 209; (Cf.) *Baskcomb* v. *Beckwith,* (1869) 8 Eq. 100. (No specific performance where defendant contracts under mistake contributed to by plaintiff even though unintentionally).
3. **See** *Macauliffe* v. *Wilson,* (1899) 21 All. 209 (PC).
4. *Huri* v. *Roshan,* (1923) 71 IC 161 : (1923) Sind 5 (FB); *Mithoo Lal Nayak* v. *L.I.C. of India,* AIR 1962 SC 814 : 1962 (32) CC 177; *Shri Krishan* v. *Kurukshetra University,* AIR 1976 SC 376 : (1976) 1 SCC 311 : 1976 (2) SCR 722 : 1976 UJ 15.

after the word "silence" in the section is out of place. As the section stands, it might justify the view that misrepresentation, though fraudulent, cannot avoid a contract, if the party could have discovered the truth with ordinary diligence. This is not correct.[1]

With reference to illustration (b) of Section 19, the Madras High Court has held that it is not exhaustive of the class of cases, which would fall within the Explanation to the section.[2] The Calcutta High Court in *Apcar* v. *Louis Melchus*,[3] had to deal with the scope of the exception. Therein it was held that if a person desirous of selling property causes certain letters to be written by others and addressed to him in which bogus offers at high prices are made, for the sole purpose of giving a fictitiously high value to the property and with the intention of deceiving the intending purchasers, the making and exhibiting of those letters to such purchasers and inducing them to purchase the property at the price represented by those letters amounts to fraud within the meaning of Sec. 17 and such case does not fall within the Exception to Sec. 19.

Right of legal representatives.—The remedy given by this section is not personal to the injured party. His legal representatives may sue to set aside a document obtained by fraud or undue influence from the deceased.[4] But a stranger without title cannot avoid it.[5]

Performance obtained by fraud.—The distinction between fraud in the making of a contract and fraud in the performance of it, was pointed out in a Bombay case, *Fazal* v. *Mangal Das*[6] and it was held that the contract could not in the latter case, be avoided.

[7][19-A. Power to set aside contract induced by undue influence.—When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

1. **See** *Niaz Ahmad* v. *Parsottam*, AIR 1931 All. 153 : (1932) 53 All. 374 : (1931) ALJ 153. **See also** *Apcar* v. *Louis Melchus*, (1939) 43 CWN 347; *Venkataraman* v. *Sivaramudu*, AIR 1940 Mad. 560.
2. *Raghava Mannadiar* v. *Sivasankara*, (1921) MWN 340 : 13 LW 525 : 62 IC 764 : (1921) Mad. 198.
3. AIR 1939 Cal. 473 : (1939) 43 CWN 347.
4. *Shravan Goba* v. *Kashiram Devji*, (1927) 51 Bom. 133 : 100 IC 932 : 29 Bom. LR 115 : (1927) Bom. 384; *Gobind* v. *Savitri*, (1919) 43 Bom. 173. (Case fell within S. 88 Trust Act); For English cases, **see** *Morley* v. *Loughnan* (1893) 1 Ch.736; *Twycross* v. *Grant*, (1874) 4 CPD 40.
5. (Cf.) *Trimbak* v. *Shankar*, (1912) 36 Bom. 37 : 13 Bom. LR 947 : 12 IC 532.
6. (1922) 46 Bom. 489 : (1922) Bom. 303; **see also** *Jamsetji* v. *Hirji*, (1909) 37 Bom. 158. **See** *East India Commercial Co.* v. *Collector of Customs*, AIR 1962 SC 1893 : 1963 (3) SCR 338 : 1963 (13) ELT 1342 : 1964 ECR 138.
7. Ins. by Act 6 of 1899, S. 3.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations

(a) *A's* son has forged *B's* name to a promissory note. *B* under threat of prosecuting *A's* son obtains a bond from *A* for the amount of the forged note. If *B* sues on this bond the Court may set the bond aside.

(b) *A'* a money lender, advances Rs. 100 to *B*, an agriculturist, and, by undue influence, induces *B* to execute a bond for Rs. 200 with interest at 6 per cent per month. The Court may set the bond aside, ordering *B* to repay the Rs. 100 with such interest as may seem just.

Undue Influence: Rescission.—This section was inserted by the Indian Contract Amendment Act, VI of 1919 and the word "undue influence" was omitted from the previous section. The second clause proceeds on the principle embodied in Secs. 35 and 38 of the Specific Relief Act now Secs. 27 and 30 of the Specific Relief Act 47/73. The special feature of this section is that while in the case of misrepresentation and fraud any benefit received by the party avoiding has to direct the refund under Section 64 of the Indian Contract Act, under this section if a contract procured by undue influence is set aside, the Court has the discretion to direct the refund of the benefit whether in whole or in part or set aside the contract without any direction for refund of benefit.[1] In *Pona Dongra* v. *Gillespie,*[2] the Court observed that reading Secs. 16 and 19-A together, it was competent to relieve a defendant against unconscionable transactions in general.

Rights of legal representatives.—It is open to the representatives of a party whose consent to a contract has been caused by undue influence to raise the defence of undue influence.[3] And in an Oudh ruling, it has been held that it is open to the transferee of a bond containing very lenient stipulations in favour of the obligee under it to exercise the option conferred by the section.[4]

Third Parties.—It may be added that a transaction vitiated by undue influence will be voidable even against a third party who did not exercise

1. **See** *Sunder Rai* v. *Suraj Bali,* (1926) 47 All. 932 : (1925) All. 783.
2. (1907) 31 Bom. 348 : 9 Bom. LR 143.
3. *Rash Behari Nasker* v. *Haripada Nasker,* (1934) 59 CLJ 387 : 152 IC 561 : (1934) Cal.762; *Manbhari* v. *Sri Ram,* (1936) All. 672 : (1936) ALJ 1215 : 165 IC 240.
4. *Ram Shahai* v. *Bhagwan Din,* (1936) Oudh 105 : 159 IC 320 : (1935) OWN 1293.

such influence, if such party takes the benefit as volunteer or with the knowledge that undue influence has been exercised. In such cases, the third party's knowledge of the fiduciary relationship puts him under the same disability as the party who occupied the position of confidence.[1]

19-B. Definitions of maintainer and Champertous Agreement.—(a) "Maintainer" means a person who gives assistance or encouragement to one of the parties to a suit or proceeding and who has neither an interest in such suit or proceeding nor any other motive recognized by the Law as justifying his interference.

(b) "Champertous agreement" means an agreement where by the nominal plaintiff agrees with maintainer to share with or give to him a part of whatever is gained as the result of the suit maintained.

19-C. Power to set aside champertous agreement—A champertous agreement may be set aside upon such terms **and conditions as the Court may deem fit to impose".**

20. Agreement void where both parties are under mistake as to matter of fact.—Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.—An erroneous opinion as to the value of the thing, which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact.

Illustrations

(a) *A* agrees to sell to *B* a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

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1. *Lakshmi Das* v. *Rup Lal*, (1907) 30 Mad. 169; *Lingo Bhimrao* v. *Dattatreya Shripad*, (1938) Bom. 97 : 173 IC 817 : 39 Bom. LR 1233; *Rama Pattar* v. *Manikkam*, (1935) 58 Mad. 454 : (1935) MWN 146 : 41 LW 228 : 158 IC 485 : 69 MLJ 104 : (1935) Mad. 726.

(b) *A* agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) *A*, being entitled to an estate for the life of *B*, agrees to sell it to *C*. *B* was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

Mistake.—A mistake may be either of law or of fact. A mistake of law is never an excuse, unless the mistake happens to be of foreign law or private rights. A mistake of fact may be as regards the contract itself, as regards the person contracted with or as regards the subject-matter of the contract. The mistake as to subject-matter of the contract may be as regards the existence, title, identity, price, quantity or quality. Where two persons agree as regards the subject-matter in the same sense, but in the written contract, there is a slip and so, the contract, as it stands, does not represent the true intention of the parties, the contract can be rectified so as to express their intention correctly. Sir John Salmond calls this *error in verbis*. But, a genuine mistake in the formation of the contract, as affecting the consent of the contracting parties, may be in the minds of both contracting parties, when it is said to be bilateral mistake or it may be a unilateral mistake in the mind of one of the contracting parties. Such a mistake, which vitiates the consent of the parties, is called by Sir John Salmond *error in consensu*. Where there has been consent but it has been induced or procured by fraud, duress, etc., it is called *an error in causa*, error relating to the reason, inducement or cause of the making of the contract. The difference between mistake and misrepresentation is important in that, if it is vitiated by mistake, the contract is void and the original owner can set aside the contract and recover the property even from third parties, who might have *bona fide* and for value acquired the goods. Any intervening *jus tertii* or the impossibility of *restitutio in integrum* does not stand in the way of the contract being avoided. But a contract vitiated by misrepresentation is only voidable, so that ownership passes and rights of third parties *bona fide* acquired cannot be disturbed. Except in such circumstances or where fraud or unfair practice is alleged or in transactions between parties having a fiduciary relationship and cases of the kind the Court does not interfere with the terms of contract agreed upon between the parties at arm's length.[1] Now, this section deals with bilateral mistake, while Section 22 deals with unilateral mistake. **[215]**

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1. **See** *Thomas Abraham* v. *National Tyre and Rubber Co.*, AIR 1974 SC 602 : (1973) 3 SCC 458 : 1972 UJ 648.

Essentials—

1. **The mistake must be mutual.**—When both parties to the contract are under a mistake of fact essential to the agreement, whether as regards the existence of the subject-matter or the identity or the price or such other essential matters, no contract arises. But where neither parties are under mistake nor the written contract contains the mistake Sec. 20 of Contract Act cannot apply.[1] Where a contractor having agreed to construct a road and one of the term of the contract was that the offer is to be made by intending contractor after physically verifying the work spot and its surroundings, he is deemed to be aware as to what could be the quantity of material and had to from where all it could be procured and as such, his plea that he was require to move the material from a nearer quarry to a farther quarry involving extra charges cannot be accepted in order to attract Sec. 20 of the Act to void the contract.[2] The *consensus ad idem* forms the basis of a contract and if there is no such *consensus,* there could be no contract. Where two persons contracted to sell and purchase cotton arriving by a ship "Peerless" from Bombay, and it was discovered that there were two ships of the same name sailing from Bombay to London, the court held that there was a mutual mistake or a bilateral mistake and therefore the contract was void.[3] Again, mistake may relate to the price (*e.g.*) of articles sold or premises let. Where a contract of lease is agreed to at a certain figure but the written deed by accident mentions a different figure, the contract is vitiated by mistake.[4]

Where the plaintiff an illiterate lady intended to execute a special Power of Attorney authorising her brother-in-law to pursue her Court cases, but she signed a document which turned out to be a General Power of Attorney authorising to transfer her property, she can plead that she never intended to execute such a document and the principle of *non est factum* applies.[5]

Plaintiff executed a receipt in full settlement of his claim for Rs. 3,753 for non-delivery of some Electron tubes. But subsequently the plaintiff found that, there was a mistake as the revised bill proceeded on the basis that there was only one carton instead of the four cartons in which four tubes were sent. Therefore the plaintiff demanded the balance due from the defendant as

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1. *Urban Improvement Trust, Jodhpur* v. *Laxmichand Bhandari,* AIR 1992 Raj. 153 : 1991 (1) RLW 443 : 1992 (1) RLW 499.
2. *State of Karnataka* v. *M/s. Stellar Constructions Co.,* AIR 2003 Karn 6, 14 (DB) : 2002 AIRKant HCR 2732 : 2003 (1) Arbi.LR 40 : ILR 2002 (3) Karn 4367 : 2002 (5) Kant. LJ 474.
3. *Raffles* v. *Wichelhaus,* (1864) 159 ER 375 : 133 RR 853; **see also** *Thornton* v. *Kempster,* (1814) 128 ER 901 : 15 RR 658.
4. *Garrard* v. *Frankel,* (1862) 34 ER 961 : 132 RR 352 : ILR (1970) 1 Cal. 459.
5. *Harmesh Kumar* v. *Maya Bai* AIR 2006 P&H 1.

actually four cartons were empty. The defendants refused to pay any further sum on the ground that the sum of Rs. 3,753 had been paid in full and final settlement.

It appeared that the defendant was also under a *bona fide* mistake in (thinking that four tubes were packed in a single carton).

It was held that as both the parties to the agreement were under a mistake as to a matter of fact essential to the agreement under Sec. 20, the agreement was void.

In an agreement for sale of land, where the seller intended to sell in terms of 'Kanals' while the purchaser intended to purchase in terms of 'bighas' the agreement is said to be affected by mutual mistake since the mutual mistake is as to the area of land which is a matter essential to the agreement. [1]

Courts are not without power to grant relief where as a result of common mistake substantial injustice has been done particularly when the interests of third parties are affected. In any such case the court may on such terms as it thinks just intervene to set aside the contract and render justice. [2]

Where the parties to a contract have agreed for providing the salvage service to a stricken vessel being under a common mistake as to the proximity where the vessel with its crew broke down, the courts will not have any jurisdiction to grant an order of recession of contract on the ground of common mistake, as the enforcement of the contract has to be viewed in accordance with the principles of Law of Contract.[3]

Mutual mistakes can be broadly grouped under four heads:

(a) Mistake regarding the existence of the subject-matter of the contract;

(b) Mistake as to the title;

(c) Mistake as to the substance of the thing contracted for, and

(d) Mistake as to any false and fundamental assumption going to the root of the contract. [4]

Mistake as to the identity of a person may also avoid a contract. If *A* offers by letter to *B* and it falls into the hands of *C* and *C* believing it to be for

1. *Tarsem Singh* v. *Sukhminder Singh,* AIR 1998 SC 1400, 1404 : 1998 (1) Supreme 275 : 1998 (2) Scale 58 : 1998 (2) JT 149 : (1998) 3 SCC 471.
2. *Kochudevassy* v. *State of Kerala,* AIR 1982 Ker. 90 : 1982 Ker.LT 100 : ILR (1982) 1 Ker 373 : 1982 (1) Civil LJ 582.
3. *Great Peace Shipping Ltd.* v. *Tsavliris Salvage (International) Ltd.,* (2002) 4 All. ER 689.
4. ILR (1970) 1 Cal. 459.

himself, accepts the offer, there could be no contract because of the mistake.[1] Similarly, mistake as regards the existence of the subject-matter may avoid a contract. Where a person contracts for the sale of a cargo expected by a ship which, unknown to both the parties, had been unloaded at an intermediate port and disposed of, it was held that there was no contract since both the seller and buyer thought that there was an existing something to be sold and bought and when that had ceased to exist, there would be no contract.[2] [*See* Illustration *(a)*]. Similarly, in a sale of a life policy, where unknown to both the parties, the life had expired, there was no contract.[3] [*See* Illustration *(b)*]. A mistake may also be as regards quantity. Where *A* ordered for three rifles but owing to the mistake of the Telegraph Office, the buyer understood it as fifty rifles, it was held that there was no contract but only an obligation to pay for three rifles.[4] **[232]**

In *Haji Abdul Rahiman* v. *Bombay and Persia Steam Navigation Co.*[5] The plaintiffs chartered a steamer to sail from Jedda to Bombay, "on the 10th of August, the 15th day after the Haj". They subsequently discovered that the 10th August was a mistake and the 15th day after Haj was the 19th July. In a suit for rectification the Court held that the remedy must be cancellation, if the mistake is bilateral and since the mistake was only unilateral, and in no way induced by the defendant, the contract could not be avoided. A licence was granted for the exploitation of sisal and the licensee agreed that he would deliver sisal fibre on an average minimum quantity of 50 tons per month. Both parties were under the impression that the sisal fibre was capable of producing that quantity of fibre a month. It was held that the agreement was void on the ground of mutual mistake.[6]

A policy of insurance was issued to cover risk by fire. There was a renewal of the old policy, which covered the risk of fire by riot. In the renewed policy a reduced premium was paid covering the risk of fire only. The policy, however, mentioned covering of risk of fire by riot also. Insurer pleaded a mistake.

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1. *Boulton* v. *Jones,* (1857) 157 ER 232 : 115 RR 695.
2. *Couturier* v. *Hastie,* (1856) 10 ER 1065 : 101 RR 329.
3. *Scott* v. *Coulson,* (1903) 2 Ch. 249.
4. *Henkel* v. *Pape,* (1870) 6 Ex. 7. **See also** *State of J&K* v. *Sanna Ullah,* AIR 1966 J&K 45; *New India Rubber Works Ltd.* v. *Oriental Fire, etc. Insurance Co. Ltd.,* (1969) 1 Comp. LJ 153 (Cal.); Settlement of suit by oath, Or. 23 R.3-A (Kerala Amendment) party can resile from agreement only on grounds contemplated by Contract Act. *Kunjayyappan Kattuparmbil Mamu* v. *Mariam,* AIR 1967 Ker. 15 : 1966 Ker LT 494 : 1966 Ker.LJ 638.
5. (1892) 16 Bom. 561; **see also** *Sodawaterwalla* v. *Volkart Bros.,* (1923) Sind 25 : 82 IC 81.
6. *Sheikh Brothers* v. *Ochsner,* (1957) 2 WLR 254 (PC).

It was held:

"(i) that none of the parties intended that in the policy there should be any such term of writing showing that the insurer would be liable to issue a policy covering the risk of riot and strike along with the risk of fire. This was a mistake, which crept into the document due to the carelessness on the part of the insurer. Had it been detected at the relevant time *viz.*, during the tenure of the said agreement it would have given to the insurer a good cause of action by way of rectification. It could not be stated at such stage and in such event that it was unilateral mistake that was committed by the insurer for which the insured was not liable.

(ii) that remedy was open to that defendant to set up the defence of mistake in the written document even though the document had spent its force by creating a so-called liability on the defendant. The Court under such circumstances was still competent to grant relief as if the mistake has been rectified and the document has been put in its proper form. On that basis, the plaintiff could not enforce its right under the said policy because the said risks of riot and strike were not covered by the said policy".[1]

A contract for procurement and supply of rice at controlled price entered into on the assumption that the rice would be available at that price in particular areas of State would become invalid when rice is not available at that price in those areas.[2]

The recital in a partition deed mentioned that the property dealt with therein belonged to the tarward to which the plaintiff belonged. There was no mistake on the part of the plaintiff as to the character of the property. The plaintiff alleged in the plaint suggesting at most unilateral mistake. The general averment was of common mistake of fact.

The Kerala High Court rejected the contention of the plaintiff about mistake of fact.

2. **The mistake must relate to an essential fact.**—(*e.g*) mistake as to the title of a vendor to the property;[3] mutual ignorance of the fact that the

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1. 1969 (1) Comp. LJ 153 (Cal.).
2. ILR (1970) 1 Ker. 529.
3. *Kuchwar Lime & Co.* v. *Secy. of State,* (1937) 16 Pat. 159 : 166 IC 966 : (1937) Pat. 65; *Rani Kunwar* v. *Mahbub Baksh,* (1930) ALJ 327 : (1930) All. 252; *Ramchandra* v. *Ganesh,* (1916) 21 CWN 404; *Secretary of State* v. *Jeshingbai,*(1893) 17 Bom. 407 (Bombay Settlement Act—Rights under—Mistake about the rights).

property had been already notified under the Calcutta Improvement Act,[1] or a compromise entered into under a mistake.[2]

In the following cases, on the other hand, the mistake was held to be as to a fact not essential; mistake as to the area of land let for colliery purposes;[3] mistake as to whether goods were actually in transit[4]; mistake as to whether a particular ship was bringing a specific quantity of goods[5]; mistaken belief that interest could be claimed in execution[6]; mistaken belief that a person was entitled to the grant of letters of administration, leading to the execution of a surety bond to Court[7]; mistake as to the nature of property, it being fit only for one of the two objects set out in the contract[8]; mistake as to the binding effect of a service agreement, which both parties thought was not determinable except by mutual consent.[9]

3. **The mistake must relate to an existing fact.**—In *Chin Gwan & Co.* v. *Adamjee,*[10] where, in a contract for sale and immediate delivery of goods the vendor declined to deliver unless there was added to the contract price, the amount of an excise duty imposed by law subsequent to the contract, it was held that the contract could not be avoided by the vendor on the ground of mistake as it did not relate to a fact existing at the date of the contract. In *Babshetti* v. *Venkatramana,*[11] a mulgeni lease was executed, fixing the rental at a certain figure, in proportion to the Government assessment. The fact that subsequently the assessment was increased, was held not to vitiate the contract, as the mistake was not as to an existing fact. Similarly, in *Sivagnana* v. *Periaswami,*[12] their Lordships of the Judicial Committee observed that a grant was not avoidable on the ground of mistake, merely because subsequent events disappointed the expectation with which such grant had been made. Again, in *Vappakandu Marakayar* v. *Annamalai,*[13] where money was advanced on the risk

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1. *Nursingh Das* v. *Chethu Lal,* (1923) 50 Cal. 615. **See also** *Sheikh Shakabuddin* v. *Vilayat Ali,* (1926) 95 IC 614 : (1926) Nag. 435 (Mutual mistake as to subject-matter of contract). *Union of India* v. *Venkateswara Rao & Co.,* (1978) 2 An. WR 96; *Solle* v. *Butcher,* (1950) 1 KB 671; *A. P. Kochudevassy* v. *State of Kerala,* AIR 1982 Ker. 90.
2. *Bibee Solomon* v. *Abdool Azeez,* (1881) 6 Cal. 687; *U. Pan* v. *Maung Pa Tu,* (1927) Ran. 90 : 100 IC 327; **but see** *Secretary of State* v. *Nabi Baksh,* (1927) Oudh 198 : 100 IC 730.
3. *Soorath Nath* v. *Bhabasanker,* (1929) 33 CWN 626 : 119 IC 205 : (1929) Cal. 547.
4. *Shri Ram* v. *Trimbak,* (1927) 29 Bom. LR 1036 : 103 IC 645 : (1927) Bom. 514.
5. *Bhailal* v. *Kalyanrai,* (1921) 45 Bom. 1222 : 23 Bom. LR 547 : (1921) Bom. 49.
6. *Seth Gokul Das* v. *Murli,* (1878) 3 Cal. 602.
7. *Debendranath* v. *Adm-General, Bengal,* (1906) 33 Cal. 713 (FB).
8. *Om Prakash* v. *Daulat Ram,* (1930) Lah. 772 : 126 IC 190.
9. *Bell* v. *Lever Bros.,* (1932) AC 161. **See also** *Kalyanpur Lime Works* v. *State of Bihar,* AIR 1954 SC 165 : 1954 SCJ 99 : 1954 SCR 958.
10. (1933) 11 Ran. 201 : 146 IC 440 : (1933) Ran. 79.
11. (1878) 3 Bom. 154.
12. (1878) 1 Mad. 312.
13. (1901) 25 Mad. 561.

of the voyage of a ship which was already at sea, and it was clear that the risk had been undertaken retrospectively from the date of the actual departure of the ship, it was held that the mere fact that the ship had, unknown to both parties, sunk at sea at the date of the advance, was not a mistake which invalidated the contract so as to attract the provisions of Sec. 65 of the Contract Act.

Rectification.—Where the parties are under a mutual mistake as to a matter of fact, the contract is void [1]; but where the parties have really agreed, but have incorrectly set out such concurrence of their wills in the deed which evidences it, the Court may "reform" the contract and rectify the written instrument. [2]

Section if applicable to decrees.—It has been pointed out in a ruling of the Allahabad High Court that the section applies only to contracts which might be rectified if the mistake is a mistake of both parties, that the analogy cannot be applied to the case of a decree and that it is not possible to avoid a decree by means of a fresh suit on the ground that the decree has been obtained on account of the mistake of parties. [3]

21. Effect of mistakes as to Law.—A contract is not voidable because it was caused by a mistake as to any law in force in [4][India,] but a mistake as to a law not in force in [4][India] has the same effect as a mistake of fact.

Illustration

A and *B* make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation; the contract is not voidable.

Mistake of Law.—The general rule is that a mistake of law is no ground for relief. [5] The maxim is *ignorantia juris haud excusat.* By law is here meant the general law of the land and so a mistake of foreign law or private rights ranks as a mistake of fact. Where a person took a lease of certain property

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1. *P.C. Muthu Chettiar* v. *Venkatachalam Chetty,* (1935) Mad. 287 : 41 LW 476 : 159 IC 486: (1935) MWN 237.
2. **See** *Sayamma* v. *Venkata Reddi,* (1931) Mad. 785 : 34 LW 266 : (1931) MWN 906 : 61 MLJ 437 (No relief where mistake is unilateral). *A.P. Kochudevassy* v. *Staie of Kerala,* AIR 1982 Ker. 90.
3. *Kasim Ali* v. *Om Prakash,* (1937) All. 731 : (1937) ALJ 1095 : 172 IC 337.
4. The original word "British India" have successively been answered by the AO 1948 and AO 1950 to read as above.
5. *Bilbie* v. *Lumley,* (1802) 102 ER 448 : 6 RR 479.

but discovered that it was his own property, he was allowed to plead the mistake.[1] **[219]**.

But where a claim is settled between parties having regard to the existing state of the law it will not be open to a party to reagitate the subject-matter of the claim on the footing of a mistake of law, merely by reason of a change in the law, subsequent to such settlement.[2]

The proposition that a mistake as to the general law of the land will not avoid a contract is illustrated in a Lahore case where a second mortgage lent money under a mistaken notion that registration of his mortgage which was later in point of time will give priority over a previously executed mortgage over the same property.[3]

The Privy Council expressed its view in the following terms:

> "If a mistake of law has led to the formation of a contract, Sec. 21 enacts that the contract is not for that reason voidable. If money is paid under that contract, it cannot be said that the money was paid under mistake of law; it was paid because it was due under a valid contract and if it had not been paid payment could have been enforced. Payment 'by mistake' in Sec. 72 must refer to a payment, which was not legally due, and which could not have been enforced; the 'mistake' is thinking that the money paid was due when in fact it was not due. There is nothing inconsistent in enacting on the one hand that if parties enter into a contract under mistake of law that contract must stand and is enforceable, but on the other hand that if one party acting under mistake of law pays to another party money which is not due by contract or otherwise, that money must be repaid. Moreover if the argument based on inconsistency with Sec. 21 were a valid, a similar argument based on inconsistency with Sec. 22 would be valid and lead to the conclusion that Sec. 72 does not even apply to mistake of fact. The argument submitted to their Lordships was that Sec. 72 only applies if there is no subsisting contract between the person making the payment and the payee and that the Contract Act does not deal with the case where there is a subsisting contract but the payment was not due under it. But there appears to their Lordships to be no good reason for so

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1. *Cooper* v. *Phibbs*, (1867) 2 HL 149; *Ram Chandra* v. *Ganesh*, (1917) 21 CWN 404 : 39 IC 78.
2. *Derrick* v. *Williams*, (1939) 2 AER 559.
3. *Jowand Singh* v. *Sawan Singh*, (1933) Lah. 836.

limiting the scope of the Act. Once it is established that the payment in question was not due, it appears to their Lordships to be irrelevant to consider whether or not there was a contract between the parties under which some other sum was due" [1]

In view of the statement of law by the Privy Council the decision of the Madras High Court in *A. M. Appavoo Chettiar* v. *South Indian Rly. Company,* [2] cannot be considered to lay down the correct law on the point. [3] In *Ram Chandra* v. *Ganesh,* [4] the Court avoided a lease on the ground of mutual mistake of fact, the mistake consisting in the parties' view of the legal incidents of the tenure of which the property was held.

Where one party paying money to another resiles from the contract by pleading mutual mistake of law and when the contract was duly acted upon by both parties, the onus will be heavy on the party making the payment that money was paid by him as a result of mistake. [5]

22. Contract caused by mistake of one party as to matter of fact.—A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

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1. *Sha Shivaraj Gopalaji* v. *Appakath Ayisa Bi,* AIR 1949 PC 297.
2. AIR 1929 Mad. 177; *C. Raja Rajeswara Sethpathi* v. *Secy. of State,* AIR 1929 Mad. 179.
3. *The Sales Tax Officer, Banaras* v. *Kanhaiya Lal Mukundlal Saraf,* AIR 1959 SC 135 : 1959 SCR 1350 : 1958 (9) STC 747; followed the decision of the Privy Council specifically overruling the decisions in ILR 44 Bom. 61; *Municipal Council Tuticorn* v. *Ralli Brothers,* AIR 1934 Madras 420; *Chairman, Municipal Council, Rajamandry* v. *Nyapathi Subba Rao,* AIR 1937 Madras 559; The Supreme Court has held that no writ can be filed claiming refund under Article 226 of the Constitution in *D.R. Mills* v. *Commissioner of Civil Supplies,* AIR 1976 SC 2243; *Municipal Corporation of Greater Bombay* v. *Advance Builders (India) Pvt. Ltd.,* AIR 1972 SC 793 : 1972 (1) SCR 408 : (1971) 3 SCC 381: 1971 UJ 838; *D. Cawasji* v. *State of Mysore,* AIR 1975 SC 813 : 1975 (2) SCR 511 : (1975) 1 SCC 636.
4. (1917) 21 CWN 404 : 39 IC 78. **See also** *Bahadur Singh* v. *Bed Kanth Singh,* AIR 1947 Cal. 70; *Ramanujulu* v. *Gajaraja Ammal,* AIR 1950 Mad. 146 : (1949) MLJ 560; *Balaji* v. *Annapurna Bai,* AIR 1952 Raj. 2; *State of J&K* v. *Sanna Ullah,* AIR 1966 J&K 45; *Kalyanpur Lime Works* v. *State of Bihar,* AIR 1954 SC 165 : (1954) SCR 958; *D.R. Mills* v. *Commissioner Civil Supplies,* AIR 1976 SC 2243; *State of Orissa* v. *Md. Khan,* AIR 1961 SC 75; *Mohd. Haneefa* v. *Narayani,* AIR 1967 Kerala 190; *Badri Prasad* v. *Nagarmal,* AIR 1959 SC 559 : 1959 Suppl. (1) SCR 769 : 1959 (29) CC 229; *Kuju Collieries Ltd.* v. *Jharkhan Mines Ltd.,* AIR 1967 Pat. 72 : 1966 BLJR 46 : ILR 45 Pat. 962.
5. *State Industrial & Investment Corporation of Maharashtra Ltd.* v. *Narang Hotels (P) Ltd.,* AIR 1995 Bom. 275.

Unilateral Mistake—Though a bilateral mistake would avoid the contract, a unilateral mistake, (*i.e.*) a mistake on the part of one contracting party, would not be permitted as a defence.[1] Though, in such a case there is strictly no *consensus* since the two minds are not agreed, yet the law takes note of minds only as expressed. If *A* has expressed himself in one way, whether by words spoken or written, he cannot afterwards be heard to say that what the said or what he wrote, was not what he intended. **[226]** The principle of estoppel by which a person who has so conducted himself as to lead another to believe in the existence of a certain set of facts and act thereon cannot be permitted afterwards to deny those facts, would apply to a case of this kind. By his words spoken or written, he has induced another to enter into a contract and he cannot be permitted to say, even if it be true, that he never intended to say or write that which he did. The maxim, according to Sir John Salmond, is *litera scripta manet*, the written word governs. **[221]**

Mistake as to contract.—But, though a person signs a document it may be possible to say that the signature is not his, as in the case of an illiterate person signing a document, which is represented to him as a document of a different nature. In such a case, the principle of *litera scripta manet* does not apply and the plea of *non est factum, (i.e.)* that is not the fact or that is not my deed, will be available.[2] The plea was extended to an old person partially blind [3] and a young and literate person signing in implicit confidence that his signature was required only as an attestor.[4] In *Surat Chandra* v. *Kanai Lal*,[5] a lady was induced to sign a deed of exchange and gift on the representation that it was a power of attorney. The Court held that the document was void, as the signer's mind did not accompany her signature. Similarly, in *Hem Singh* v. *Bhagwat*,[6] where a blind man signed what he thought was a compromise petition, but it was in reality a release, on the fraudulent representation of another, the plea of *non est factum* was upheld. The case of *Chimanram* v. *Divanchand* [7] is also in point. The principle is that where a person signs a document, which turns out to be of, a different nature from what he had intended, it could be avoided. The

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1. *Khuda Bux* v. *Fateh Chand*, (1911) 10 IC 343; *Tikam Das* v. *Abbas Mirza*, (1936) Oudh 97 : 159 IC 772; *A.P. Kochudevassy* v. *State of Kerala*, AIR 1982 Ker. 90; *Namayya* v. *Union of India*, AIR 1958 AP 533 : 1958 (2) An.WR 153; *Governor of Orissa State* v. *Shiva Prasad Sahu*, AIR 1963 Orissa 217.
2. *Thoroughgood's Case*, (1582) 76 ER 408.
3. *Foster* v. *Mackinnon*, (1869) 4 CP 704.
4. *Lewis* v. *Clay*, (1898) 67 LJQB 224.
5. (1921) 26 CWN 479 : 70 IC 525 : (1921) Cal. 786.
6. (1925) Pat. 140 : 80 IC 67.
7. (1932) 56 Bom. 180 : 34 Bom. LR 6 : (1932) Bom. 151; *Gangaram* v. *Sumangal*, (1933) Sind 347 : 147 IC 486 (Signature to arbitration reference by illiterate party—Party not bound); **but see** *Firm Khim Chand* v. *Udhavdas*, (1928) Sind. 97 : 106 IC 565 (Party signing contract printed in unknown language without caring to know the contents will be bound).

question will be "did the signer intend to sign a document of that *legal category?*" If what he signs is a document of one legal category and what he intended to sign was a document of a different legal category, then the plea of *non est factum* will be available. **[226]** Where the thumb impression of an illiterate woman was taken on two documents of them one was gift deed and another was sale deed of her properties, when she honestly believed that she is executing only one single document of gift in favour of her daughter, the execution of sale deed is totally void and not voidable. The woman never intended to execute the sale deed since her mind did not accompany the thumb impression.[1] In such a case, even negligence is immaterial. But if a person negligently signs a document of the same legal category, as he intended to sign, but with different terms and conditions, he cannot be heard to plead mistake and avoid the contract.[2] Similarly negligence would bar the plea of *non est factum* if the document signed was a negotiable instrument.[3] Where a fraudster practising fraud on an issuing bank obtained a draft drawn on a company claiming to be its signatory and received payment from the receiving bank, the question that arose was whether title to the draft passed on from the issuing bank to the receiving bank through the fraudster. It was held that as between two innocent parties it is issuing bank which must suffer the loss, because the delivery of banker's draft from the issuing bank to the receiving bank with the authority of the issuing bank, albeit the authority was induced by fraud, established a contract, *albeit* a voidable contract, between the two banks under which the title to the draft passed directly from the issuing bank to the receiving bank.[4] While pleading misrepresentation in challenging the validity of the agreement although there is no averment as to mistake of fact, it being the ground hitting the very root of the validity of the agreement, it may not necessarily be pleaded.[5]

Where a illiterate, old and sick woman was under the impression that she is executing a lease deed for one year but the document got executed by the defendant was discovered subsequently for a period of 99 years at a paltry sum of Rs. 2,500/-, she is entitled to get the document set aside on the principle of *non est factum* since her intention of thumb marking of the document was to consent for lease of a period of one year only and not for a period of 99 years.[6]

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1. *Dularia Devi* v. *Janardhan Singh,* AIR 1990 SC 1173, 1175 : 1990 All. LJ. 245.
2. *Blay* v. *Pollard* (1930) 1 KB 628; *Howatson* v. *Webb,* (1908) 1 Ch. 1; **see** *New India Assurance Co. Ltd.* v. *Food Corporation of India,* (1983) 96 LW 166 (SN).
3. *Carlisle & Cumberland Banking Co.* v. *Bragg,* (1911) 2 KB 489; (Cf.) *Oriental Bank* v. *Fleming,* (1879) 3 Bom. 242.
4. *Citibank N.A.* v. *Brown Shipley & Co. Ltd.,* 1991 (2) All.E.R. 690.
5. *Seth Srenikbhai Kasturbhai* v. *Seth Chandulal Kasturchand,* AIR 1997 Pat. 179 : 1997 (2) BLJR 1219.
6. *Hamelo* v. *Jang Sher Singh,* II (2002) Civ.C.R. 411 (P&H).

Where a plaintiff a rustic and illiterate women under a mistaken belief has executed a family settlement deed thinking it to be a document of license and subsequently on the discovery of the nature of the document revoked it, the action of the plaintiff in revoking the deed is proper in view of the fact that the defendant has miserably failed to substantiate that the document after her execution was read over and explained to her.[1]

Mistake as to identity of person.—Mistake as regards the identity of a person may also avoid a contract.[2] Such a mistake has caused much difficulty to Courts; for in most cases of this kind the other contracting party, usually a swindler is convicted and the Courts are necessarily called upon to adjudge the claims between two innocent parties. Where *A* started correspondence for purchasing goods under a name which resembled the name of a well-known firm carrying on business in the same street, induced *B* to sell goods on credit to him and transferred the same to *C* who *bona fide* purchased it for value, it was held that there was a mistake as to the identity of the person contracted with and therefore, since there was no *consensus*, there was no contract and ownership or property in the goods cannot pass to *A*, much less to *C*.[3] **[233]** Again where an order was sent to a firm and the firm had just then changed hands, and the new management sent the goods without any intimation as to the change of ownership it was held that there was no contract, since the acceptance was not by the offeree.[4] Again where a person knowing that a ticket for a performance in a theatre will not be issued, if he applied in his own name, got a friend to purchase it for him, it was held that there was no contract.[5] **[239-240]** But where a man entered a shop, purchased goods and gave a worthless cheque the seller believing that the purchase was a well-known person of credit and stability, the Court held that the ownership passed to the purchaser and there was only an error in the inducing cause or error *in causa* and that the contract was with the person who entered the shop, identified by sight and identified by hearing.[6] Where the thumb impression of an illiterate woman was taken on two documents of them one was gift deed and another was sale deed of her properties, when she honestly believed that she is executing only one single document of gift in favour of her daughter, the execution of sale deed is totally void and not voidable. The woman never intended to execute the sale deed since her mind did not accompany the thumb impression.[7] The principle in all these cases is the same *viz.* Where the identity

1. *Khandu Charan Polley* v. *Chanchala Bhuinya*, AIR 2003 Cal 213, 217 : 2002 (3) Cal HN 609.
2. *Ismail* v. *Dattatraya*, (1916) 40 Bom. 638 : 34 IC 515 (Decision really rested on S. 65, Contract Act).
3. *Cundy* v. *Lindsay*, (1878) 3 AC 459.
4. *Boulton* v. *Jones*, (1857) 157 ER 232 : 115 RR 695; (Cf.) *Bell* v. *Lever Bros.*, (1932) AC 161 (217).
5. *Said* v. *Butt*, (1920) 3 KB 497.
6. *Phillips* v. *Brooks*, (1919) 2 KB 243; (Cf.) *Lake* v. *Simmons*, (1927) AC 417.
7. *Dularia Devi* v. *Janardhan Singh*, AIR 1990 SC 1173, 1175 : 1990 All. LJ 245.

of the person with whom one is willing to contract enters as an element in the formation of the contract, any mistake as regards the identity destroys the consent and annuls the contract. **[208-209]** But, where one would be willing equally to contract with any other individual, the identity is immaterial, and the contract cannot be annulled.

Mistake as to quality.—This is again a difficult matter as to under what circumstances a person could plead a unilateral mistake as to the quality of the goods, which he is purchasing. The principle of estoppel again applies. Where, for instance, a person purchases in an auction property *A*, believing it to be property *B*, he is prevented from pleading his own mistake and the contract cannot be avoided.[1] But where from the huge difference in the prices of two properties the seller is likely to know that the buyer, when offering a certain amount is making a mistake, as to the quality of the goods he is purchasing, *e.g.*, where a person purchased tow under the impression that he was purchasing hemp and the auctioneer knew that the buyer was making a mistake, the Court held that the contract could be avoided.[2] Where an employee signed a service agreement wherein owing to mistake in recording, his salary was written as Rs. 600 while in fact only Rs. 500 had been agreed upon, it was held that as he was aware of the mistake he could not enforce the agreement and that his conduct was fraudulent.[3] The reason is that principle of estoppel does not apply where a person knows the real facts. So Sir William Anson says: mistake by one party, as to the intention of the other party, known to that other, would avoid a contract. Generally, in all transactions of sale the principle is *caveat emptor,* purchaser beware; the seller is, therefore under no duty to point out the defects in the articles sold, unless he chooses to make a representation or the law implies a warranty, *e.g.*, description, merchantability, fitness and so on. In case, where a sample of oats was seen by a buyer, who thought he was purchasing old oats and the seller knew that the buyer thought that the oats were old, it has been held that the contract was binding as the passive acquiescence of the seller in the self-deception of the buyer, will not avoid the contract.[4] The principle is this: Though the seller may know that the buyer is mistaking the quality of the goods, there is no duty on the part of the seller to disabuse the mind of the purchaser; but where the seller knows that the buyer is under the mistaken idea that the seller is making a representation about the quality of the goods, (*i.e.*) where the mistake is as to the promise,

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1. *Van Pragh* v. *Everidge,* (1902) 2 Ch. 266.
2. *Scriven* v. *Hindley,* (1913) 3 KB 564.
3. *W.C.Binns* v. *W&T.Avery,* (1934) 61 Cal. 548 : 38 CWN 908 : 152 IC 117 : (1934) Cal.778.
4. *Smith* v. *Hughes,* (1871) 6 QB 597.

namely, that old oats are being promised, then a duty arises on the party of the seller to disabuse the mind of purchaser, and if he fails to do so, the contract may be avoided by the buyer. **[247]**

Contracts Uberrimae fidei.—There are however, certain contracts known as contracts *uberrimae fidei*, in which the principle of *caveat emptor* does not apply since the parties in such case are not dealing at arm's length, and there is a duty on one of the parties fully and frankly disclose whatever is material in the matter of obtaining the consent of the other party to the contract. Contracts of insurance are leading types of this class and they have been avoided even for mere non-disclosure of apparently immaterial facts.[1] It is well settled fact that a contract of insurance is contract *uberrimae fidei* and therefore there must be complete good faith on the part assured.[2]

A contract for the sale of land is also considered a contract of utmost good faith, in that the seller is under an obligation to disclose latent defects, as regards the land and the title or any restrictive covenants of which the seller knows, but there is no duty to disclose any patent defects.[3] A contract of suretyship, a contract of partnership, and family arrangements are all contracts of good faith to lesser or greater degree. A contract to marry has been in a Napur ruling held to belong to the category of contracts *uberrimae fidei*.[4] It has been held that a contract of service is not a contract of this kind.[5] **[256]**

23. What considerations and objects are lawful, and what not.— The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or

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1. *Locker & Woolf* v. *Western Australia Insurance Co.*, (1936) 1 KB 408; *Merchant's & Manufacturers' Insurance Co. Ltd.* v. *Davies*, (1938) 1 KB 196 : (1937) 2 AER 767; *London Assurance* v. *Mansell*, (1879) 11 Ch.D. 363; *Glicksman* v. *Lancashire & General Assurance Co.*, (1927) AC 139; *Ionides* v. *Pender*, (1874) 9 QB 531. *Umesh Cord Storage* v. *Oriented Fire & General Insurance Co. Ltd.*, (1985) 3 Comp. LJ 362; *Hindustan General Insurance Society Ltd.* v. *Khushiram*, (1983) 53 Comp. Cas. 713.
2. *LIC of India* v. *Ajit Gangadhar Shanbhag*, AIR 1997 Karn. 157, 159 : 1996 (2) Civ. LJ 787 : ILR 1996 Kar. 2078.
3. *Flight* v. *Booth*, (1834) 131 ER 1160 : 41 RR 599.
4. *Haji Ahmed* v. *Abdul Gani*, (1937) Nag. 270 : ILR (1937) Nag 299; but Sir Frederick Pollocks the contrary view; **see** Contracts, p. 555.
5. *Bell* v. *Lever Bros.*, (1932) AC 161 (227-28).

involves or implies injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations

(a) A agrees to sell his house to *B* for 10,000 rupees. Here, *B's* promise to pay the sum of 10,000 rupees is the consideration for *A's* promise to sell the house and *A's* promise to sell the house is the consideration for *B's* promise to pay the 10,000 rupees. These are lawful consideration.

(b) *A* promises to pay *B* 1,000 rupees at the end of six months, If *C*, who owes that sum to *B*, fails to pay it. *B* promises to grant time to *C* accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.

(c) *A* promises, for a certain sum paid to him by *B*, to make good to *B* the value of his ship if it is wrecked on a certain voyage. Here *A's* promise is the consideration for *B's* payment, and *B's* payment, is the consideration of the *A's* promise, and these are lawful considerations.

(d) *A* promises to maintain B's child and *B* promises to pay *A* 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful consideration.

(e) *A*, *B* and *C* enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for *B* an employment in the public service, and *B* promises to pay 1,000 rupees to *A*. The agreement is void, as the consideration for it is unlawful.

(g) *A*, being agent for a landed proprietor, agrees for money without the knowledge of his principal, to obtain for *B* a lease of land belonging to his principal. The agreement between *A* and *B* is void, as it implies a fraud by concealment by *A*, on his principal.

(h) *A* promises B to drop a prosecution which he has instituted against B for robbery, and *B* promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) *A's* estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. *B*, upon an understanding with *A*, becomes the purchaser, and agrees to convey the estate to *A* upon receiving from him the price, which *B* has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) *A*, who is *B's* mukhtar, promises to exercise his influence, as such, with *B* in favour of *C*, and *C* promises to pay 1,000 rupees to *A*. The agreement is void because it is immoral.

(k) *A*, agrees to let her daughter to hire to *B* for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code [45 of 1860].

General.—The consideration or object of an agreement might be unlawful either by its being forbidden by law or defeating the provisions of any law; or it might be unlawful, in that it is immoral, as for instance an agreement for illicit, cohabitation, or an agreement for future separation between husband and wife; or it might be unlawful; as being opposed to public policy. It is, however, difficult to classify agreements, which are opposed

to public policy, because new grounds of public policy have necessarily to be recognised even though Courts are reluctant to do so.[1] Judge's have very often said that "public policy is an unruly horse and once you get astride it, you are apt to be run away with" and again, "that the public policy of one judge may not be the public policy of another judge and it would introduce uncertainty, into the law." The principle underlying this section is that the contract, the consideration or object of which is unlawful or if is prohibited by law it cannot be enforced in law.[2] However, if the contract itself is not prohibited, its performance in an unlawful manner does not prevent recovery under the contract.[3] The section adds that agreements, whose object or consideration is fraudulent or involves or implies injury to the person or property of another, are also unlawful. Certain specific kinds of unlawful agreements are stated in Sections 26, 27, 28 and 30. The arrangement of the sections is not logical.**[320]**

"Consideration" and "Object".—One of the requisites of a valid contract enforceable at law is the legality of its object. Section 10 of the Contract Act requires that a contract should be made for a lawful consideration and with a lawful object. The present section sets out when a consideration or object would be unlawful.

It will be noticed that the words "consideration" and "object" are not used synonymously. While "consideration" is used in the sense it bears in Section 2, Clause (d), and the word 'object' appears to be used in the wide sense of purpose. This distinction has been pointed out in a Calcutta case, where a person transferred his property to a near relation for a certain sum, with a view to defeat creditors. Here the consideration was certainly lawful, namely, payment of money, but the object or design was unlawful as it offended the provision of the insolvency law.[4] The appellation "void" in relation to a juristic act, means without legal force effect or consequence not binding, invalid, null, worthless, cipher, useless and ineffectual etc.[5]

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1. (Cf.) *Gulam Hossain* v. *Syed Altaf,* (1934) 61 Cal. 80 : 58 CLJ 333 : 149 IC 1215 : (1934) Cal. 328 : 38 CWN 214.
2. *B & B. Viennese, Fashions* v. *Losane,* (1952) 1 All. ER 909.
3. *John Shipping Corporation* v. *Joseph Rank Ltd.,* (1956) 3 All. ER 683.
4. *Jaffer Mahomed* v. *Budge Budge,* (1909) 33 Cal. 702 : 10 CWN 755 : (Cf.) *Sabava Yellapa* v. *Yamanappa Sabu,* (1933) 35 Bom. LR 345 : (1933) Bom. 209; **see also** *Rajbenback* v. *Memon,* (1955) 1 All. ER 12 : *A.R.L.D. Firm* v. *U.P. Kaying,* AIR 1939 Rangoon 305 (An agreement which is opposed to the personal or customary law is unlawful); *Abdul Khader* v. *The Plantation Corporation of Kerala Ltd.,* AIR 1983 Kerala 1.
5. *Nutan Kumar* v. *II Additional District Judge, Banda,* AIR 1994 All. 299, 303.

The subject can be broadly divided into three heads:

(1) The consideration or object may be illegal ; or

(2) It may be immoral ; or

(3) It may be opposed to public policy.

Illegal—Forbidden by law.—Agreements which are forbidden may fall into one of three kinds, depending on the nature of the prohibition. The object with which a contract is prohibited may be only the consideration of the state revenue, so that the legislature does not consider the agreement either immoral or illegal, but simply says that the agreement shall not be allowed to impair the convenient collection of the revenue. Again, an agreement may be forbidden, because it contravenes a law intended to protect the public interest and the conduct of particular trades. One should look to the Act itself to see of the agreement complained of is prohibited by law or it would defeat the provisions of any law so as to pronounce it as void.[1] In such a case, the agreement is not enforceable as between the parties. Again, there may be agreements, which the law declares illegal and would make it impossible, if it can, for people to enter into such agreements. These are illegal agreements simpliciter. Here the law not only refuses to enforce the agreement, as between the immediate parties but prohibits transactions collateral to such agreements, entered into with the knowledge of the illegality. Thus, running a lottery is an offence punishable under the Indian Penal Code, and therefore even collateral transactions connected with a lottery will be tainted, with the result that a person knowingly letting a house for the conduct of a lottery cannot recover the rent therefor. In many of the cases, the statute may in order to discourage people from making such contracts, provide penalties without declaring in terms that the contract themselves are illegal. An agreement offending a statute or public policy or forbidden by law is not merely void but it is invalid from nativity. It cannot become valid, even if the parties thereto agree to it. When a Statute provides penalty for a matter or thing, such a matter or thing is forbidden by law, prohibition is implicit in penalty. No legal relations come into being from an agreement offending a statute or public policy.[2] An agreement to sell with the promoters of Housing Co-op. Society, which is yet to be registered, cannot specifically be enforced after its subsequent registration as the society acquires legal personality only after its registration and as such the contract is nullity in law and void.[3] The exact scope of the statutory prohibition is a matter of construction in each case. **[324]** The distinction

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1. *Banarsi Dass* v. *Smt. Shakuntala,* AIR 1989 Del. 184.
2. *Nutan Kumar* v. *II Additional District Judge, Banda,* AIR 1994 All. 299, 303
3. *Ashok Kumar J. Pandya* v. *Suyog Co-op. Society Ltd.,* AIR 2003 NOC 118 (Guj) : 2002 AIHC 3401.

between contract prohibited by statute and those prohibited at common law is lucidly discussed in *Dungat* v. *Lee*.[1] When sale of land earmarked for agriculture and sale in excess of ceiling limit was prohibited under A.P. Urban Land (Ceiling and Regulation) Act, 1976, except with permission of the competent authority, agreement to sell land without obtaining the permission was held to be opposed to statute hit by Sec. 23.[2] Where an agreement relating to alienation of land came into existence much earlier to an enactment passed prohibiting the alienation under Land Ceiling Act, the agreement cannot said to be hit by Sec. 23 of Contract Act.[3] Although the sale of urban property is barred under the Land Ceiling Act but where the recital in the agreement provides for obtaining the permission of the appropriate authority, the agreement cannot be rendered unlawful on the ground of public policy.[4] Where a tenant was in possession of the building without any order of allotment under an agreement of lease which is in contravention of the provisions of Rent Control Act, the agreement cannot be held to be contrary to public policy in the absence of any provision in the statute declaring the contract contrary to the statute as void and as such the tenant being an authorised occupant of the premises is bound by the decree of ejectment.[5] Merely because the agreement relating to sale of immovable property contained a condition for obtaining permission from the Urban Ceiling Authorities, the agreement cannot be rendered void and unlawful being contrary to public policy.[6]

An agreement to sell between a land owner and the Housing Co-op. Society preceding the registration of the society cannot said to be ratified merely because the land owner has put two endorsements on the agreement

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1. (1969) 1 Ch. 545; **see also** *Mannalal* v. *Kedar Nath,* AIR 1977 SC 536 : 1972 (2) SCR 190: (1977) 2 SCC 424 : 1976 UJ 1017 : 1977 CC 185. (Negative, prohibitory and exclusive words are indicative of the legislative intent when the statute is mandatory. Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statutory provision imperative.) *Kiriri Cotton Co. Ltd.* v. *Dewani,* (1960) AC 192; *Wilson Sri Thetto Co. Ltd.* v. *Terruzzi,* (1976) QB 683; **see also** *Archbolds (Freightase) Ltd.* v. *Spanglett. Ltd.,* (1961) 1 QB 374 : 385, 393 : *Ashmore, Benson Pease & Co. Ltd.* v. *A.V. Dawson Ltd.,* (1973) 1 WLR 828; *St. John Shipping Corporation* v. *Joseph Rank Ltd.,* (1957) 1 QB 267, 283; *Viswanatha* v. *Shanmuogham,* AIR 1969 SC 493 : (1969) 1 MLJ 86 SC reversing (1966) MLJ 363; *Ghulam Ahmed* v. *Mohammad Iqbal,* AIR 1970 J & K 165: **see also** *K.R. Prasad* v. *Subba Rao,* (1970) 2 All WR 218; And **See** *Gnana Guru Rajan* v. *Bagyavathi Ammal,* (1978) 2 MLJ 432.
2. *Denzyl Winston Ferries* v. *Abdul Jaleel,* AIR 1992 AP 246 : 1992 (1) ALT 144.
3. *N. Venkataramanna* v. *M. Narasimhan,* AIR 1994 AP 244, 252 : 1994 (1) ALT 185 : 1993 (2) APLJ 381 : 1994 (1) Cur. CC 941 : 1994 CCC 699 : 1993 (2) LS 215.
4. *Emani Krishna Rao* v. *M/s.Vijaya Chitra Films,* AIR 2003 NOC 142 (AP).
5. *Nutan Kumar* v. *2nd Additional District Judge,* AIR 2002 SC 3456 : (2002) 8 SCC 31 : 2002 (7) Supreme 8 : 2002 (4) SCJ 496 : 2002 (4) Cur. CC 62.
6. *Emani Krishna Rao* v. *M/s. Vijaya Chitra Films,* AIR 2003 NOC 142 (AP) : 2003 (1) Civil LJ 591 (AP) : 2002 (6) ALD 176.

ratifying the same and he and the society have made a joint application seeking government's permission under Urban Land Ceiling Act.[1]

The Forest Act, the Tolls Act and the Ferries Act contain provisions intended for the protection of the State revenue. There are provisions in them for leasing out particular rights (either to cut grass as in the Forest Act or to collect tolls or ply ferries). The conditions under which licences in these cases are issued may prohibit the sub-letting or transfer of the rights; for, if the Government were to recognise all transfers and assignments, difficulties may arise in collection of the fees. So what the law says is "So far as the State is concerned, any agreement prejudicial to easy collection of revenue will not be recognised. But if any licence sublets, or transfers his right, he may recover, and the law will not prevent it."[2] As Parsons, J. observed in *Bhikanbai* v. *Hiralal*,[3] "When conditions are prescribed by statute for the conduct-of any particular business or profession and such conditions are not observed, agreement made in the course of such business or profession are void if it appears by the context that the object of the legislature in imposing the condition was the maintenance of public order to safety or the protection of the persons dealing with those a whom the condition is imposed, but valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes (*e.g.*) the convenient collection of the revenue." It was therefore held in this case that a lessee of tolls could recover the amount due under a sub-lease granted without the sanction of the Collector. It was observed that the Act imposing tolls is an Act passed for the benefit of the revenue, and not an Act for the protection to public morals. On this principle, in the case of a contract made with the Public Works Department, the plaintiff who had entered into a sub-contract with the defendant contractor, in ignorance of a clause prohibiting the sub-letting or assignment of the contract was held entitled to recover.[4] **[325-326]**

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1. *Ashok Kumar J.Pandya* v. *Suyog Co-op. Society Ltd.*, AIR 2003 NOC 118 (Guj).
2. *Abdulla* v. *Allah Diya*, (1927) 8 Lah. 310 : 100 IC 846 : (1927) Lah. 333 : *Nazar Ali* v. *Babamiya*, (1916) 40 Bom. 64 : 30 IC 913 (Assignment of grass cutting licence); *Venkatanandam* v. *Dhanraju*, (1929) 117 IC 298 : (1929) Mad. 689 (Partnership in respect of contract under Forest Act); *Abdulla* v. *Mammod*, (1902) 26 Mad. 156 (Ferries Act-Lessee transferring without authority of Collector); As to what amounts to sub-letting within the meaning of the above Acts, **See** *Gauri Shankar* v. *Mumtaz Ali*, (1879) 2 All. 411; *Karsan* v. *Gatlu*, (1913) 37 Bom. 320; *Radhey Shiyam* v. *Mewa Lal*, (1928) 51 All. 506 : 116 IC 89 : (1929) All. 210; *Narayana Murthy* v. *Mallapudi Subramania*, (1928) 114 IC 655 : (1928) Mad. 1197; *Gangadhara* v. *Swaminatha*, (1926) 22 LW 679 : 92 IC 112 : (1926) Mad. 218. **See also** *Bhagwant Genuji* v. *Gangabisan Ramgopal*, AIR 1940 Bom. 369.
3. (1900) 24 Bom. 622.
4. *Gangadhar* v. *Damodar*, (1897) 21 Bom. 522. See *I.T. Commr. Bombay* v. *Shantilal (P) Ltd.*, AIR 1983 SC 952 : (1983) 3 SCC 561 : 1983 (3) SCR 470 : 1983 (2) Comp. LJ 305 (Speculative Transaction u/s. 43 (5) & Act; *Naveen Chandra* v *VI Addl. District Sessions Judge Meerut*, AIR 1983 All. 116.

It may be observed that in the above cases, the statute itself does not forbid or attach a penalty to the transaction of sub-letting, but vests a power in the licensing authority to impose a condition and revoke a licence in case the consideration is violated.

On the other hand, prohibitions contained in the Salt Act, Abkari Act and the Opium Act have all been held to be for the protection of the public also and not merely for the protection of the revenue. A licence granted under these Acts depends on a consideration of the character of the licencee. To recognise any sub-letting or transfer will not be expedient. So, the Court refuses to recognise such transfers.[1] Where an Abkari licensee had taken another into partnership contrary to the terms of his licence, and a third party knowingly advanced money to the illegal partnership, the lender was held disentitled to recover as being *particeps criminis*.[2] The position may be different if the plaintiff had no knowledge of the illegality.[3] In one case however, where the plaintiff had advanced money with the knowledge, that only one of the defendants had a licence, and sued to recover the money from both, the court, instead of dismissing the suit *in toto*, applied the distinction between *malum in se* and *malum prohibitum* and held that the lender could recover one half

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1. *Bahari* v. *Jagodish*, (1904) 31 Cal. 798; *Ragunath* v. *Nathu*, (1895) 19 Bom. 626 (Opium Act); *Nalain Padmanabhan* v. *Sait Badrinath*, (1912) 35 Mad. 582 (Opium Act); *Hormasji* v. *Pestonji*, (1888) 12 Bom. 422 (Partnership contravening Abkari licence); *Debi Prasad* v. *Rup Ram*, (1888) 10 All. 577; *Thithi Pakurudasu* v. *Bheemudu*, (1902) 26 Mad. 430 (Sub-letting of liquor licence); *Marudamuthu* v. *Rangaswami*, (1900) 24 Mad. 401 (partnership between arrack and toddy licencees in contravention of Abkari rules); *Namasivaya* v. *Subramania*, (1916) 34 IC 927; *Santhanarama* v. *Sami Karuppundar*, (1921) 14 LW 226 : 61 IC 537 : (1921) Mad. 455; *Rabiabibi* v. *Gangadhar*, (1922) 46 Bom. 651 : 24 Bom. LR 111 : (1922) Bom. 78 (Salt Act); *Ismalji* v. *Raghunath*, (1909) 33 Bom. 636 : **but See** *Gordhandas* v. *Champsey*, (1921) PC 137; *Bansidhar* v. *Budangal*, (1928) 33 CWN 362 : 49 CLJ 65 : 117 IC 604 : (1928) Cal. 763; *District Council, Wardha* v. *Aanna Daulat Co. Kumbi*, AIR 1941 Nag. 273 (Contract in violation of C.P. Local Self Govt Act); *Divanjee Dhadha Abdulla Saheb* v. *Guruvappa*, AIR 1944 Mad. 387 (Madras Yarn Dealers Control Order, 1943); *Fakirchand* v. *Bansilal*, AIR 1955 Hyd. 28 (Hyderabad Excise Act and Rules) *Birla Jute Mfs. Co.* v. *Pratapmull*, AIR 1953 Cal. 450; *Bhadhal Mull Bazar* v. *Purushottham Das & Co.*, AIR 1953 Cal. 618; *Hanumanthaiah* v. *Thimmiah*, AIR 1954 Mad. 87; *Sadasivayya* v. *Venkata Narayana & Co.*, AIR 1953 Mad. 45; *Avulla* v. *Avulla*, AIR 1964 Kerala 200; *Rama Rao* v. *Papayya*, AIR 1954 AP 51; *Subba Raja* v. *Narayana Raja*, AIR 1954 Mad. 1074; *Narayana & Bros* v. *Subha Raja*, AIR 1954 AP 37; *Gountia* v. *Gountia*, AIR 1954 Orissa 80.
2. *Vairava* v. *Pothikachala*, (1936) Mad. 603 : 44 LW 203 : 165 IC 765 : (1936) MWN 507; **see** AIR 1952 Bhopal 32; *Dhuri Co-op Society* v. *Budhram*, AIR 1971 Punj. 134 (Licence under cotton control order (1955), Partnership with third party to workout licence not hit by Sec. 23).
3. *Appadurai* v. *Murugappa*, (1926) Mad. 772 : 23 LW 709 : 96 IC 91 : 51 MLJ 12; **see** *Velupadyochi* v. *Sivasooriam*, AIR 1950 Mad. 444 (Chitty on Contract 24 Edn, pages 906 to 910).

of the amount lent and that from the actual licensee.[1] Where the lender is himself a partner in contravention of the licence, he cannot recover advances made by him inasmuch as the partnership is illegal.[2] **[292]** Where the transfer of licence granted under West Bengal Cinema (Regulation) Act is prohibited, running of cinema business in partnership with another on the basis of the licence is illegal and void.[3]

The Indian Penal Code punishes the commission of offences and every agreement the object of which is to commit an offence punishable by the Indian Penal Code is unlawful and illegal.

The Lahore High Court[4] held that a contract of life insurance that the amount would be paid even in case of suicide by the assured was not void. The decision was based on suicide not being an offence punishable under the Indian Penal Code. Under the English law, however, suicide, while sane, is a felony and so, a contract of this kind has been held unenforceable.[5] It is submitted that the Lahore ruling may require reconsideration; for suicide, though for obvious reasons not made punishable, may certainly be taken to be forbidden in Indian Law.

If the contract was illegal at its inception owing to a statutory provision, can the party, seeking relief against the other party, plead that he was ignorant of the statutory provision and relief should be granted to him?

The case *in Re. Mahmoud and Ispahani*[6] is relevant. There, the plaintiff agreed to sell oil to the defendant, who refused to take delivery and was sued for non-acceptance of the goods. A statutory order provided that no person should buy or sell certain specified articles, including linseed oil unless he was licensed to do so. Before the conclusion of the contract, the defendant falsely alleged that he held a licence and the plaintiff who himself was a licensee believed the representation. The plaintiff contended that he believed the representation of the defendant about the compliance with law and he was not aware of the illegality of the transaction. The court held that once it was established that each party was forbidden by statute to enter into the contract,

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1. *Garupathi Brahmayya* v. *Kuralla Ramaiah,* (1920) 41 Mad. 141 : 38 MLJ. 123 : 10 LW 476 : 54 IC 47.
2. *Ramanayudu* v. *Seetharamayya,* (1935) 58 Mad. 727 : 155 IC 544 : (1935) MWN 343 : 41 LW 521 : (1935) Mad. 440 : 68 MLJ 570. (Cf.) *Satyala* v. *Bhagavalli,* (1935) Mad. 895 : 42 LW 840 : 69 MLJ 490 (Partnership agreement prior to taking out licence); *State* v. *Board of Revenue,* AIR 1983 MP 112; *Abdulkhader* v. *Plantation Corporation of Kerala Ltd.,* AIR 1983 Kerala 1.
3. *Satchidananda Samanta* v. *Ranjan Kumar Basu,* AIR 1992 Cal. 222, 238.
4. *Northern India Insurance Co.* v. *Kanya Lal,* (1938) Lah. 561.
5. *Beresford* v. *Royal Insurance Co. Ltd.,* (1938) AC 586.
6. (1921) 2 KB 716.

the court had no option but to enforce the prohibition even though the defendant relied upon his own illegality. The honest belief of the plaintiff that the defendant held a licence was irrelevant.

Where the plaintiff bank advanced loan to the defendant enabling him to construct the building and lease out the first floor to the bank, the fact that the building under the Delhi Development Act can be leased only for residential purposes the lease deed between the plaintiff bank and the defendant is void rendering the defendant liable to repay the loan with interest. [1]

While the suit by the landlord for eviction against the tenants was pending, the agreement by the landlord not to execute the decree for eviction and allow the tenants to continue to be in possession may be on higher rent is not unlawful and contrary to public policy.[2]

An agreement or promise made by the Government to refund sales tax as an incentive measure to those who set up selective large scale industries in specific area of the state is against public policy, as constitutional requirements of levy of tax being for the welfare of the State and not for a specific individual, is in contravention of public purpose. [3]

In all cases, where a contract is illegal in its formation, neither party can circumvent the rule *Ex turpi causa non oritur actio* by pleading ignorance of the law. [4]

Where a contract is to do a thing, which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not. [5]

Where the parties to an agreement authorise the Collector to recover money due under the agreement as arrears of Land Revenue, the agreement in the absence of any such authority delegated under the statute, is void and contrary to Sec. 23 of the Act. [6]

In the *Miller* v. *Karlinski,* [7] there was an agreement between the employer and employee to pay the latter's salary in a particular way, which enabled the

1. *Amril Banaspati Co. Ltd.* v. *State of Punjab,* AIR 1992 SC 1075, 1083 : JT 1992 (2) SC 217 : (1992) 2 SCC 416.
2. *M.K.Usman Koya* v. *C.S.Santha,* AIR 2003 Ker 191, 195 : 2003 (3) Civ. LJ 1 : 2003 (2) Civil Court Cas 59 : 2003 (1) Ker LT 940.
3. *Bank of Rajasthan* v. *Sh. Pala Ram Gupta,* AIR 2001 Delhi 58, 64.
4. *J.M. Allen (Merchandise) Ltd.* v. *Cloke,* (1963) 2 QB 340 : (1963) 2 All. ER 238. **See also** *Levy* v. *Yates,* (1838) AER 129.
5. *Waush* v. *Morrie,* (1873) LR 8 QB 202; **see also** *Re. Trapca Mines Ltd.,* (No. 2) (1963) Ch. 199; *Jagannath Tewary* v. *Dr. Gopal Prasad,* AIR 1983 Pat. 50; *Ramswarup Prasad* v. *Budhdeo Sao,* AIR 1983 Pat 266.
6. *Mahesh Chandra* v. *Zilla Panchayat, Mainpuri,* AIR 1997 All. 248, 253 (DB) : 1997 All.LJ 1252 : 1996 All.LJ. 1168.
7. (1945) 62 TLR 85.

employer to defraud the Revenue. The employee claimed arrears of salary on the basis of the agreement. The employer contended that the agreement was illegal and the employee cannot found his claim on the agreement. The employee put forth the plea that he was not aware of the illegality. The court held that the employee was not entitled to the relief prayed for by him, as the agreement was illegal, whether or not the parties knew what they were doing was illegal.

Where a statute makes the contract itself illegal, the illegality does not depend upon the knowledge of the parties.

The Supreme Court had occasion to consider the question in *Ramasya* v. *Muraliprasad,*[1] which arose from the decision in *Murali Prasad* v. *Parasnath Prasad.*[2]

The question that was mooted was whether a partnership agreement was in contravention of Section 9 (2) and (3) and Section 28 of the Electricity Act, 1910. Section states:

> **9 (1)** The licensee shall not, at any time without the previous consent in writing of the State Government, acquire, by purchase or otherwise the licence or the undertaking of, or associate himself so far as the business of supplying energy is concerned with any person supplying or intending to supply energy under any other licence before applying for such consent, the licensee shall give not less than one month's notice of the application to every local authority both in the licensee's area of supply and also in the area or district in which such other person supplies or intends to supply energy.
>
> (2) The licensee shall not at any time assign his licence or transfer his undertaking, or any part thereof, by sale, mortgage, lease, exchange or otherwise without the previous consent in writing of the State Government.
>
> (3) Any agreement relating to any transaction of the nature described in sub-section (1) or sub-section (2) unless made with or subject to such consent as aforesaid shall be void.
>
> Section 28 reads:
>
> "28(1) No person other than a licensee shall engage in the business of supplying energy except with the previous sanction of the State Government and in accordance with such

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1. AIR 1974 SC 1320 : 1974 (3) SCR 915 : (1974) 2 SCC 266.
2. AIR 1967 Patna 191.

conditions as the State Government may fix in this behalf and any agreement to the contrary shall be void:

Provided that such sanction shall not be given within the area for which a local authority is constituted without that local authority's consent or within the area of supply of any licensee reduce without that licensee's consent unless the State Government considers that consent has been unreasonably withheld.

(2) Where any difference or dispute arises as to whether any person is or is not engaging or about to engage in the business of supplying energy within the meaning of sub-section (1), the matter shall be referred to the State Government and the decision of the State Government thereon shall be final."

Section 41 of the Act provides for penalty for unauthorised supply of energy by non-licensees.

The facts of the case briefly are as follows:

X obtained a licence under the Indian Electricity Act, (1910) and started an undertaking known a "Chapra Supply Works". Subsequently the aforesaid licence and the undertaking were transferred to "Chapra Electric Supply Works Ltd.," with the consent of the State Government. Later on this Company went into voluntary liquidation and a liquidator was appointed. He put the undertaking into auction on 15-9-1944 and the highest bid of M was accepted. Being moved by the liquidator, the State Government gave its consent to this sale to *M* and also to the assignment of licence to him. Really *M* did at the auction on behalf of a partnership created orally sometime before 15-9-1944. The deed of partnership was executed on 10-7-1945 and was registered the next day. The different copartners paid their quotas to *M*, who gave it to the liquidator. On receipt of the sale amount the liquidator delivered possession of the undertaking to *M* on 13-7-1945. On account of subsequent change in partners and their shares, new partners (including *M*) executed another deed of partnership on 31-8-1950 and got it registered on the same day. One of the partners was appointed as managing partners. Copy of this document was sent to the Electrical Inspector also. Registration of the Firm was also granted on 13-6-1953. On 9-9-1953, the Electrical Inspector intimated M that action in taking partners was illegal and void and also called for an explanation for the unsatisfactory working of the Company. On 22-5-1954 *P* one of the partners instituted a title suit impleading all the

partners as defendants. He sought for a declaration that the partnership was dissolved by a notice of dissolution served by him on 11-3-1954 and for rendition of accounts. On application by *P*, a Receiver was appointed.

On 19-5-1955, Government revoked the licence and on 20-10-1955 took possession of the undertaking under Sec. 7-A of the Act and deposited in Court a part of the purchase money.

On 5-11-1956, *M* instituted a title suit for a declaration that was the sole licensee and the owner of the undertaking and that he was entitled to the entire compensation money payable by the Government. All the partners and the State were impleaded.

The Patna High Court held:

(i) that *M's* suit must succeed but he will be entitled to get the purchase money only after execution of a sale-deed in that respect. *P's* suit must fail as his claim arose out of a partnership agreement, which was unlawful, on ground of violation of Secs. 9 and 28 of the Act. The fact that there was no sale-deed and hence no title did pass to *M* could be questioned only by the seller or his representative-in-interest and not by the partners. A purchaser without a sale deed but with a licence in his name, with the consent of the Government could carry on the business and when he took partners to run the business without consent of the Government his action amounted to unlawful transfer of a part of his interest in the running undertaking.

(ii) that though there was no penal provision for violation of Sec. 9 (2) and (3) of the Act, these sub-sections contain a substantive prohibition and therefore the partnership was unlawful, though not punishable. Besides, the partners also violated the provisions of Sec. 28, the violation of which was penalised by Sec. 41 of the Act.

The Patna High Court held that the partnership was illegal drawing support from decisions.[1]

The High Court considered the contention that the partnership was not illegal on the basis of other decisions.[2]

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1. *Nalain Padmanabhan* v. *Sait Badrinath*, (1912) 35 Mad. 582; *Nash* v. *Stevenson Transport Ltd.*, (1936) 2 KB 128; *Chai Sauyin* v. *Liew Kweesam*, (1962) AC 304.
2. *Commr of Income-Tax* v. *M/s. Indian Union Mica Company*, AIR 1960 Patna 398; *Hadibandhu Behera* v. *Gopal Sahu*, AIR 1943 Patna 374.

The High Court was invited to decide whether the partnership agreement resulted in the transfer of ownership of the business. The High Court relied on the Full Bench decision of the Madras High Court. [1]

Whether the learned Judges of the Madras High Court had concurred with the ratio laid down in ILR 35 Mad. 582 in the following terms:

> "Thus, if two persons agree to start a business in partnership and to contribute capital therefor there is no transfer involved in the transaction. But if one person carrying on a trade and possessing stock and capital admits another into partnership with himself, making the stock and capital the joint property of both, it is impossible to contend that there is not a transfer in such a case. The word 'transfer' says James, L.J. in (1881) 17 Ch. D. 1 is 'one of the widest terms that can be used' and according to Lush, L.J. in the same case the word 'transferable' is a word of the widest import and includes every means by which the property may be passed from one person to another."

The Supreme Court reversed the decision of the Patna High Court. The Supreme Court [2], at page 1330 observed that:

> "In these appeals, it is not necessary to decide the question whether the carrying on of the business of partnership as an Electricity Undertaking when the licence stood in the name of Murli Prasad is invalid."

At page 1329, the Supreme Court observed that the relief claimed by the partners did not depend on the validity on the partnership either of 1945 or 1950. However, at page 1329, the Supreme Court observed that:

> "The openness with which the entire business was run clearly establishes that the partners at any rate were not aware of the illegality".

The Supreme Court did not intend to lay down that the legality of partnership depended upon the knowledge of the parties about the nature of the transaction. If that be so, any person would be able to contend that he was not aware of the illegality." The attention of the Supreme Court was not drawn to the English cases above referred to.

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1. *Velu Padayachi* v. *Sivasoorian,* AIR 1950 Mad. 444.
2. *Ramagya Prasad Gupta* v. *Murli Prasad,* AIR 1974 SC 1320 : 1974 (3) SCR 915 : (1974) 2 SCC 266.

Another case of interest decided by the Supreme Court is[1] affirming the decision of the Patna High Court[2] where the question of knowledge of illegality of transaction as its inception or formation came to be considered:

The facts were:

> "Defendant 2 Raja Bhahadur K.N. Singh, proprietor of an estate known as Ramgargh Raj in the Hazaribagh District who was in possession of his estate in which coal mines were situate, gave a mining lease to defendants 3 and 4 in respect of an area described in the schedule of the plaint, which was to expire on the 6th of April 1950. The plaintiff company was carrying on business in the name of Hari Charan Singh J.D. and Co. Ltd. in 1949 and later that name was changed to Kuju Collieries Ltd. in which name the present suit was instituted.
>
> On the 4th October, 1949 there was an agreement between defendant 2 in the name of defendant 1, a limited Company created by him and the plaintiff in the name of Hari Charan Singh, J.D. and Co. Ltd. to the effect that on the expiry of the lease of defendants 3 and 4 defendant 1 will execute a lease in favour of the plaintiff. The premium and the royalty payable were also agreed upon and entered in the deed of agreement. Following that, on the 7th September 1950 an indenture of lease was executed between defendant and for a consideration of Rs. 2,00,000 besides rents and royalties as mentioned in the document. Out of the aforesaid amount, a sum of Rs. 50,000 was paid at the time of registration of that instrument on the 16th September 1950 and subsequently another sum of Rs. 30,000 was paid by the plaintiff in August 1951. The plaintiff executed a mortgage bond in favour of defendant 1 for the balance of the consideration money. In spite of these, possession was not delivered to the plaintiff; and hence the plaintiff instituted the present suit on 22nd May 1954.

The suit was contested by the defendants. The first two defendants pleaded that possession had been given in pursuance of the lease to the plaintiff, whereas defendants 3 and 4 raised the plea that the lease executed in favour of the plaintiff was void, as it was in contravention of the provisions of the Mines and Minerals (Regulation and Development) Act (Act LIII of 1948) 1948 and the Minerals Conservation and Development Rules made thereunder

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1. *Kuju Collieries* v. *Jharkhan Mines*, AIR 1974 SC 1892 : 1975 (1) SCR 703 : (1974) 2 SCC 535.
2. *Kuju Collieries* v. *Jharkhan Mines Ltd.*, AIR 1967 Pat 72 : 1966 BLJR 46 : ILR 45 Pat 962.

which came into force on the 25th October 1949. While this suit was pending, defendant I brought a mortgage suit against the plaintiff on the mortgage that they had executed. Both the suits were tried together and were dismissed on contest but without costs.

The transaction was held to be void being in contravention of the Mines and Minerals (Regulation and Development) Act, 1948. The question of knowledge of the transaction was not raised before the High Court. The Supreme Court observed at page 1893 that there was no occasion for the plaintiff to have been under any kind of ignorance of law. The Supreme Court referred to *Rangayya Prasad Gupta's case.*[1]

It is submitted that, if the Supreme Court intended to lay down the law, that illegality depends upon the knowledge of the parties, it runs counter to the principles laid down right from *Mahmud and Ispahani In re.*[2]

It is hoped that when an occasion arises, the Supreme Court would consider this very important point. Knowledge may be relevant under circumstances similar to the one that occurred.[3]

Money was borrowed and with the help of that money a marriage was celebrated in contravention of the Child Marriage Restraint Act. When the lender filed the suit, the defence was one of illegality. The Andhra Pradesh High Court, referring to Cheshire and Fifoot held that the plaintiff cannot be non-suited. Cheshire and Fifoot have explained the position in a succinct way:

> "The effect in law of an illegal contract may depend on whether the illegality is known to both or to one only, of the parties. This distinction does not arise where the contract is *per se* illegal, as for instance when *A* and *B* agree to do something which will necessarily constitute a fraud on the revenue. In such a case *A* may be ignorant of the illegal nature of the contract, but he will be precluded by the rule *ignorantia juris haud excusat* from relying upon his ignorance. The distinction between knowledge and no knowledge is material only when one party intends to exploit for an unlawful purpose a contract that is *ex facie* lawful.

The question of constructive knowledge presents difficulty. What has to be decided is whether the one party ought to have known of the unlawful design of the other. If, so he is taken to have known it. Everything depends

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1. AIR 1974 SC 1320 : 1974 (3) SCR 915 : (1974) 2 SCC 266.
2. (1921) 2 KB 716.
3. *Pisipati Punnakotiah* v. *Kallapalli Kolikamba,* AIR 1967 AP 83 : (1966) 1 ALT 21 : 1966 (1) An.WR 209.

upon the circumstances and upon the impact that they would make upon that favourite of the law..... the reasonable man. Would this hypothetical person, if placed in the shoes of the person alleging ignorance have inferred the existence of the illegal intention? The answer to this will turn to an indefinable extent upon the individual Judge....." ..... Again, mere suspicion that an unlawful design may be contemplated is not sufficient. As Martin B said in leading case—

> If money is lent, the lender merely handing it over into the absolute control of the borrower; although he may have reason to suppose that it will be employed illegally, he will not be disentitled from recovering.
>
> Even where both parties are aware of the illegality the rule on this matter is that, if one of them is not in *pari delicto* with the other, he can recover what he has parted with. *A fortiori*, therefore, it would seem that one who is entirely innocent cannot be in a worse position".

Under this section, any agreement that is forbidden by law is not enforceable.[1] We have to see how Courts have decided on the facts and circumstances of the case before them.[2]

The legality of a partnership entered into for the purpose of conducting a business in arrack or toddy on licence granted, or to be granted, to only one of the partners under the Abkari Act I of 1866 was considered. The relevant provisions of the Abkari Act were Secs. 15, 55 and 56 and R. 27 framed under the Act. Section 15 runs:

> "No liquor or intoxicating drug shall be sold without a licence from the Collector....."

Section 55 makes punishable, with respect to the subject of the various sub-clauses, including the selling of liquor or any intoxicating drug in "contravention of this Act, or of any rule or order made under this Act, or of any licence or permit obtained under this Act".

Section 56 makes punishable a contravention of any term of a licence or permit granted under the Act, which is not covered by Sec. 55 or any other provisions of the Act.

Rule 27 says:

> "No privilege of supply of vendor shall be sold, if transferred or sub-rented without the Collector's previous permission".

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1. *Pearce* v. *Brooks*, (1866) LR 1 Ex. 213 at p. 219.
2. *Velu Padayachi* v. *Sivasooriam*, AIR 1950 Mad. 444.

A Full Bench of the Madras High Court held:

"It is evident that there is a long and consistent body of opinion of this High Court from *Marudamuthu* v. *Rangasami* 24 Mad. 401 onwards, with which we agree, that a partnership entered into for the purpose of conducting a business in arrack or toddy on a licence granted or to be granted to only one of them is void ab initio, whether the contract was entered into before the licence was granted or afterwards, in that it either involves a transfer of the licence which is prohibited under Rule 27 and punishable under Sec. 56, or a breach of Sec. 15, Abkari Act, punishable under Sec. 55 because the unlicensed partner, by himself or through his agent, the other partner, sells without a licence. If a partnership is lawful at its inception because it is not intended to infringe any provision of the Contract Act, it nevertheless becomes unlawful when it intends to conduct the business jointly on a licence granted to one only of the partners."

In *Dinshawji* v. *Abdul Rasool,*[1] a contract between *A* and *B* to run business of supplying liquor in partnership in the name of *B* was held to be void, as being opposed to Sec. 14 of the Hyderabad Abkari Act (I of 1316 F.).[2]

A sold his export licence through his agent to a third party circumventing the provisions of the Export Control Order. The transaction was held to be illegal and opposed to public policy.[3]

A partnership with a view to exploit advantages accruing to persons having licence "A" or "B" under the Cochin Tobacco Act and the Notifications there under was held to be illegal.

The cases that have arisen under the Motor Vehicles Act are of great interest,[4] an agreement of partnership in respect of a lorry business, which involved a transfer of permit, was considered. The Madras High Court held:

"We have no doubt whatever that the principle underlying the long catena of cases of which it is sufficient to refer to [5] will apply to this case the principle being that an agreement of partnership which will entail a transfer of a licence or permit granted by the Government when there is an express provision prohibiting such a transfer is illegal and void *ab initio.*[6] The case is related to an agreement of partnership in respect of a cinema business and the decision[7] arose under the Abkari Act. The doctrine on which these rulings are

1. AIR 1967 AP 119 : (1966) 2 An.WR. 102.
2. *Nathmal Bhaironbux & Co.* v. *Kashi Ram,* AIR 1973 Raj. 271 : 1973 WLN 505.
3. *I.T. Commissioner* v. *Union Tobacco Co.,* AIR 1960 Kerala 276.
4. *Hira Gowder* v. *Naga Maistry,* AIR 1959 Mad. 620.
5. *Velu Padayachi* v. *Sivasooriam,* AIR 1950 Mad 444 : ILR (1950) Mad. 987. 444 (FB) (A) and *Viswanathan* v. *Nanakchand Gupta,* (1954) 2 Mad. LJ 782 at p. 787 : AIR 1955 Mad. 536 at p. 539 (B).
6. *Viswanathan* v. *Nanakchand Gupta,* AIR 1955 Mad. 536 B : (1954) 2 Mad. LJ 782.
7. AIR 1950 Mad. 444 (FB) : ILR (1950) Mad. 987.

based in this.[1] When a penalty is imposed for contravention of a provision of law, that can be taken as an indication that the transaction which involves such a contravention is prohibited and therefore illegal; but when there is no imposition of a penalty, the question whether the contract is illegal should be determined on a consideration of the purpose behind the legislation. If the provisions are enacted for the purpose of revenue and in the interest of administration, no question of illegality will arise; but when the provisions are enacted the interest of the public and promotion of its welfare the contravention of such provision must be held to be illegal. In the present case Sec. 59 (1) of the Motor Vehicles Act expressly prohibits transfer of a permit except with the permission of the transport authority. A partnership in respect of a lorry business which involves a transfer of a permit will therefore be illegal and void."

Where a partnership is formed in contravention of any statutory provisions and consequently rendered illegal, none of the partners of such illegal partnership can initiate a suit *inter se* for the capital invested by them in the partnership, since a party to an illegal contract cannot invoke the aid of a contract to have such contract carried into a effect.[2]

In *K.M. Viswanathan Pillai* v. *K.M. Shannuigam Pillai,*[3] the Supreme Court held that: Section 42 (1) of the Motor Vehicles Act does not require that the owner himself should obtain the permit; it only requires that the transport vehicles shall not be used except in accordance with the conditions of the permit. The definition of 'Permit' in Section 2 (20) of the Act itself shows that all permits need not be in the name of the owner because the latter part of the definition shows that it is only in the case of a private carrier of public carrier that a permit has to be in the owner's name. The same inference follows from the definitions of 'private carrier' and 'public carrier' contained in the Act.

Also in *P.N. Dorairaj* v. *N.G. Rajan,*[4] the plaintiff and defendants first and second entered into partnership agreement for running a touring cinema. The licence was in the name of the second defandant. The plaintiff subsequently who intended discontinue the partnership demanded his share in the partnership. The defendants thereupon allowed the plaintiff to withdraw from partnership and executed a promissory note in favour of the plaintiff for the share due to him. On default by the defendants the plaintiff filed a suit. It

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1. *Viswanathan* v. *Nanakchand Gupta,* AIR 1955 Mad. 536 : (1954) 2 Mad LJ 782.
2. *Dasari Satyanarayana* v. *Appa Rao,* AIR 1966 AP 209 : (1965) 1 An.WR 156.
3. AIR 1967 SC 294.
4. AIR 1977 Mad. 243 : (1977) 1 Mad.LJ. 198 : 90 Mad.LW 64 : ILR (1976) 3 Mad. 73.

was contended on behalf of the defendants that the partnership agreement is illegal being in contravention of Madras Cinema (Regulation) Act and consequently the plaintiff is not entitle to recover any amount in respect of such illegal partnership. The defendants were held to be liable to return the money under Sec. 65 of Contract Act, since the money under the promissory note represented the amount paid by the plaintiff to the defendants.

The Madras High Court observed:

> "In the present it is not clear as to when the partnership was entered into. But one thing seems to be clear that the parties were ignorant of the legal position from the commencement of the partnership. In the written statement they have stated that they commenced and continued the business under the licence issued in the name of the second defendant ignorant of the legal position. In fact, this is the finding of the court below. Therefore, the parties seem to have entered into the business under the licence issued in the name of the second defendant completely unaware of the legal position that the partnership itself might be considered to be hit by Sec. 23 of the Contract Act. It is only subsequently they must have learnt about illegality. Both in promissory note and in the written statement it is stated that the promissory note was executed in respect of share capital of the plaintiff. It is also admitted in the written statement that even after the plaintiff came out of the partnership the business was carried on by the three defendants. Since the promissory note amount represented the amount paid by the plaintiff to the defendants, the defendants are bound to return the money under Sec. 65 of the Contract Act.

Where a licence to exhibit cinema films entered into partnership with other to run the cinema business, it cannot be said transfer of licence and such partnership is not illegal nor opposed to public policy and it would be inequitable for the licencee to raise such a plea when a suit is brought for the dissolution and accounts by one of the partners.[1]

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1. *Kommineni Krishna Rao* v. *Kommineni Babji Rao*, AIR 1992 AP 232, 242.

The transactions entered into in anticipation of law to come into existence will not be hit by Section 23.[1]

Cancellation of an allotment and transfer of plot by the respondent C & I Dev. Corp. of Maharashtra Ltd. originally allotted in favour of the appellant on the ground of public policy is improper by merely stating the reason that the law declared by the Supreme Court was universally binding.[2]

Ignorance of Prohibition of Contract under Statute—Where under a contract the defendant a firm of solicitors have agreed to pay commission to the plaintiff in consideration of introducing Somali refugees seeking legal aid from the Legal Aid Board which contract is prohibited under Rule 7 of Solicitors Practice Rules of 1990, the contract is unenforceable and ignorance of the plaintiff as to such prohibition is no excuse.[3]

Illegal under Foreign Laws—Although the Court would not enforce a contract in order to benefit the plaintiff if his claim is derived from his criminal conduct constituting a statutory offence under foreign law, but if the

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1. *Naganatha Duggar* v. *Authorised Officer,* (1971) 1 MLJ 274 (reversed on some other point in AIR 1979 SC 487) : **see also** *Kamal Cinema* v. *Lolit Talkies,* 1979 All. LJ 1205 Transfer of licence in force of lessee is not illegal); *Pitchai Pillai* v. *Govindaswamy Chettiar,* (1977) 1 MLJ 107 (owner of Theatre entering into agreement of lease with another stipulation for transfer of "C" Form licence in the name of lessee-not-void); *Smt. Sualatha Saha* v. *Sushil Chandra Saha,* AIR 1979 NOC 117 (Cal); *Ratanlal* v. *Firm Mangilal Mathuralal,* AIR 1963 MP 323, (arising under Indore Oil Seeds Farmers Contracts Prohibition Order, 1943); *Dayabhai & Co.* v. *I.T. Commissioner,* AIR 1963 MP 13 (According to *M.P. High Court* the decision to the full bench in AIR 1950 Mad. 444 is not correct in view of 37 ITR 271 (SC); *Mangilal* v. *Gheesukhan,* AIR 1980 Raj. 14 : 1979 Raj.LW 331. **See also** *Gnanagururajan* v. *Bagyavathi Ammal,* (1978) 2 MLJ 432 (**but see** the cases in section li); **see also** the following cases *Kalawathi* v. *Bisheswar,* AIR 1968 SC 261; *Sattappa* v. *Appayya,* AIR 1968 SC 1358 : 1968 (1) SCR 223 : *Sakthi* v. *Kuppathamma,* (1960) 2 MLJ 89; *Lily White* v. *R. Munuswami,* AIR 1966 Mad. 13 : 1965 Mad.WN 256 : 78 Mad.LW 467; *Manbhailal* v. *Bajrang Rice Mill,* AIR 1965 Nag. 225; *Basavayya* v. *Kottayya,* AIR 1964 AP 145; *Mahapothra Bhandar* v. *C.I.T,* AIR 1965 Orissa 160 ; *Sontham Chemical Works* v. *Fakruddin,* AIR 1970 Bom. 121; *Inderjit Singh* v. *Sundre Singh,* AIR 1969 Raj. 155; *Kalyanasundaram* v. *Chockalinsan Chettiar,* AIR 1952 Mad. 293; *Chandojisukraj* v. *Lal & Co.,* AIR 1960 AP 444; *Samarth Mal.* v. *Union of India,* AIR 1959 MP 1721; *Prabhat Bank Ltd.* v. *Babu Ram,* AIR 1966 All. 134; *Narasimham* v. *Rameshwara Lal,* AIR 1966 A.P. 134; *Kashinath* v. *Babu Rao,* AIR 1940 Nag. 305; *Dhoddiah* v. *Madhukjarsi Estates,* (1974) 1 MLJ 146; *Priya Gupta* v. *S.M. Neam,* AIR 1959 All. 643; *Vdhoodas* v. *Prem Prakash,* AIR 1964 All. 1; *Ramkripal Sheo Prasad* v. *Municipal Committee, Bilaspur,* AIR 1963 MP 240; *Janaki Bai Chunnilal* v. *Ratan Melu,* AIR 1962 MP 117; *Tekumall Rama Rao* v. *Dursa Suryanarasyana,* AIR 1964 AP 256; *Mukul Dotta* v. *I.A. Corporation,* AIR 1962 Cal. 311; *Pujari Narasappa* v. *Shaik Hazrat,* AIR 1960 Mys. 59; *A.E. Thirumal Naidu* v. *Rajammal,* AIR 1968 Mad 201.
2. *Sunil Pannalal Banthia* v. *C&I Dev. Corp. of Maharastra Ltd.,* AIR 2007 SC 1529 2007 AIRSCW 2117 : 2007 (3) AIR Bom R 518.
3. *Mohamed* v. *Alaga & Co.,* (1998) 2 All ER 720 (Ch.D).

breach of foreign law is not likely to affront public conscience, the plaintiff cannot be disqualified from enforcing the contract. In *Howard* v. *Shirlstar Container Transport Ltd.*,[1] the plaintiff apprehending danger to the lives of himself and his wireless operators flew out the air craft of the defendants without obtaining the air traffic control clearance in consideration of the defendants agreeing to pay £25,000. The Court of appeal allowed the plaintiff to recover consideration money as the breach of law did not confront with public conscience and more particularly to save himself and his wireless operator from imminent death.

Defeating the provisions of any law.—(a) Where the enforcement of a particular contract, though not directly in violation of any provision of law, is calculated to contravene the policy underlying a particular statute the Courts decline to enforce the agreement. For instance, there are certain Tenancy Acts the object of which is that the tenant in possession of the soil should not be compelled to contract himself out of all his rights, and provision is therefore made that agreement having, or likely to have, the effect of divesting the tenant of all rights, shall not be enforceable. Thus, a sale of occupancy rights under the N.W.P. Rent Act,[2] an alienation of the rights of an ex-proprietory tenant under the Agra Tenancy Act,[3] an agreement to pay the enhanced rent for an exproprietory holding;[4] a lease calculated to defeat the C alcutta Rent Act;[5] an agreement contravening the rule against perpetuities;[6] an agreement in violation of a Government notification prohibiting the export of the feathers

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1. 1990 All. ER 366.
2. *Jhinguri* v. *Durga*, (1885) 7 All. 878.
3. *Kashi Prasad* v. *Kedar Nath*, (1897) 20 All. 219 (FB); *Bithal Das* v. *Ragunath*, (1922) All 430 : 70 IC 601; *Mukund Lal* v. *Mt. Sunita*, (1931) All. 467 : 132 IC 422; *Usman Khan* v. *Sitara Khan*, (1935) ALJ 339 : 157 IC 1096; *Mohammad Muzaffar* v. *Madad Ali*, (1931) Oudh 309 : 132 IC 543.
4. *Prag* v. *Sital*, (1914) 36 All. 155 : 22 IC 965; **see also** *Sanwal Kunwar* v. *Murli*, (1912) 10 ALJ 52 : 16 IC 339; *Khusal* v. *Labhan Rao*, (1928) Nag. 232 : 110 IC 35.
5. *Salesh* v. *Manekji*, (1923) 50 Cal. 491 : 75 IC 521 : (1924) Cal. 57. **See also** *Administrator W.C. Ltd.* v. *J.K. Das*, AIR 1968 Cal. 146 (Agreement to share commission in violation of Sec. 41 of the Insurance Act held to defeat the provisions of law; *Ramsewak* v. *Ramcharan*, AIR 1982 All. 177 (Agreement of partners of a business to conceal profit to evade tax not enforceable); *Calcutta National Bank* v. *Rangaroon Tea Co. Ltd.*, AIR 1967 Cal. 294.
6. *Dinker Rao* v. *Narayan*, (1922) 47 Bom. 191 : 24 Bom. LR 449 : 82 IC 628 : (1922) Bom 84, (Cf). *Aulad Ali* v. *Syed Ali*, (1927) 49 All. 527 : 25 ALJ 289 : (1927) All. 170. **See also** *Debi Dayal* v. *Sussita*, AIR 1929 Sind 667 : *Ishwari Singh* v. *Sumitradevi* AIR 1966 J & K 89; *Arjuna Mudiliar* v. *Luxmi Ammal*, AIR 1949 Mad. 265; *Ratanlal Kanhiyalal* v. *Ramanuja Das Ramachandra*, AIR 1944 Nag. 187; *Mahammad Din* v. *Amir Khan* AIR 1940 Lal. 17; *Ranbaxy Laboratories Ltd.* v. *Doon Apartments of Ltd.*, (1979) 1 Delhi 84 (If an oral argument pleaded by the plaintiff was contrary to written argument with the defendant it is void as it would defeat Sec. 92 of Evidence Act. An agreement between expectant heirs to divide property on the succession opening is not invalid. **See** *Lalita Prasad* v. *Sarman*, (1933) Pat. 165.

of particular kinds of birds;[1] an agreement fixing rent in perpetuity in violation of the Oudh Rent Act[2]; a charge created by a Mohammedan on the undefined share of one of his heirs[3] have all been held unenforceable. But an agreement by the parties to a suit, even apart from the Oaths Act, to abide by the statement of a witness, including one who is a party to the suit, is perfectly valid, as it does not defeat any law, but only waives the right to produce any other evidence.[4] Where the plaintiff who was not eligible to participate under the rules in Abkari auction entered into an agreement with the successful bidder for the transfer of some of the toddy shops and paid consideration, the plaintiff was held to be not entitled to recover the money from the defendant, as the object of agreement is to defeat the provisions of law and hit by Sec. 23.[5]

"Any law".—By this is meant substantive and not adjective law.[6]

Stay of notification leading tender contract and vacated.—Merely because stay orders of Supreme Court and High Court were in operation on the construction of the buildings at the time when the tender notification was issued which was vacated later, it cannot be said that Sec. 23 is attracted.[7]

(b) AGREEMENT INDEMNIFYING BAIL.—Agreements to indemnify bail are another class of cases tending to defeat the provisions of law.[8] Monies paid to induce a person to stand bail, cannot be recovered even after the object of the bail is over.[9] And conversely, the person who has given bail for an accused person cannot recover the amount of the bail forfeited because of the non-appearance of the accused.[9] Monies promised to be paid will be equally irrecoverable.[10] A transaction, however, long after such forfeiture securing payment of the amount forfeited by the surety has been held not opposed to Sec. 23[11] **[377]**

(c) VARYING THE PERIOD OF LIMITATION.—An agreement which curtails the period of limitation is not permissible under Section 28 of

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1. *Fazal Muhammad* v. *Ata Muhammad*, (1930) 11 Lah.8 : (1929) Lah. 663.
2. *Jarbandhun* v. *Bajarang*, (1932) 16 RD 235.
3. *Mahbub Hasan* v. *Mt. Kalsumati*, (1933) All. 934.
4. *Akbari Begam* v. *Rahmat Hussain*, [1933] ALJ 1127 : 146 IC 84 : (1933) All. 961.
5. *Sundara Goundar* v. *Balachandran*, AIR 1990 Ker. 324 : (1990) 1 Ker. LJ 244 : (1990) 1 Ker. LJ 265.
6. *Hukumchander* v. *Taharunnessa*, (1889) 16. Cal. 504.
7. *T. H. & R. Pvt. Ltd., Ernakulam* v. *Greater Cochin Dev. Authority*, AIR 2001 Ker. 279,281.
8. *Maharulla* v. *Samiruddin*, (1930) 34 CWN 388 : (1930) Cal. 595; *Laxmanlal* v. *Mukhtarkar*, (1908) 32 Bom. 449; *Fateh* v. *Samrad*, (1878) 1 All. 751. See also *R.* v. *Porter* (1910) 1 KB 369.
9. *Krishan Lal* v. *Durga Prasad*, (1922) 65 IC 137.
10. *Jodraj* v. *Basemal*, (1932) Nag. 51 : 82 IC 1036.
11. *Bangaldy* v. *Golam Ebibar*, (1919) 24 CWN 368 : 56 IC 531.

the Indian Contract Act.[1] An agreement not to plead limitation is likewise illegal.[2] A contract, which enlarges the period of limitation, though not affected by Section 28, is still bad, under this section, as defeating the provisions of the Indian Limitation Act.[3] However an agreement providing that the rights of parties would cease, if no action is taken in Court before a particular period, has been held to be good.[4] It is said that there is a marked distinction between a condition, which limits the time within which a suit may be brought to enforce rights and one which provides that there shall no longer be any rights to enforce.[5] A person may contract that, on the happening of a certain event, he shall lose all his rights.[6] See section 28, infra. **[373]**

(d) OTHER CASES.—An agreement not to oppose the final discharge of an insolvent, in consideration of special payment, is unenforceable;[7] so is a scheme by the Official Assignee inconsistent with the Insolvency Act;[8] also any assignment by an insolvent so as to defeat creditors;[9] likewise, an agreement to pay an annuity as consideration for giving a boy in adoption,[10] also an agreement intended to shut out evidence of due execution of a will;[11] so too, an agreement to pay a tax prohibited by law;[12] also a promise to pay the salary of a receiver in a suit without the leave of Court[13] or an agreement attempting to alter the Hindu law of succession,[14] or to abrogate inherent rights of partition under the Hindu law;[15] or an agreement for

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1. *Bursing* v. *Kehru,* (1938) Lah. 732.
2. *Saroj* v. *Jnanadha,* (1932) 36 CWN 555 : 55 CLJ 377 : 140 IC 263 : (1932) Cal. 720.
3. *Ballapraguda* v. *Gopayya* (1917) 40 Mad. 701 : 4 LW 48 : 35 IC 575 : 31 MLJ 231.
4. *Gobardhan* v. *Dau Dayal,* (1932) All. 273 : (1932) ALJ 365.
5. *Ghose* v. *Reliance Insurance Co.* (1934) 11 Ran. 475 : (1934) Ran. 15; *Girdhari Lal* v. *Eagle Star and British Dominions Insurance Co.,* (1924) 27 CWN 955 : (1924) Cal. 186 : 80 IC 637; **see also** *Haji Shakoor Ghani* v. *Hinde & Co.,* (1932) 34 Bom. LR 634 : (1932) Bom. 330 : 138 IC 793 : (clause in bill of lading re : time limit of action).
6. *G. Rainey* v. *Burma Fire and Marine Insurance Co.,* (1926) 3 Ran. 383 : 91 IC 622 : (1926) Ran. 3.
7. *Navroji* v. *Kazi Sidick,* (1896) 20 Bom. 636; *Krishnappa* v. *Adimula,* (1897) 20 Mad. 84.
8. *In the matter of Purshothamdoss,* (1929) 55 MLJ 657 : 28 LW 816 : 116 IC 125 : (1929) Mad. 385. (Cf.) *Alagappa* v. *Kannappa,* (1937) MLJ 508 : 46 LW 449 : (1937) MWN 942 : (1937) Mad. 962 (Collusive arrrangement between insolvent and purchasers from official receiver).
9. *Jaffer Meher* v. *Budge Budge Jute Mills Co.,* (1907) 34 Cal. 289 : 11 CWN 566.
10. *Narayan* v. *Gopal Rao,* (1922) 46 Bom. 908 : 24 Bom LR 414 : 67 IC 850 : (1922) Bom. 382; *Sitaram* v. *Harihar,* (1910) 35 Bom. 169; *Eshan Kishore* v. *Haris Chandra,* (1874) 13 Beng. LR p. 42.
11. *Monmohini* v. *Bangachandra,* (1903) 31 Cal. 357.
12. *Gosvami* v. *Robbi,* (1884) 8 Bom. 398.
13. *Prokash* v. *Adlam,* (1903) 30 Cal. 696.
14. *Pan Kuer* v. *Ram Narair,* (1929) 117 IC 33.
15. *Brijbishwari* v. *Kashi Prasad,* (1928) Oudh 365 : 110 IC 886.

purchase by a Buddhist monk which is opposed to the Vinaya, his personal law [1]; or an agreement designed to assist a judgment-debtor to delay execution of the decree [2]; or a partnership agreement in one person's name benami for the real partner with a view to defeat the law of insolvency.[3] In a case of the Rangoon High Court, an insolvent obtained a discharge on condition of his consenting to a decree for the full amounts of the debts proved. Thereafter, he bargained with one of the creditors that the latter should waive his claim in the insolvency, and take instead a fresh promissory note for *inter alia* the amount of the original indebtedness with interest thereon from date of insolvency. It was held that the contract was not void as tending to defeat the provisions of the Insolvency Law inasmuch as the creditor did not prejudice the rights of the other creditors and was securing to himself an advantage only by a new and independent contract.[4] Where lease of land for 99 years was granted by the Government for the benefit and enjoyment of a family or near relatives, the transfer of lease rights in favour of a stranger by the lessee would defeat the public purpose.[5] Where the State Electricity Board invited tenders for erecting Ash handling plant and appointed M/s. Development Consultants Ltd. as consulting Engineer the fact that the sister concern of M/s. Development Consultants in which it held 100% shares participated in the tender is not unethical and did not disqualify the sister concern.[6]

Allotment of part of the land to the same persons from whom the land was acquired under Land Acquisition Act apart from award of compensation for such acquisition is opposed to public policy.[7]

AGREEMENTS DEFEATING PROVISIONS OF HINDU AND MOHAMMEDAN LAW.—Again, agreements which are opposed to the spirit of the two great systems of personal law prevailing in India will be void. Thus an ante-nuptial agreement by a Hindu husband that he will not remove his wife from her parent's abode will be void.[8] An agreement on the same lines between a Mohammedan couple, allowing the wife to reside with her parents after marriage will stand on the same footing.[9]

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1. *U. Teja* v. *Ma. G. Gywa,* (1928) 5 Ran. 626 : 106 IC 201 : (1928) Ran. 3.
2. *Nand Kishore* v. *Kunj Behari Lal,* (1933) ALJ 85 : 145 IC 756 : (1933) All. 303.
3. *Narinjan Singh* v. *Damodar,* (1936) Lah. 831.
4. *Kashim Ismail* v. *Chotalal,* (1938) Ran. 11 : (1938) Ran. LR 19 : 174 IC 863.
5. *State of West Bengal* v. *Kailash Chandra Kapur,* AIR 1997 SC 1348, 1353 : 1997 (1) Cal.HN 65 : (1997) 2 SCC 387 : 1997 (1) Supreme 324 : 1997 (1) Cur. CC 67.
6. *Baktawar Singh* v. *State of M.P.,* AIR 1992 MP 318 : 1992 JLJ 593 : 1992 MPLJ 953.
7. *Secretary, Jaipur Development Authority* v. *Daulat Mal Jain,* (1997) 1 SCC 35.
8. *Tekait Mon Mohini* v. *Basanta Kumar,* (1901) 28 Cal. 751.
9. *Abdul* v. *Hussein Bi,* (1904) 6 Bom. LR 728.

Agreements fraudulent.—The Transfer of Property Act by Sec. 53 provides that a transfer in fraud of creditors is voidable. It would therefore seem that a contract voidable under that section will not fall within the ambit of Sec. 23.[1] But, a sale for a fair consideration though made with a view to defeat an impending execution is not necessarily fraudulent.[2] Where, however, a Kabuliat fixing a high rent is entered into solely to give a false idea of the property and to increase the selling value it has been held to be void.[3]

On the same principle where a contractor who had been refused any contracts by a Railway Company managed to secure them in the name of the defendant and subsequently sued for a declaration of his right to the benefit of his contracts, the Court declined to enforce the agreement as perpetrating a fraud on the Railway Company.[4]

Where an agent for sale of certain lands contracted with a prospective purchaser, in consideration of a commission, that he would secure the lands for him at a cheap price, in spite of higher offers by others, the Court held, applying illustration (j) that the contract was unenforceable as the consideration was fraudulent.[5]

Again, where a debtor enters into a deed of composition with his creditors, a secret arrangement to give one of the creditors an additional benefit is a fraud on the other creditors. In such a case, the creditor cannot enforce the stipulation for the additional benefit.[6]

Agreement involving or implying injury to the person or property of another.—Such is an agreement to indemnify a person against the consequences of an illegal act. The term 'injury' has been construed to mean criminal or wrongful harm. A bond providing that the person executing it should perform manual labour in lieu of interest till the sum borrowed be repaid was held void, as being indistinguishable from slavery.[7]

Again, an agreement to give a son in adoption in consideration of a monetary allowance will be void as involving injury to the person and property of the adopted son.[8]

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1. *Parsharam* v. *Sadasheo,* (1936) Nag. 268.
2. *Rajan Harji* v. *Ardeshir,* (1879) 4 Bom. 70
3. *Kashinath* v. *Brindabun,* (1884) 10 Cal. 649.
4. *Mani Ram* v. *Purshotham,* (1930) All. 732 : (1930) ALJ 1402 : 128 IC 823.
5. *Manikka* v. *Peria Muniyandi,* (1936) Mad. 541 : (1936) MWN 466 : 44 LW 166 : 164 IC 31 : 70 MLJ 724.
6. *Atuma,* v. *Dipchand,* (1939) Sind 33; *John* v. *Mendoza,* (1938) 4 AER 472; *Mallalieu* v. *Hodgson,* (1851) 16 QB 689; *Leicester* v. *Rose,* (1803) 102 ER 874; *Bradshaw* v. *Bradeshaw,* (1841) 151 ER 13; *Jamal* v. *Parameshwaran,* (1906) 16 MLJ 418. **See also** *Globe Motors Ltd.* v. *Mehta Teja Singh & Co.,* (1984) 55 Comp. Cas. at 461-62.
7. *Ram Sarup* v. *Bansi Mandar,* (1915) 42 Cal. 742.
8. *Eshan Kishore* v. *Harichandra,* (1874) 13 Ben. LR App. 42.

In a Calcutta case, where an attaching decree-holder in executing an attached decree made an adjustment with the judgment-debtor therein prejudicial to the interests of the decree-holder under the attached decree, the Court held that the adjustment would be hit by this clause, and declined to record the adjustment.[1]

Agreements, which are immoral.—The term 'immoral' covers the class of cases, which the law, though it strongly disapproves of them, does not deem it expedient to actually penalise.[2] Agreements for illicit co-habitation cannot be enforced as between the parties. A promise made in respect of future co-habitation is unenforceable. Again, collateral transactions entered into with the knowledge of the immoral purpose, will also be void. [315] Where a coach was hired to a prostitute with the knowledge, that it was to be used "to make a display favourable to her immoral purposes [3]" and where a house was let to a prostitute knowing that she was the kept mistress of a particular man and the rent would be paid out of her immoral earnings [4], the hire or the rent was held to be irrecoverable. Money, lent to enable defendant to continue co-habitation is not recoverable.[5] But moneys borrowed for tuition fees in respect of teaching music to a dancing girl, were held to be recoverable, since singing was not necessarily connected with prostitution.[6] [354]

PAST CO-HABITATION.—As to past illicit co-habitation, there is a difference between English and Indian Law. [355] In English Law, an agreement in respect of past illicit co-habitation is unenforceable not on the ground that it is immoral, but on the ground that past consideration is no consideration, so that, if a promise was under seal, there was no objection to its enforceability. In Indian Law, however, past consideration having been recognised as good consideration, in an early Allahabad case *Dhiraj Kuer* v. *Bakramjit Singh*,[7] it was

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1. *Durga Prasad* v. *Secy of State*, (1937) Cal. 468 : 41 CWN 880.
2. *Thani Muthukonnu* v. *Shanmuga*, (1905) 28 Mad. 413; *Wootten* v. *Wootten*, is referred to by Subramania Iyer, ACJ); *Kandasamy* v. *Narayanaswamy*, (1923) MWN 566 : 11 LW 617; 76 IC 306 : (1924) Mad 151 : 45 MLJ 551; *Ghumna* v. *Ramachandra Rao*, (1925) 47 All. 619 : 23 ALJ 376 : 88 IC 411 : (1925) All 437; *Chandrakali* v. *Shambunath*, (1935) Oudh 71: 153 IC 333.
3. *Pearce* v. *Brooks*, (1866) 1 Ex. 213; *Allah Baksh* v. *Chunia*, (1877) 56 PR; *Kali Kumari* v. *Mano Mohini*, (1935) Cal. 748.
4. *Upfill* v. *Wright*, (1911) 1 KB 506; *Kali Dassi* v. *Kunnai Lal*, (1921) 26 CWN. 52 : 64 IC 709 : (1921) Cal. 486; *Bomi Manicharam* v. *Regina Stanger*, (1907) 32 Bom. 581; *Changa* v. *Puari*, (1908) 32 All. 58; *Gauri Nath* v. *Madhumati*, (1872) 9 Beng. LR Ap. 37; *Pirthimal* v. *Mt. Bhagan*, (1898) 2 PR.
5. *Panni Chand* v. *Nanoo Sankar*, (1908) 18 MLJ 456.
6. *Khub Chand* v. *Beram*, (1899) 13 Bom. 150 See *Gulab Chand* v. *Kudilal*, AIR 1966 SC 1734 (the immorality in the section is not confined to sexual immorality it covers the case of bribery also).
7. (1881) 3 All. 787.

held that a promise to pay an allowance in consideration of past co-habitation was enforceable as a promise to compensate for service voluntarily rendered under Section 25, clause (2). In *Lakshminarayana* v. *Subadhramma,*[1] Bhashyam Iyengar, J., also held that such an agreement was enforceable. In Bombay, however, cases have laid down that a consideration which is immoral cannot become good, simply because it is past, and therefore, an agreement for past illicit co-habitation cannot be a good consideration for a subsequent transfer of property.[2]

In Madras, a note of dissent was struck in *Ganapathy* v. *Sundararaj Pillai,*[3] where Sundaram Chettiar, J., followed the Bombay view. But a latter decision in *Namberumal* v. *Veeraperumal,*[4] has set the matter at rest at least, so far as Madras is concerned and affirmed the older cases. The Patna High Court has held to the same effect.[5]

It must, however, be noticed that where the past co-habitation is of an adulterous kind, a promise relating to it is unenforceable. The case of *Alice Mary Hill* v. *William Clarke,*[6] is clear authority on the point. The Rajputana High Court has in *Pyare Mohan* v. *Smt. Narayani,*[7] stated that past co-habitation even if adulterous cannot be an object of an agreement in the case of gifts. The term object in Section 23 means purpose of design and the motives of the parties are not to be considered. The past co-habitation though was adulterous being only the motive of the gift in the case before the Court was not hit by the section.

The Bombay High Court has held in pursuance of the principle of equity applied in *Ayerst* v. *Jenkins,*[8] that where a transfer of property on such an immoral consideration has taken effect in possession, the Court will not help the transferor to recover.[9] The Bombay High Court has, in a recent decision, held that merely because a female happened to be styled in a document of gift as

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1. (1903) 13 MLJ 7.
2. *Hussen Ali* v. *Dinbai,* (1924) Bom. LR 252 : 86 IC 240 : (1924) Bom. 135; *Kisondas* v. *Dondu,* (1920) 44 Bom. 542 : *Sahava* v. *Yamanappa Sabu,* (1930) Bom. 209 : 35 Bom. LR 345; *D. Nagarathnamba* v. *Kunuku Ramayya,* AIR 1968 SC 283.
3. (1929) MWN 828 : (1930) Mad. 239.
4. (1930) 59 MLJ 596 : 128 IC 689 : 32 LW 768 : (1931) MWN 224 : (1930) Mad. 956.
5. *Godfrey* v. *Parbati,* ILR (1938) Pat. 308 : (1938) Pat. 502; *Subhash Chandra* v. *Narbada Bai,* AIR 1982 MP 236 : 1982 MPLJ 617 : (1982) 1 DMC 58.
6. (Cf). (1905) 27 All. 266 : 1 ALJ 632; *Sita Devi* v. *Gopal Saran,* (1928) Pat. 375 : 111 IC 762; *Pyare Mohan* v. *Narayani,* AIR 1962 Raj 43 (Gift deed for past cohabitation was held not hit by section as it is a transfer without consideration; *Mahatab-un-Nisa* v. *Rifaqatullah,* AIR 1925 All. 474.
7. *(Ibid).*
8. (1873) 16 Eq. 275.
9. *Sabava Yellappa* v. *Yamanappa,* (1933) 35 Bom. LR 345 : (1933) Bom. 201.

"mistress" by a donor it would not follow that the gift in her favour was made for securing immoral or carnal purposes within the meaning of Sec. 23.[1]

AGREEMENT FOR SEPARATION.—**[356]** Both in English and Indian Law, an agreement for future separation between husband and wife is bad and unenforceable.[2] So also an agreement between a Mohammedan and his wife that the latter may live with her parents agreement is void.[3] An ante-nuptial agreement between a Mussalman and has wife reserving liberty to the wife to divorce herself under certain conditions is enforceable if the conditions are not repugnant to the spirit of Mohammedan law.[4] So too, a stipulation by a Mohammedan husband to make an allowance for the wife in case of separation will be valid.[5] Similarly, an ante-nuptial agreement between a lady and her husband providing for maintenance in the event of future dissensions is good in law.[6] But an agreement between a Hindu and his wife, providing that the wife may avoid the marriage, if the husband married second wife is void.[7] So too, money advanced for procuring a divorce with a view to marry afterwards, cannot be recovered.[8]

But an agreement in view of immediate separation or in respect of a separation already effected is not objectionable.[9] **[357].**

In English law a promise to marry made by a married man, in the life-time of his wife, to be carried out on the death of the wife has been held opposed to public policy.[10] So is a contract contingent on the defendant obtaining a decree of nullity of an existing marriage.[11] But a contract by a person who has already obtained a decree *nisi*, to marry as soon as the decree absolute is made is not opposed to public policy.[12] **[384]**

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1. *Sushila Bhiku Shinde* v. *Sulochana Baburao Bhoj*, (1981) Bom. LR 267.
2. *Muhamed* v. *Jamal*, (1921) 43 All. 650 : 11 LJ 675 : 63 IC 883 : (1929) All. 152; *Fatima* v. *Ali. Mohamed*, (1913) 37 Bom. 280; *Muhammad* v. *Fatima*, (1930) 11 Lah. 85 : (1929) Lah. 660; (Cf). *Lurie* v. *Lurie*, (1938) 3 AER 156 (Reconciliation agreement with provision for future separation not bad).
3. *Abdul* v. *Hussein Bi*, (1904) 6 Bom. LR 728.
4. *Aytunnissa* v. *Karan Ali*, (1908) 36 Cal. 23; *Badu Mia* v. *Badrannessa*, (1919) 29 CLJ 230: 40 IC 803.
5. *Muhammad* v. *Fatima*, (1929) 11 Lah. 85 : 119 IC 486 : (1929) Lah. 660.
6. *Muhamed* v. *Jamal*, (1921) 43 All. 650 : 11 ALJ 675 : 63 IC 883 : (1921) All. 152; *Jamila* v. *Abdul Rashid*, (1939) Lah. 165; (Cf) *Mansur* v. *Azizul*, (1928) 3 Luck. 603 : 109 IC 812 : (1928) Oudh 303.
7. *Chait Ram* v. *Nathi*, (1900) 15 PR.
8. *Bai Vijli* v. *Nansa Nagar*, (1885) 10 Bom. 152.
9. (Cf.) *Purshothamdas* v. *Rukmini*, (1937) Bom. 358 : 39 Bom. LR 458 : 170 IC 897.
10. *Wilson* v. *Carnley*, (1908) 1 KB 729.
11. *Siveyer* v. *Allison*, (1935) 2 KB 403.
12. *Fender* v. *Mildmay*, (1938) AC 1; *Sujan Singh* v. *Mohkam Chand*, AIR 1983 P&H 180 (Agreement not to bid against each other. Not opposed to public policy).

Agreements opposed to Public Policy.—An agreement may be contrary to public policy, in that it does not conduce to the welfare of the State either because it interferes with the civil or judicial administration, or interferes unduly with the freedom or liberty of individual citizens. Public policy is a rather elastic term and it is difficult to define and classify agreements opposed to public policy, for the "public policy" of one Judge may not be the same as that of another.[1] Public policy is incapable of being precisely defined and on the basis of material brought on record, it is for the Court to decide the concept as to what is public good or in the public interest or what would be injurious or harmful to the public good or the public interest at the relevant point of time.[2] The term public policy has to be understood in an entirely different and more extensive meaning from the expression policy of law and this is a principle of judicially evolved based on the current requirements of the community.[3] The concept of "public policy" keeps on changing from generation to generation and from time to time and it being vague is used in a narrow or wider sense depending upon the context in which it appears.[4] In *Shrinivasdas* v. *Ramachandra,*[5] Scott, C.J. and Hayward, J., observed "Public policy should not be interpreted under Sec. 23 of the Act as comprehending all the political policies from time to time of the Government of India", and awarded damages in a case of forward dealings in gold currency **[357].**

The Supreme Court has explained what public policy is in *Gherulal Parkash* v. *Mahadeodas Maiya* [6]: "Public policy or the policy of the law is an illusive concept; it has been described as 'untrusworthy guide', 'variable quality', uncertain one", unruly horse" etc. The primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity

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1. *Kamala Sugar Mills Ltd.* v. *Ganga Bishen Bhajan Singh,* AIR 1978 Mad. 178 : (1977) 1 MLJ 149 ; *Kastoori Devi* v. *Sri Chheda Lal Shop,*1978 All LJ. 159 (Compromise between husband and wife that amount of maintenance agreed to be paid will not be enhanced is not opposed to public policy.
2. *State of Rajasthan* v. *Basant Nahata,* AIR 2005 SC 3401 : 2005 (6) Supreme 243.
3. *M.K.Usman Koya* v. *C.S.Santha,* AIR 2003 Ker 191, 195 : 2003 (3) Civil LJ 1 : 2003 (2) Civil Court C 59 : 2003 (1) Ker. LT 940.
4. *Oil and Natural Gas Corpn. Ltd.* v. *SAW Pipes Ltd.,* AIR 2003 SC 2629, 2638 : (2003) 5 SCC 705 : 2003 (3) Supreme 449 : 2003 (2) Arbi. LR 5 (SC).
5. (1920) 44 Bom. 6 : 21 Bom. LR 788 : 52 IC 546. *Harishankar* v. *Bishwanath,* AIR 1965 Pat. 33 (Compromise under Or. 23, R. 3 Cal.); *Ram Sewak* v. *Ram Charan,* AIR 1982 All. 177 (an agreement between partners that they would conceal some part of their business activity and would not enter certain items in the books of account mentioned by them in order to evade payment of Income-tax of Sales-tax cannot be enforced).
6. AIR 1959 SC 781 : 1959 Supp. (2) SCR 406 ; *Jai Chand Bhasin* v. *Union of India,* AIR 1983 Delhi 508. (Waiver clause held to be not opposed to public policy); *D. Balarama Krishnayya* v. *Arokapudi Jagannadha Rao,* AIR 1983 AP 136. (Waiver, opposed to public policy). *Sandhya* v. *Salil Chandra,* AIR 1980 Cal. 244 : (1980) 1 Cal.LJ. 446 : (1980) 2 Cal.HN. 69.

of contracts which form the basis of society, but in certain cases, the court may relieve them of their duty on a rule founded on public policy; the doctrine of public policy is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and just like any other branch of common law, it is governed by precedents; the principles have been crystalized under different heads and though it is permissible for courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days".

Apropos public policy a recent decision points out.[1] The whole concept of limiting the heads of public policy is based on the concept of freedom of contract, which was considered to be so very fundamental when *laissez faire* ruled the world. Freedom of contract has now ceased to have the idealistic attraction it had in the 19th century. The world is now more and more concerned with the social and economic interest of the community rather than individual interest. With the fundamental change in the concept of freedom of contract, the concept of limiting policy must be considered to be on its way to becoming archaic. Further in a developing country dedicated to the establishment of a new social order, the door cannot be finally shut against new heads of public policy.

There is a very interesting discussion on the subject in *Esso Petroleum Limited Case.*[2]

An agreement between the Electricity Board and the consumer provided *inter alia* that the consumer shall bear the costs of replacement of a transformer which may get stolen while the law provided that it would be the duty of the Electricity Board to maintain 'distribution line' of which the transformer was one of the parts. It was the agreement being contrary to the provisions of Electricity (Supply) Act, 1948 and the Electricity Act, 1910 was void and the Board could not enforce the same as being opposed to public policy.[3]

The Allahabad High Court held in *Sri Tej Chaddha* v. *Sideshwari,*[4] that under U.P. (Temporary) Control of Rent and Eviction Act, a compromise entered into between the landlord and the tenant is not illegal or against public policy.

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1. *Ratanchand Hirachand* v. *Askar Nawar Jung,* (1975) APLJ 344; *Nagle* v. *Feilden,* (1966) 2 Q 635; *Hill* v. *Archbold,* (1968) 1 QB 686; *Associated Cement Company Ltd.* v. *State,* AIR 1981 Raj. 133 : 1980 Raj.LW. 611.
2. (1968) AC 269 : (1967) 1 All. E Report, 699. **See also** Cheshire and Fifoot Law of Contract 9th Edition Page 372 *et seq.*
3. *U.P. State Electricity Board* v. *Smt. Lakshmi Devi Sehgal,* AIR 1977 All. 499.
4. AIR 1973 All. 324 : 1973 All.WR 338 : 1973 All.LJ. 533; *Farduman Chand* v. *Kashmira Singh,* AIR 1943 Lahore 100.

Where the defendant by an agreement has agreed to assign certain copyrights in favour of the plaintiff, the agreement does not involve any public policy in the sense of legal parlance under the strict interpretation of Sec. 23 as there is no obligation involved to the public here and as such the agreement cannot said to be opposed to public policy.[1]

1. Interfering with Civil Administration.—Agreements having for their object the sale of offices or trafficking in honours or titles will come under this category. They are rightly considered illegal and opposed to public policy. Thus in English Law, a devise of property with a defeasance clause in case the devise did not acquire the title of Duke of the Marquis considered bad, as it was calculated to be an encouragement to the use of unlawful means to get the title.[2] An agreement to procure a Knighthood for a reward,[3] has also been held to be opposed to public policy. So, a devise with a condition divesting the interest of a legatee if he entered the naval or the military service of the Crown,[4] and an agreement by a Member of Parliament to forego his discretion and to obey the party whip,[5] has all been held to be objectionable. **[360]**

Procuring the withdrawal of a candidature for the office of lambardar is unlawful.[6] An agreement to pay money to a public servant to induce him to retire earlier amounts to an office brokerage agreement and is illegal.[7] So is a contract to procure an appointment to the promisor,[8] or to pay remuneration to the clerk of a pleader.[9] A sale of a religious office is also void,[10] but an

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1. *Prentice Hall India Pvt. Ltd.* v. *Prentice Hall Inc.*, AIR 2003 Delhi 236, 246.
2. *Egerton* v. *Brownlow*, (1853) 10 ER 359 : 14 RR 1; **see also** *Champion* v. *Wallace*, (1920) 2 Ch. 274.
3. *Parkinson* v. *College of Ambulance*, (1925) 2 KB 1.
4. *Re. Beards : Reversionary and General Securities Co.* v. *Hall*, (1907) 1 Ch. 383; *Cohen* v. *Edgar*, (1939) 1 AER 635.
5. *Amalgamated Society of Railway Servants* v. *Osborne*, (1910) AC 87.
6. *Puttu Lal* v. *Raj Narain*, (1931) ALJ 397 : 132 IC 419 (2) : (1931) All. 428.
7. *Saminatha* v. *Muthuswamy*, (1907) 30 Mad. 530 : 17 MLJ 252; *Karuppiah* v. *Ponnuchami*, (1933) 65 MLJ 532 : (1933) MWN 1003 : 38 LW 585 : 145 IC 972 : (1933) Mad. 768 (Agreement to pay a monthly sum to Karnam in consideration of his recommending a person to the office of Karnam gumastha is void).
8. *Ledu Coachman* v. *Hiralal*, (1916) 43 Cal. 115 Money paid cannot be recovered even if promise is not carried out. *N.V.P. Pandian* v. *M.M. Roy*, AIR 1979 Mad. 42 : (1979) 2 MLJ 417- (Payment for using influence with the selection committee to Madras Medical College for admitting a candidate and on failure to secure admission suit for recovery of money back is not maintainable). An agreement by the intending bidders at an auction forming a ring to share the profits resulting from the "Knowkout" is against public policy". **See also** AIR 1955 Bom. 305.
9. *Suryanarayana* v. *Subbayya*, (1918) 41 Mad. 471 : 33 MLJ 724 : (1918) MWN 54 : 7 LW 58 : 42 IC 911 (FB).
10. *Narasimha* v. *Anantha*, (1881) 4 Mad. 391; *Kuppa Gurukal* v. *Doraisami*, (1882) 6 Mad. 76 (Cases of Shebaitship) *Wahid* v. *Ashruff*, (1882) 8 Cal. 782 (Office of mutawalli); *Hnanasambanda* v. *Velu*, (1900) 23 Mad. 271; *Rajah Vurma Valia* v. *Ravi Vurma*, (1876) 1 Mad. 235; *Anjeneyulu* v. *Sri Venugopala Rice Mill*, (1922) 45 Mad. 620 (Alienation of property attached to religious office.)

agreement to share offerings made in a temple is not *per se against* public policy.[1] But an alienation of a religious office to a member of the family,[2] or a compromise recognising the right of a particular member.[3] will be valid. Likewise, it has been held that the appointment of a Mutawalli for a term and with conditions of service attached is not opposed to public policy on the mere ground that the terms of appointment are not in accord with those relating to a Mutawalli under the Muhammadan Law.[4]

Similarly it is contrary to public policy to induce public officers, to use their influence for money or other consideration for the promisor's benefit.[5] And an advance made with the knowledge that it was intended to bribe a public official is not recoverable.[6] But an agreement to remunerate a third party for using his influence to bring about a settlement of a civil suit is not illegal or opposed to public policy.[7] Officers in Government service are prevented either by particular Act or by departmental rules from contracting for the purchase of lands etc., within their respective jurisdictions. This is a rule enacted in the public interest. The decisions as to the legality of purchases made in violation of the Acts or rules are not quite unanimous.[8]

2. Interfering with judicial administration.—This may be either (i) by perverting justice or (ii) by an abuse of legal process.

(i) Perverting justice—STIFLING PROSECUTION—An agreement for stifling a prosecution is illegal, inasmuch as it impedes the

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1. *Mauta Baksh* v. *Sajawal,* (1933) Lah. 223 : 141 IC 427; *Kallu Tewari* v. *Rajindra,* (1923) 45 All. 79 : 20 ALJ 807 : 70 IC 124 : (1923) All. 56.
2. *Mancharam* v. *Prashankar,* (1882) 6 Bom. 298.
3. *Girijanand* v. *Sailajanand,* (1896) 23 Cal. 645.
4. *Golam Hossain* v. *Altaf Hossain,* (1964) 61 Cal. 80 : 149 IC 1215 : 38 CWN 214 : 58 CLJ 333 : (1934) Cal. 328. **See** *Hafiz Mohammed* v. *U.P. SEC. Board,* AIR 1965 SC 333.
5. *Manindra Chandra* v. *Aswini Kumar,* (1921) 48 Cal. 427 : 25 CWN 297 : 60 IC 337 : (1921) Cal. 185; *Krishnayya* v. *Nookayya,* (1928) Mad. 476 : 109 IC 649; **but see** *Shiv Saran* v. *Kesho Prasad,* (1918) 42 IC 122.
6. *Firm of Attar Singh* v. *Haku,* (1914) 24 IC 692 : 185 PLR 1914.
7. *Zahurul* v. *Wazirul,* (1912) 16 CWN 480.
8. *Abdul Rahman* v. *Ghulam Muhammad,* (1926) 7 Lah. 463 : 98 IC 673 : (1927) Lah. 18 (Agreement by Government servent for purchase of agricultural land in his jurisdiction is void); *Sundra Bai* v. *Manohar,* (1933) 35 Bom. LR 404 : 144 IC 781 : (1933) Bom. 262 (Police officer purchasing land in mother's name no suit for declaration title is maintainable as the contract of purchase was void); *Sitarampur Coal Co.* v. *Colley,* (1908) 13 CWN 59 (Agreement tending to create conflict with official duties is void). **But see** *Bhagwan Devi* v. *Murari Lal,* (1917) 39 All. 51; *Dharwar Bank* v. *Mahomed Hayat,* (1931) 33 Bom. LR 250 : (1913) Bom. 269; *Qurban Hussain* v. *Fazal Shah,* (1933) Lah. 291 : 145 IC 163. **See** *Ouseph Poulo* v. *Catholic Union Bank,* AIR 1965 SC 166 : 1964 (7) SCR 745. (The validity of the transaction to show that it is based upon an agreement to stifle prosecution); *Govinda* v. *Kalu,* AIR 1966 Orissa 228.

administration of justice. "You shall not make a trade of felony," "You cannot make a profit out of a crime," these are the principles of law. Where a person has committed an offence, the law must take its course and if he be guilty, he must receive sentence; and so, if a person, in consideration of receiving money, promises to shield an offender, or not to prosecute him, such an agreement is illegal. **[363].**

Where the plaintiff has agreed to compromise with the defendant by agreeing not to pursue a criminal case filed against the defendant in consideration of the defendant agreeing for the execution of the exchange of deeds, Sec. 23 renders the execution of deed of exchange unlawful.[1]

CIVIL LIABILITY.—In order to render a transaction illegal on the ground that the object of the transaction was to stifle a criminal prosecution, it must be proved to the Court's satisfaction that it was entered into or brought about in *pursuance of an agreement to stifle criminal prosecution.* The mere possibility or talk of criminal prosecution will not make the transaction illegal.[2]

The question presents difficulties in cases where the transaction between the parties involves a civil liability as well as a criminal offence. Where there is a pre-existing debt or obligation, there is nothing to prevent a creditor from taking a security from his debtor even if the debtor is induced to give the security by a threat of criminal proceedings;[3] for the debtor will be only making reparation, a duty which he owes quite independently of his fear of prosecution.[4] In such a case, as between the debtor and the creditor, there is no trading in felony which public policy condemns and the law attempts at preventing. The creditor gets just what he was entitled to and there is no advantage or emolument coming to him for withdrawing the prosecution against the debtor.[5]

In such cases, the security is not vitiated by the fact that the creditor is induced to abstain from prosecuting the debtor. But it should be borne in mind that the abstention from prosecuting should not be part of the *bargain expressly or impliedly.* If it does form a part, if the *quid pro quo* is the withdrawal of criminal prosecution the transaction fails. This distinction is expressed in

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1. *Sri Srihari Jena* v. *Khetra Mohan Jena,* 2002 (4) Civil LJ 279 (Ori).
2. *Lakshmanaswamy* v. *Narasimha Rao,* (1936) MWN 1137 : 44 LW 572.
3. *Widya Wanti* v. *Jai Dayal,* (1932) 13 Lah. 356 : 140 IC 220 : (1932) Lah. 541; *Abdul Qadir* v. *Imam din,* (1927) 9 LLJ 165 : 104 IC 418 : (1927) Lah. 231; *Ram Gopal* v. *Ganeshi Lal,* (1925) Lah. 364 : 85 IC 610; *Kumar Roy* v. *Ananth Bandhu,* (1931) 35 CWN 26 : 131 IC 133 : (1931) Cal. 421; *Radha Krishan* v. *Sital Prasad,* (1926) 94 IC 465; *Jai Kumar* v. *Gauri Nath,* (1906) 28 All. 178; *Veerayya* v. *Sobhandari,* (1936) Mad. 656 : 44 LW 507: (1936) MWN 908; *Flower* v. *Sadler,* (1883) 10 QBD 572.
4. *Jones* v. *Merionethshire Permanent Benefit Building Society,* (1892) 1 Ch. D 173.
5. *Sudhindra Kumar* v. *Ganesh Chandra,* (1938) Cal. 840 : 43 CWN 147. **See** *Chand Bhima,* AIR 1963 MP 139.

some cases by distinguishing between the motive and the consideration for the agreement.[1]

The Privy Council has pointed out that the agreement need not specifically state that part of the consideration was an agreement to settle criminal proceedings but that it is sufficient to give evidence from which the inference necessarily arises that a part of the consideration is unlawful.[2]

The mere fact however that in such circumstances, the creditor withdraws from the prosecution of his complaint does not give rise to a presumption that there was a contract that he should do so.[3]

The position may be summarised thus. If the pre-existing liability of the debtor was sole consideration for the security which he gives, the transaction will be protected even if it were given under threat of criminal proceedings; but if the dropping of prosecution was also a matter of bargain between the parties and constituted a part of the consideration apart from the pre-existing debt, the security cannot be enforced.[4]

It may be mentioned that in some cases under this category, another line of distinction has been suggested, namely, that if the promise is made or security given by an outsider who is under no existing obligation, the consideration could be nothing else but the withdrawal of the prosecution, and therefore, the transaction will fail.[5] In *Dwijendaranath* v. *Gopiram*,[6] where the defendant who was being prosecuted for criminal breach of trust passed a bond to the plaintiff for the sum embezzled and the plaintiff had the

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1. *Sudhindra Kumar* v. *Ganesh Chandra*, (1938) Cal. 840 : 43 CWN 147; *Deb Kumar Roy* v. *Anath Bandhu*, (1931) Cal. 421 : 35 CWN 26 : 131 IC 133; *Dwijendranath* v. *Gopiram*, (1926) 53 Cal. 51: (1926) Cal. 59 : 29 CWN 855 : 89 IC 200; *Tek Chand* v. *Harjas Rai*, (1929) Lah. 564 : 117 IC. 74; *Santi Sarup* v. *Lal Chand*, (1927) Lah. 530 : 9 LLJ 319 : 108 IC 444; *Feroze Din* v. *Ghulam Fatima*, (1926) Lahl 88 : 89 IC 434; *Onkar Mal* v. *Ashiq Ali*, (1927) 49 All. 540 : 100 IC 499 : 25 ALJ 495 : (1927) All. 318; *Adikanda* v. *Jogi*, (1922) 1 Pat. 164 : 70 IC 295 : (1922) Pat. 502; *Sukhdeo* v. *Mangal*, (1917) 2 PLJ 630 : 41 IC 812; *Kessowji* v. *Hurjivan*, (1887) 11 Bom. 566; *Mahomed Azim* v. *Adil Shah*, (1934) Pesh 105 : 151 IC 1025.

2. *Kamini Kumar* v. *Birendra Nath*, (1930) 57 Cal. 1302 : AIR 1930 PC 100 : 123 IC 187 : **see also** *Veerayya* v. *Sobhandari*, (1936) Mad. 656 : (1936) MWN 908 : 44 LW 507. See *Loganathan* v. *Ponnusami Naicker*, AIR 1969 Mad. 15 : 81 MLW 10 : ILR 1968 (2) Mad. 298 : (1968) 1 MLJ 422; *Narayana Pillai* v. *K.R.S. Co-op Society Ltd.*, AIR 1967 Kerala 51.

3. *Narsimhalu* v. *Naina*, (1929) Mad. 7 : 115 IC 156.

4. **See** *Banu Mal* v. *Ratan Deo*, (1937) ALJ 333 : 169 IC 533 : (1937) All. 370.

5. **See** *Flower* v. *Sadlar*, (1883) 10 QBD 572; *Sudhindra Kumar* v. *Ganesh Chandra*, (1938) Cal. 840 : 43 CWN 147; *Sayamma* v. *Punamchand*, (1933) 57 Bom. 678 : 35 Bom. LR 850 : 147 IC 1096 : (1933) Bom. 413; *Kessonji* v. *Harjivan*, (1887) 11 Bom. 566.

6. (1926) 53 Cal. 51 : 29 CWN 855 : 42 CLJ 90 : (1926) Cal. 59 : 89 IC 200; *Nanak Chand* v. *Durani*, 9 PR (1906).

prosecution withdrawn through the Commissioner of Police, it was held that the bond was enforceable, "since the decision to withdraw was that of the Commissioner of Police and the Plaintiffs did not attempt to take the administration of justice into their own hands." In *Narsimulu* v. *Naina Pillai,*[1] where a person accused of criminal breach of trust, acknowledged his liability and executed a promissory note for the amount due, and the complainant thereafter withdrew the prosecution, it was held following *Flower* v. *Sadler*[2] that an action could be maintained on the note. Similarly, in *Sulaiman* v. *Tan Hui Ya,*[3] the Rangoon High Court held that where *A* guaranteed the payment by *B* of a bond executed in pursuance of an agreement to withdraw a prosecution pending against *B*, *A* will be liable on the guarantee though the note may be void. But, where a civil suit and a criminal complaint in respect of the same matter were pending, and in the course of a house search in connection with the criminal case, the defendant agreed to an arbitration reference, it was held that the agreement was vitiated, as the object was to stifle the criminal proceeding.[4]

The essence of the doctrine of stifling of prosecution is that the administration of justice cannot be taken out of the hands of judges and put in the hands of a private party.

In *Union Carbide Corporation* v. *Union of India,*[5] a settlement deed was entered into between the Attorney General of India and the Counsel for UCC by which Union of India consented for withdrawal of criminal prosecution against UCC and UCC agreed to offer 470 million U.S. dollars as compensation to the families victims of Bhopal gas leakage. This agreement was challenged on account of it being opposed to public policy as it amounted to stifling of the prosecution. The Supreme Court held, when the Union of India as *Dominis Litis* consented for quashing the criminal proceedings, it not being a private authority, the principle of stifling of prosecution has no application. Further it was held that, a distinction has to be made between motive and consideration and dropping of criminal prosecution is a motive for entering into agreement but not its consideration.

OFFENCES COMPOUNDABLE AND NON-COMPOUNDABLE— The Criminal Procedure Code mentions those offences which are compoundable by parties (see Section 320) and an agreement in consideration of not prosecuting in such cases will not amount to a stifling of prosecution. The Criminal Procedure Code also mentions certain offences as compoundable

1. (1929) Mad. 7 : 115 IC 156; **see also** *Shaik Gafoor* v. *Hemanta Sashi Dabya,* (1931) 35 CWN 28 : 131 IC 564 : (1931) Cal. 416.
2. (1883) 10 QBD 572 (576).
3. (1930) 7 Ran. 121 : 121 IC 803 : (1930) Ran. 140.
4. *Gogala Chandra* v. *Lakshmi Kanta,* (1933) 37 CWN 749 : (1933) Cal. 817.
5. AIR 1992 SC 248, 287, 288 : (1991) 4 SCC 584.

with the permission of the Court and if such permission is obtained, there is no objection. But, where such permission is not obtained or where the offence is not compoundable, then a contract in consideration of not proceeding with a prosecution will amount to a stifling of prosecution.[1] Where an implied term of a reference to arbitration was that certain pending non-compoundable criminal proceedings will not be proceeded with, the consideration was held unlawful.[2] If the offence be compoundable, the agreement is enforceable.[3] It is enough if the offence is compoundable under law of the place where it is committed.[4] The essential element in the stifling of a prosecution is the tampering by a private individual, with the administration of justice.[5] **[364-365]**

Money paid under pressure in respect of an agreement to withdraw a non-compoundable prosecution is money paid under 'coercion' within Sec. 72 and is recoverable.[6] If a person sets the machinery of the criminal law into action on the allegation that the opponent has committed a non-compoundable offence and by the use of this coercive criminal process he compels the opponent to enter into an agreement, that agreement would be treated as invalid for the reason that its consideration is opposed to public policy. Once the machinery of the criminal law is set into motion on the allegation that a non-compoundable offence has been committed, it is for the criminal courts and criminal courts alone to deal with that allegation and to decide whether the

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1. *Majibar* v. *Syed Maktashed,* (1912) 40 Cal. 113.
2. *Kamini Kumar* v. *Birendra Nath,* (1930) 57 Cal. 1302 : 34 CWN 489 : 57 CLJ 400 : 32 Bom. LR 631 : 123 IC 187 : AIR 1930 PC 100 : 51 MLJ 82; *Muhammed Ismail* v. *Wahiduddin,* (1926) 24 ALJ 311 : 92 IC. 503 : (1926) All. 270; *Sayamma* v. *Punamchand,* (1933) 57 Bom. 678: 35 Bom. LR 850 : (1933) Bom. 413 (Breach of trust compounded); *Dalsukhram* v. *Charles De Bretton,* (1904) 28 Bom. 326 : 6 Bom. LR 73 (compounding of offence of unlawful assembly); *Karuna Krishna* v. *Rakhaldas,* (1923) Cal. 292 : 68 IC 721; *Nazar* v. *Mt. Paras,* (1923) Lah. 689 : 73 IC 668; *Ghulam Mohiuddin* v. *Deoki Nand,* (1914) 22 IC 398 : 39 PR (1914) (compounding breach of trust); *Thakurain* v. *Tota Ram,* (1926) Oudh 40; *Mottai* v. *Thanappa,* (1913) 37 Mad. 385 (compounding charge of grievous hurt); *Bakhtawar* v. *Issardas,* (1934) Sind 71 : 150 IC 734.
3. *Rajaram* v. *Charanji,* (1939) Lah. 98; *Saktay* v. *Mahadin,* (1930) 4 Luck. 669 : (1930) Oudh 196; *Ahmed Hasan* v. *Hassan,* (1928) 52 Bom. 693 : 30 Bom LR 885 : 112 IC 459: (1928) Bom. 305; *Abdul Qadir* v. *Imam Din,* (1927) 9 LLJ 165 : 104 IC 418 : (1927) Lah. 231; *Ali Hussein* v. *Mohamed,* (1930) 28 ALJ 1927; *Moulvi Mahammed* v. *Samad Ali,* (1915) 20 CWN 946; *Chetan Das* v. *Hari Ram,* (1911) 8 ALJ 498; *Badri Dhar* v. *Ram Saran,* (1911) 10 IC 189; *Ram Jash Gosham* v. *Markanda,* (1934) All. 1068; *Gaya Prasad* v. *Jamma Prasad,* (1935) OWN 553 : 155 IC 341.
4. *Venkata Subramania* v. *Syed Usuf,* (1923) 18 LW 314 : (1923) MWN 721 : 74 IC 1006 : (1923) Mad. 708 : 45 MLJ 59.
5. *Birendranath* v. *Basanta Kumar,* (1926) Cal. 59; 19 IC 624; *V. Narasimharaju* v. *V. Gurumyrthy Raju,* AIR 1963 SC 107; *Rameshwar* v. *Upendranath,* (1926) 29 CWN 1029 : 90 IC 463 : (1926) Cal. 455; **see also** *Durgesh Nandini,* AIR 1941 PC 95.
6. *Muthu Veerappa* v. *Ramaswamy,* (1917) 40 Md. 285; for converse case **see** *Amjadennessa* v. *Rahim Baksh,* (1915) 42 Cal. 286 : 28 IC 713.

offence alleged has infact been committed or not. The decision of this question cannot either directly or indirectly be taken out of the hands of criminal courts and dealt with by private individuals.

Where the parties to a pending criminal case with regard to offences under Secs. 420, 485, 468 and 477 read with Secs. 107 and 120-B Indian Penal Code, some of which are non-compoundable, entered into an agreement on the date of hearing of the criminal case whereby the parties agreed to refer their criminal case for arbitration, it was held that the arbitration agreement was invalid as being opposed to public policy under Sec. 23 Contract Act.[1]

AGREEMENTS TENDING TO OUST THE JURISDICTION OF COURTS—Where there are two competent Courts which can deal with the subject-matter of the suit it is open to the parties to a contract to agree that dispute in respect thereof should be adjudicated upon by one of the two competent courts and such an agreement is perfectly legal and not contrary to law. The freedom of contract in this direction is being increasingly recognised and so, where two contracting parties agree that in case of breach, neither, should resort to a Court, such an agreement has been held to be binding.[2] **[367]** An agreement between the parties to a contract to the effect that a suit concerning disputes arising between them on the basis of that contract should be instituted in one only out of two competent courts having territorial jurisdiction over the subject matter of that suit is valid and enforceable.[3] Where a clause in the agreement enabled one of the parties to it to nominate a sole arbitrator of his choice including his employee for resolving the dispute between the parties there is nothing illegal in inserting such term and it does not fall within any of the categories enshrined in Sec. 23. Such clause would not amount to ousting of the jurisdiction of Courts.[4]

Where the wife on the dissolution of the marriage by mutual consent agreed not to claim alimony, she cannot be prevented from initiating proceedings subsequently claiming maintenance since her consent amounts to ousting the jurisdiction conferred on the Court.[5]

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1. *V. Narasimharaju* v. *Gurumurthy Raju,* AIR 1963 SC 107 : 1963 (3) SCR 687.
2. *Rose Frank and Co.* v. *J.R. Crompton Bros.* (1923) 2 KB 261; on appeal (1925) AC 445; *H.K. Dada (India) Ltd.* v. *M.P.S. Mill Co. Ltd.,* AIR 1954 Mad. 845; *Hukam Singh* v. *Gammon,* AIR 1971 SC 740 : 1971 (3) SCR 314 : (1971) 1 SCC 286 : 1971 UJ 167. **See** discussion under Sec. 28.
3. *Thakral & Sons* v. *Indian Petro Chemicals,* AIR 1994 Del. 226, 231 : 1993 (3) Cur. CC 218 : (1993) 50 DLT 561 : 1993 (25) DRJ 479 : (1993) 2 BC 45.
4. *Vijay Singh Amar Singh & Co.* v. *Hindusthan Zinc Ltd.,* AIR 1992 Raj 82, 86 : 1991 (1) Raj. LR 652.
5. *Geeta Satish Gokarna* v. *Satish Shankarrao Gokarna,* AIR 2004 Bom 345 (DB) : 2004 (3) CivLJ 819 : 2004 (3) BomLR 767.

AGREEMENT TO PERFORM PUJA FOR SUCCESS IN LITIGATION.—In *E. V. Balasundara* v. *Mahomed Oosman,*[1] the Madras High Court held, dissenting from an Allahabad ruling [2] that a contract whereby a Muhammadan defendant agreed to pay the plaintiff, a Hindu, a certain sum in consideration of the latter offering prayers for the defendant's success in a pending litigation was not opposed to public policy. The Court observed that new heads of public policy should not be devised. **[378]**

(ii) Abuse of Legal Process–MAINTENANCE AND CHAMPERTY.—According to English Law, Maintenance and Champerty are both illegal. The former is an agreement to stir up litigation in which the person has no interest and the latter, to finance litigation with a view to share in its profits. **[378]** Where a car-hire Co. entered into an agreement with the plaintiffs whose cars were involved in Motor Accident agreeing to replace the car while plaintiffs cars are under repair on hire charges to be paid out of damages to be recovered in legal proceedings against the insured defendants and also agreed to provide legal assistance to the plaintiffs in this regard, the agreement cannot be said to amount to champerty since the car-hire Co. did not intermeddle in the litigation to share the spoils.[3] An agreement to finance to fight a pending legal litigation on the condition that 40% of the compensation should be paid in the event of success in the case of land acquisition or 40 % of sale proceeds if the property is sold is unconscionable bargain amounting to champerty agreement and therefore voids being opposed to public policy.[4] In Indian Law, however, a champertous agreement is not *per se* void.[5] The Supreme Court had occasion to consider the position in the matter of "S" Senior Advocate.[6] The agreement between the counsel and the client was: "I hereby engage you with regard to my claim against the Baroda Theatres Ltd., for a sum of Rs. 9,400/- (balance due to me). Out of the recoveries you may take 50 per cent of the amount recovered. I will by Wednesday deposit Rs. 200 in your account or give personally towards expenses."[7]

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1. (1929) 53 Mad. 29 : 57 MLJ 154 : 30 LW 333 : (1929) Mad. 812 : 118 IC 65; **see also** *Bapuji* v. *Nataranjan,* (1935) Nag. 119 : 31 NLR 229 (contract to propitiate deity with a view to avert malign influences valid).
2. *Bhagwan Dat* v. *Raja Ram,* (1927) 49 All. 705 : 25 ALJ 518 : 100 IC 1023 : (1927) All. 406.
3. *Giles* v. *Thompson,* 1993 All. ER 321.
4. *Khaja Moinuddin Khan* v. *S.P. Ranga Rao,* AIR 2000 AP 344, 347 : 2000 (2) ALD 461 : 2000 (2) ALT 596.
5. *Bhagwat* v. *Devi Dayal,* (1908) 35 Cal. 420; *Ramanamma* v. *Viranna,* (1931) 61 MLJ 94 : 33 LW 757 : (1931) MWN 601 : (1931) ALJ 544 : 35 CWN 633 : (1931) PC 100; *Abul Kasim* v. *Eshanul,* (1921) Oudh 207 : 65 IC 129; *Fateh Singh* v. *Bute,* (1934) Lah. 1017.
6. Mr. 'G' a senior Advocate AIR 1954 SC 557.
7. *Ram Coomar* v. *Chander Canto,* (1876) 2 Cal. 233; *Subadrayamma* v. *Venkatapathi,* (1924) 48 Mad. 280 : 47 MLJ 98 : 20 LW 298 : (1924) MWN 607 : 29 CWN 57 : 26 Bom. LR 786 : 80 IC 807 : (1924) PC 162; *Champalal* v. *Nagulal,* (1928) 109 IC 591; *Ramji Das* v. *Fazl Azim,* (1926) 98 IC 959; *Begraj* v. *Ali Sher,* (1923) Sind 50 : 77 IC 87; *M.R. Stewart* v. *Ram Chandi,* 26 PR (1906); *Achal Ram* v. *Kazim Husain,* (1905) 27 All. 271; *Alopi* v. *Court of Wards,* (1938) Lah. 23.

The Supreme Court observed: "Now it can be accepted at once that a contract of this kind would be legally unobjectionable if no lawyer was involved. The rigid English rules of champerty and maintenance do not apply in India, so if this agreement had been between what we might term third parties, it would have been legally enforceable and good. It may even be that it is good in law and enforceable as it stands though we do not so decide because the question does not arise: but that was argued and for the sake of argument even that can be conceded. It follows that there is nothing morally wrong, nothing to shock the conscience, nothing against public policy and public morals in such a transaction *'per se'*, that is to say, when a legal practitioner is not concerned". The Court may reduce the quantum of relief.[1] Thus, where the promised remuneration is out of all proportion to the trouble and expense involved so as to be inequitable against the borrower the Court may reduce the amount of remuneration to a reasonable figure.[2]

Agreements of this kind are subject to the rigorous scrutiny of the courts; the circumstances in which they were made and possibly also the consideration given will be carefully appraised. The test of champerty is whether it is merely the acquisition of an interest in the subject of litigation *bona fide* entered into or whether it is an unfair, or illegitimate transaction got up for the purpose of mere spoil.[3] An agreement between a pleader and his client that the former should be given a share of the property, which was the subject-matter of the suit, has been held contrary to public policy.[4] In an Allahabad case[5] the defendant had raised to the expenses of certain litigation on behalf of a third party words subscriptions from various people on the understanding that the subscribers should share half the decretal amount in case of success. In a suit by one of the subscribers for return of the subscriptions, it was held that the transaction was opposed to public policy as; the terms of the agreement were not consistent with a proper and *bona fide* motive of helping a poor litigant.

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1. *Raghunath* v. *Nil Kanth,* (1893) 20 Cal. 843; *Seshayya* v. *Subbayya,* (1924) 82 IC 411 : 47 MLJ 646 : (1924) MWN 887 : (1924) Mad. 887; *U.Pe Gyi* v. *Mg. Thein,* (1924) 1 Ran. 565 : 77 IC 372 : (1924) Ran. 48; *Raja Mokham* v. *Raja Rup,* (1893) 15 All. 352; *Lucy Moss* v. *Mah Nyein,* (1933) Ran. 418; *Kesho Das* v. *Thulsi Das,* (1926) Lah. 43 : 89 IC 229; *Soon Thin* v. *Mg. Than Gawe,* (1934) Ran. 346 : 153 IC 405.
2. *Court of Wards Vahali* v. *Andrews,* (1936) 15 Lah. IC 405.
3. *Amrital Lal* v. *Pratap Chandra,* (1931) 130 IC 817 : 52 CLJ 412 : (1931) Cal. 144; *Baldeo* v. *Harbans,* (1911) 33 All. 626; *Indar* v. *Munshi,* (1920) 1 Lah. 124; *Abdul Hakim* v. *Durga,* (1879) 5 Cal. 4; *Tara Chand* v. *Sukla,* (1888) 12 Bom. 559; *Weld & Co.* v. *Sher Ahmed,* (1921) Nag. 135 : 63 IC 356; *Kalimuthu* v. *Maung Tha Din,* (1936) 14 Ran. 892 : (1936) Ran. 491 : 166 IC 273.
4. *Kathu* v. *Viswanath,* (1925) 49 Bom. 619 : 27 Bom. LR 682 : 89 IC 199 : (1925) Bom. 470 **see also.** In the matter of "s" Senior Advocate, AIR 1954 SC 557.
5. *Babu Ram* v. *Ram Charan Lal,* (1934) All. 1023 : 15 IC 969.

Agreements in restraint of parental rights.—Under the law, the father has the sole right to the guardianship and custody of his children. The English law on the subject is clear from the cases *Agar Ellis* v. *Lascelles* [1] and *Humphreys* v. *Polak and Wife* [2]. In India the law is the same. The Privy Council in *Giddu Narayaniah* v. *Mrs. Annie Besant* [3] has pointed out that guardianship is in the nature of a sacred trust and the father cannot, substitute in his lifetime, another person in his place. **[382]** In *V.J. Walter* v. *M.J. Walter,* [4] it was held by the Calcutta High Court that an agreement by a father to give up entirely the custody and control of his child to the mother is opposed to public policy. In *Atma Ram* v. *Banku Mal,* [5] the Lahore High Court observed that an agreement by a father, which virtually abdicated all his right to give his daughter in marriage, was void as opposed to public policy.

Agreements in restraint of marriage.—For this and marriage brokerage agreements, See Section 26. **[383]**

Restraint of Trade. —See Section 27. **[387]**

Terms of Contract that interfere with citizen's Rights.—Where a party has really no option but to accept all the terms of the contract without any bargaining power, the unfair and unreasonable terms sought to be enforced against would be regarded as opposed to public policy. The plaintiff who has been allotted cooking gas agency entered into a contract with petroleum corporation containing a clause to the effect that corporation shall have power to terminate the agency at anytime by giving 30 days notice. When the agency was terminated in pursuance of the clause in question it was held that the plaintiff had no option except to accept the clause as the contract being the source of his livelihood and did not enter into the contract with full open mind. The clause was held to be not binding on the plaintiff. [6]

Where in a contract between the O.N.G.C. and the respondent shipping company relating to manning, running, operating, repairing and maintenance on hire of three vessels of the appellant for a period of three years containing a clause giving a right to the appellant O.N.G.C. to terminate the contract after one year without assigning any reason, the clause in question cannot be set aside on the ground of it being unconscionable and opposed to public policy.[7]

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1. (1878) 10 Ch.D. 71.
2. (1901) 2 KB 385.
3. (1915) 38 Mad. 807 : 12 ALJ 1155 : 16 Bom. LR 625 : 18 CWN 1089 : 24 IC 280 : (1914) PC 41.
4. (1928) 55 Cal. 730 : 111 IC 543 : (1928) Cal. 600.
5. (1930) 11 Lah. 598 : (1930) Lah. 561.
6. *Shyam Gas Company* v. *State,* AIR 1991 All. 129.
7. *O.N.G.C. Ltd.* v. *Stream Line Shipping Co. Pvt. Ltd.,* AIR 2002 Bom 420 (DB) : 2002 (4) Civil LJ 337 : 2002 (3) Cur. CC 386 : 2002 (4) Bom. CR 706 : 2002 (3) All. MR 404.

Restraint of personal freedom.—While the law maintains, the freedom of every individual to make any contract he pleases, it does not tolerate any undue restraint of individual liberty. Thus an agreement by a borrower with his lender by which the former undertook not to incur any obligation of any kind without the consent of the latter and virtually gave up all independence of action was held opposed to public policy.[1] But where a father agreed to discharge the debts of his spendthrift son on condition of the latter not approaching within eighty miles of London, the court upheld the contract as not unduly restricting individual liberty.[2] **[412]**

Where a borrower executes a promissory note and agrees to perform manual service for a specified term, in lieu of interest, the courts, have held such agreements gratuitous and enforceable.[3] And in the analogous case of a promise to perform gratituitous service for a certain number of days in the year in lieu of rent of land occupied, the courts have enforced the contract as reasonable and not opposed to public policy.[4] But, in *Rama Sastriar* v. *Ambalakaran,*[5] where the interest on a bond was to be paid in the shape of work by the executants and his wife, and there was no provision for repayment of the principal, the court held it was a slavery bond, and not enforceable. Similarly, in *Sundara Reddy* v. *Jagannath,*[6] where under a bond by a father and son, the latter undertook to discharge the interest by work, and after the son had done work for one year, a suit was instituted for the principal and interest, Jackson, J. held the bond was unenforceable. So too, in *Ram Sarup* v. *Bansi Mandar*[7] a stipulation for manual service till repayment of a debt was held bad. On the other hand, an agreement by which the defendant was to do work in lieu of interest and in case of default, the plaintiff was at liberty to sue for the principal and interest, was held enforceable.[8]

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1. *Horwood* v. *Milliar Timber and Trading Co.,* (1917) 1 KB 305.
2. *Denny's Trustee* v. *Denny,* (1919) 1 KB 583.
3. *Ponnuswami* v. *Palayathan,* (1919) MWN 534 : 10 LW 202 : 51 IC 252.
4. *Radhu Hari* v. *Narendranath,* (1929) 56 Cal. 862 : 49 CLJ 189 : 115 IC 34 : (1929) Cal. 224.
5. (1929) Mad. 267 : 106 IC. 850.
6. (1927) Mad. 818 : 103 IC 96. *Distinguished in Ananthayya* v. *Subba Rao,* AIR 1960 Mad. 188. (*A* brought up and educated by his brother *B*, before entering service in the Public Works Department : *A* agreeing to pay percentage of income to *B* in future. Agreement held not void).
7. (1915) 42 Cal. 742.
8. *Karuppanna* v. *Pambayan,* (1927) 25 LW 601 : 101 IC 39 : (1927) Mad. 531; *Rambilas* v. *Durga Bijai Prasad,* AIR 1965 Pat. 239; *T.V. Balakrishnan* v. *T.S. Venkatachalam,* AIR 1980 Mad. 99 (Tenant agreeing not to take any legal proceedings against the owner if time is given to vacate the premises is valid); *Abdul Jabbar* v. *Abdul Muthaliff,* AIR 1982 Mad. 12 (Suit not for recovery of money sent through non-official channels from abroad but for declaration that rice mill constructed with the help of it belongs to the plaintiff. Suit is maintainable; *U.P. Electric Supply Co.* v. *Bower,* AIR 1968 All. 95 (Employer cannot get rid of statutory liabilities by contract with workmen); *Sukha* v. *Ninnt,* AIR 1966 Raj. 163 (Agreement to maintain illegitimate child is not unlawful).

Not exhaustive.—The several heads of public policy mentioned above are far from exhaustive. While it is in a general sense true that the courts will not readily invent new heads of public policy.[1] the application of the doctrine to new cases falling within the recognised bounds has resulted in a large mass of case law. Arbitration agreement providing that an award shall be accepted by parties and any objection thereto shall be null and void will not be entertained. Agreement entered by parties to contract themselves out of statutory requirements is itself void and award not made rule of court as required under Section 14 and 17 of the Arbitration Act, 1940 is inoperative.

Agreement, by which Pawner was authorised to sell securities pledged with it in case credit balance of pawnor fell below margin-without notice, is held to be void.[2] Agreements tending to create interests opposed to one's duties have generally been held unenforceable. For example, an agreement by a Patwari to buy lands within his circle has been held to be unenforceable as opposed to public policy, but judicial opinion is not unanimous on the point.[3] Again, a promise to pay money in consideration of giving evidence in the promisor's favour has been held to be void.[4] Likewise, it has been held that a promise to pay money in consideration of bringing about the adoption of the promisor by a third party cannot be made the basis of a suit.[5] And in a rather curious Oudh case, an agreement to associate only with a particular body of people, and abstain from association with another has been held unenforceable, perhaps on the ground of being calculated to impede individual freedom of action.[6] So too, an agreement between two priests allocating to each, a certain number of families for religious services and ministrations. with a clause providing for compensation for transgression by either party,

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1. *Janson* v. *Driefontein Consolidated Mines,* (1902) AC 484; *Shrinivas* v. *Ramachandra,* (1919) 44 Bom. 6; *Gholam Hussain* v. *Altaf Hussain,* (1934) Cal. 328 : 38 CWN 214 : 149 IC 1215 : 61 Cal. 80.
2. *Prabhat Bank* v. *Babu Ram,* AIR 1966 All. 134; *Mani Ram Tiwari* v. *Babu Ram Dixit,* AIR 1978 All. 134, 144 (Contract of tenancy in respect of house governed by U.P. (Temporary) Contral of Rent and Eviction Act. 3/47 not void or illegal on ground of allotment order in view of *Murlidhar Agarwal* v. *State of U.P.,* AIR 1974 SC 1924 : 1975 (1) SCR 575 : (1974) 2 SCC 472 : 1976 RCJ 705; *Shankar Lal* v. *Jagdishwar Rai,* AIR 1980 AP 181 (FB) lease agreement between landlord and tenant though was in contravention of Rent Control Legislation was not hit by Sec. 23.
3. *Abdul Rahman* v. *Ghulam Mahomed,* (1927) 7 Lah. 463 : 98 IC 673; (1926) Lah. 18; *Shyam Lal* v. *Chhaki Lal,* (1900) 22 All. 220; *Sheo Narain* v. *Mata Prasad,* (1905) 27 All. 73 (Not enforceable); **but see** contra, *Bhagwan Dei* v. *Murari Lal,* (1917) 39 51 : 14 ALJ 962 : 36 IC 259 (FB) : compare *Dharwar Bank* v. *Mahomed Hayat,* (1931) 33 Bom. LR 250 : (1931) Bom. 269 (Acquisition of property by Government servant in breach of departmental regulations is not illegal); *Sitarampur Coal Co.* v. *Colley,* (1908) 13 CWN 59 : 1 IC 351.
4. *Adiraja* v. *Vital a Bhatta,* (1914) MWN 322 : 1 LW 300 : 22 IC 540.
5. *Kothandarama* v. *Thesu,* (1914) 27 MLJ 416 : 1 LW 928.
6. *Lal Khan* v. *Kimman Khan,* (1924) Oudh 404 : 80 IC 560 : 27 OC 100.

has been held opposed to public policy.[1] For like reasons of public policy, agreements tending to create monopolies have been held void.[2] However, agreements among bidders not to bid against each other are not necessarily opposed to public policy.[3] Similarly, a contract by Government to open a telegraph office at a certain place on condition of the residents meeting any deficit in expenses of working is not objectionable. Such a contract relates to a matter of amenity calculated to advance the material welfare of the subject, and not to any of its fundamental constitutional obligation.[4]

Where a person has expressly or by implication promised an illegal contract entered into by him as a valid one, such a promise forms collateral to the agreement upon which the other party being innocent of turpitude can claim damages.[5]

After the above discussion one may ask oneself as to how the Courts are to work out remedies on the facts and circumstances placed before them. The answer to this question depends upon a variety of factors, namely, the nature of the transaction, the nature of the law governing the situation the common course of events, the conduct of the parties, the object of the law and mischief that the law sought to remedy. For this purpose, we may note a series of decisions, which will show how the Courts have taken pains to render justice between the parties,[6] and considered the nature and incidents of "badla transaction." The contract was between A and B, that B should enter into 'badla transaction' in goods on behalf of A. As between A and B the contract is not a wagering contract. But, the consequent transactions contemplated,

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1. *Khudiram* v. *Sarada Prasad,* (1938) 42 CWN 1038.
2. *Somu Pillai* v. *Municipal Council, Mayavaram,* (1905) 28 Mad. 520; *Devi Dayal* v. *Narain Singh,* (1927) 100 IC 859; *Kameswar* v. *Yasin,* (1938) 17 Pat. 255 : (1938) Pat. 473; *Amba Prasad* v. *Jugal,* (1936) All. 112 : 159 IC 790; *Dt. Board Jhetum* v. *Hari Chand,* (1934) Lah. 474.
3. *Ram Lal Misra* v. *Rajendranath,* (1933) 8 Luck 233 : 142 IC 595; (1933) Oudh 124; *Gobindo* v. *Shyak Lal,* (1905) 1 CLJ 85; **see also** *Rungiah Goundan* v. *Hajee,* (1911) 10 IC 627; *Mahadeo* v. *Kewalram,* (1918) 44 IC 223; *Nand* v. *Bhagat,* (1931) Lah. 869 : 134 IC 101.
4. *Kishori* v. *Secy of State,* ILR (1938) Cal. 463 : 176 IC 990 : 42 CWN 116 : 66 CLJ 592, (1938) Cal. 151; *Glasbrook Brothers* v. *Glamorgan Country Council,* (1925) AC 270; **see also** *Glamorgan Coal Co.* v. *Glamorgan County Council,* (1916) 2 KB 206. **See** *Lachoo Mal* v. *Radhey Shyam,* AIR 1971 SC 2213 : 1971 (3) SCR 693 : (1971) 1 SCC 619 : 1971 UJ 343, (A landlord can waive the exemption granted to him under Rent Control Act on the maxim *Cuilibet Licet Renuntiare Juri Prose Introduce* - Any one may waive or renounce the benefit of a Principle or rule of law that exists only for his protection); *Naminath Appayya* v. *Jamboo Rao Satappa,* AIR 1966 Mys. 154 affirmed in AIR 1968 SC 1358; **see also** *Binder* v. *Alachouzos,* (1972) 2 QB 151.
5. *Rajat Kumar Rath* v. *Govt. of India,* AIR 2000 Orissa 32, 35 : 1999 (2) Orissa LR 562.
6. *Firm of Pratapchand Nopaji* v. *Firm of Kotrike Venkata Setty & Sons,* AIR 1975 SC 1223 : 1975 (3) SCR 1 : (1975) 2 SCC 208.

which were stated to be collateral agreements, were held to be illegal as being prohibited by law. The Supreme Court at page 1228 pointed:

> "If an agreement is merely collateral to another or constitutes an aid facilitating the carrying out of the object of the other agreement which though void is not in itself prohibited within the meaning of Section 23 of the Contract Act, it may be enforced as a collateral agreement. If on the other hand, it is part of a mechanism meant to defeat what the law has actually prohibited, the Courts will not countenance a claim based upon the agreement because it will be tainted with an illegality of the object sought to be achieved which is hit by Section 23 of the Contract Act. It, is well established that the object of an agreement cannot be said to be forbidden or unlawful merely because the agreement results in what is known as a 'void contract'. A void agreement, when coupled with other facts, may become part of a transaction which creates legal rights, but this is not so if the object is prohibited or *mala in se*". The Supreme Court laid down that where both parties do not show that there was any conspiracy to defraud a third person, or to commit any illegal act the maxim *in pari delicto* etc. can hardly be made applicable.

The significance of the maxim *"in pari delicto potior est conditio possidentis"* is that whenever any money has been paid or property is handed over by the plaintiff in pursuance of an illegal or immoral contract, the court is incapable of rendering any assistance to such illegal transaction in any manner.[1]

The Supreme Court laid down the guidelines as to the circumstances under which relief could be granted in the following manner:

> "The correct position in law, in our opinion is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston (on Contracts), and the plaintiff is not required to rest his case upon that illegality; then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by mis-stating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or

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1. *Ramkrishna Ganpatrao Jogdand* v. *Kondiram Jaysingrao Naikwada*, AIR 2002 Bom. 148 : 2001 (3) All. MR 441 : 2001 (3) Bom. CR 242 : 2001 (4) Mah. LJ 85.

> proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved; then unless it be of such a gross nature as to outrage the conscience of the court the plea of the defendant should not prevail."

In *Surasaibalini Debi* v. *Phanindra Mohan,*[1] one P intended to carry on certain business. As he was an employee of Court of Wards and in view of service rules prohibiting to carry on any business or trade, he entered into an agreement with 'G' and held out G as owner of the business. P submitted income tax returns in the name of G in respect of profits of business and dealt with authorities as a manager of the business and not as the owner. P after some time left the place of business temporarily on medical advice. P while leaving entrusted the management of business with all its effects to G upon an understanding that after his return G would hand over the possession back to him. When P on his return demanded for possession G refused. P filed a suit for declaration of title and delivery of possession of the business. It was contended on behalf of G that the arrangement for holding out G as the owner was made with the intention of evading tax liability and thereby to circumvent the provisions of Income Tax Act and consequently the agreement under which the business carried on was invalid and P is not entitled for possession of business relying on his own unlawful conduct. It was held that P cannot be non suited as benami arrangement is not tainted with any illegality and the principle of 'pari delicto' does not apply.

The Supreme Court of India also explained the principle of *'in pari delicto'*

> "It was not the object of the parties at the time when the transaction which is called in the High Court benami was entered into to circumvent or to defeat the provisions of the Income-Tax Act by taking advantage of the fact that the business stood in the name of Gupta. It is true that the plaintiff obtained benefit of a lower rate of tax for the business income and his personal income escaped taxation. But it cannot on that account be held that the transaction on which he founded his claim was unlawful. In claiming a decree for possession from the defendant the plaintiff did not plead any invalidity of the transaction under which possession of the business was entrusted to Gupta. He merely pleaded his title to the business, entrustment thereof to Gupta and refusal on the part of the latter to deliver possession when demanded. On the findings recorded by the Trial Court as well as by the High Court the plaintiff's title is proved entrustment of the business when the plaintiff left Calcutta in 1948 is also

1. AIR 1965 SC 1364, 1368 : 1965 (1) SCR 861.

established by the evidence and Gupta has admittedly refused to deliver possession when demanded. The plaintiff as the owner of the business was in the circumstances not prevented from enforcing that title against Gupta, there being no taint attaching to the entrustment."

It is true that if the plaintiff seeks the assistance of the court to effectuate an unlawful transaction, the court will refuse to assist him. Where, however, the plaintiff is seeking to enforce his title to the property and it is not an integral part of his pleading which he must prove to entitle him to relief that there was between him and the defendant an unlawful transaction or arrangement which he seeks to enforce, the plaintiff will be entitled to the assistance of the court, even if the initial title of the plaintiff is rooted in an illegal transaction.".

In *Abdul Jabbar* v. *Abdul Muthaliff*,[1] the plaintiff residing in Malaysia remitted monies to defendants in India through unofficial channels in contravention of the Foreign Exchange Regulation Act. The defendants used the monies for buying a site and constructing a rice-mill thereon for the benefit of the plaintiff. Further remittances were made by the plaintiff to discharge the amounts already due towards the construction of the mill. On his return to India he got the licence transferred to his name and was in possession and enjoyment of the rice mill till the defendants entered the mill without plaintiff's knowledge and removed the sale books etc. In a suit by the plaintiff for declaration of his absolute ownership and for injunction to restrain the defendants from interfering with his possession and enjoyment, the court observed that though the remittances were illegal, the construction of the mill by itself did not involve the execution of any unlawful object and the plaintiff who contributed to the construction could always claim the property as his. He did not have to rely on his illegality in order to make out such a claim; he was merely trying to recover his own property and therefore the suit was competent. The maxim *in pari delicto potior est conditio defendantis* had no application.

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1. (1981) 2 MLJ 316 : AIR 1982 Mad. 12; *Anand Prakash* v. *Oswal Trading Agency*, AIR 1976 Del. 24.

VOID AGREEMENTS

24. Agreements void, if considerations and objects unlawful in part.—If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustration

Promises to superintend, on behalf of *B*, a legal manufacture of indigo, and an illegal traffic in other articles. *B* promises to pay to *A* a salary of 10,000 rupees a year. The agreement is void, the object of *A's* promise and the consideration for *B's* promise being in part unlawful.

Consideration or object unlawful.—If the consideration or the object of the contract be unlawful or illegal, the contract cannot be enforced.

There is no presumption that a contract is illegal; on the other hand, the presumption is the other way and it is for the party who alleges its illegal character to prove it before a Court of law [1] **[418]**. But even if the parties do not allege the illegality, if the Court finds on the evidence that the contract is illegal, it is the duty of the Court to refuse to enforce performance. [2] Nor will the courts countenance an agreement to waive an illegality. [3]

Scope.—A Full Bench of the Allahabad High Court has stated that the present section will have no application to completed transfers of immovable property (*i.e.,*) cases where the transaction between the parties has passed out of the domain of a mere contract into one of a conveyance. [4]

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1. *Ramaseshayya* v. *Venkatramayya,* (1930) MWN 584; *Maung Sein* v. *Ghee Pan,* (1925) 3 Ran. 275 : 92 IC. 270 : (1925) Ran. 275; *Narayan* v. *Laxman,* (1925) Nag. 111 : 80 IC 885. **See** *Thunki* v. *Baji Rao,* AIR 1956 Nag. 160.
2. *Narayanamurthi* v. *Ramalingam,* (1933) Mad. 187 : 145 IC 599; *Lakshmi Ayya* v. *Murhari,* (1930) MWN 129 : 31 LW 516 : (1930) Mad. 547; *Vazhmuni* v. *Nathamuni,* (1930) Mad. 361 : 122 IC 342; *Janu Sait* v. *Ramaswami Naidu,* (1923) 18 LW 564 : (1923) MWN 335: 72 IC 735 : (1923) Mad. 626. **See also** *Ismail* v. *Wasudeo,* (1920) 59 IC 285 : 16 NLR 129; *Asa Ram* v. *Ludeshwar,* (1938) Nag. 335; *Surasaibalini Debi* v. *Phanindra Mohan,* AIR 1965 SC 1364.
3. *Dhanukhahri* v. *Nathema,* (1907) 11 CWN 848.
4. *Dip Narain* v. *Nageshwar Prasad,* (1930) 52 All. 338 : (1930) ALJ 45 : 122 IC 872 : (1930) All. 1; **see also** *Gappoo Singh* v. *Har Charan,* (1935) Oudh 501 : 151 IC 267.

In pari delicto.— If the plaintiff has to rely upon a contract, which is illegal, the maxim *in pari delicto potior est conditio defendantis applies*, (i.e.,) in case of equal guilt; the condition of the defendant is better. There is also another maxim expressing this (*viz.*) *Ex turpi causa non oritur actio.* Out of turpitude, no cause of action arises. It is not as if the Court is partial to either of the parties; but the Court is neutral and in the result, the defendant gets the advantage of this neutrality. As observed in *Raghavalu* v. *Adinarayana,*[1] "the rule of law which allows a defendant to protect himself against an action by plaintiff on a contract made or deed entered into between them by showing the illegal or immoral nature of the transaction is based on grounds of public policy and the benefit that accrues thereby to the defendant is the inevitable result of the application of such a rule and is not based on any right to which he is entitled." **[422]** Monies promised under an illegal agreement cannot be recovered. Monies paid cannot be got back.[2]

The Calcutta High Court,[3] has, after an examination of the authorities, reaffirmed that where an agreement is illegal or immoral, the money due under it cannot be recovered by a mere change in the form of action based on another agreement naturally connected with, or which has for its support, the original agreement and that it is immaterial whether the illegal agreement has to be relied upon by the plaintiff or is pleaded by the defendant.

Limitations and Exceptions.—The principle of *in pari delicto* has two limitations, in that, in cases where a person need not necessarily allege the illegality, he is not prevented from recovering.[4] If a landlord who lets a house to a prostitute sues in ejectment, he need not allege the illegal contract but can recover possession on the strength of his title. Again, where the plaintiff and the defendant have not been equally guilty, (*i.e.*) the one is an oppressor and the other is the oppressed, for example, in cases where a creditor bargains for a secret payment from the debtor in a composition, the principle does not come into operation.[5] This principle is also subject to the three exceptions. First, where the illegality is one created for the benefit of a class as in the case of moneylenders' transactions, the borrower can obtain relief.[6] Secondly, it is

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1. (1909) 32 Mad. 323.
2. *Saktay* v. *Mahadin,* (1930) 4 Luck. 669 : (1930) Oudh 196. **But see** *U. Sein Po.* v. *Phya,* (1930) 7 Ran. 540 : 120 IC 902 : (1930) Ran. 21; *Mewa Ram* v. *Ram Gopal,* (1926) 48 All. 735 : 24 ALJ 777 : 97 IC 90 : (1926) All. 591; *Gopila* v. *Pandurang,* (1926) Nag. 241 : 92 IC 640 (Company illegal for want of registration : members can sue for return of shares).
3. *Kali Kumari* v. *Mono Mohini,* (1935) Cal. 748 : 160 IC 212; *Rajaram Sha* v. *Kapoor,* AIR 1964 AP 537.
4. *Liladhar* v. *Sunderlal,* (1932) Nag. 32 : 136 IC 875.
5. *Kearley* v. *Thomson,* (1890) 24 QB 742; *Atkinson* v. *Denby,* (1862) 158 ER 749 : 123 RR 835.
6. *Asa Ram* v. *Ludeshwar,* (1938) Nag. 335 : 177 IC 6 (FB).

open to the parties before the illegal purpose has been carried out, to put an end to the contract and get back the monies paid.[1] But, where part of the illegal contract has been carries out or the illegal purpose has been substantially accomplished the monies paid cannot be recovered.[2] Thus a transferor of property for an illegal purpose cannot get the transfer annulled, if the intended purpose has been carried out.[3] Lastly, this principle does not apply to the relationship of principal, and agent where the one has to account to the other. **[422]**

The second exception above-mentioned deserves some examination, as the right to recover under an agreement void because of unlawful consideration has been the subject of some diversity of judicial opinion in India. The discussion has mainly centered on the interpretation of the words *"discovered to be void"* in Section 65.

In *Jijibai* v. *Naoji,*[4] it was said that the expression 'discovered to be void' applied to all agreements void from their inception, including agreements for an unlawful consideration. This interpretation would virtually abrogate the principle of neutrality underlying the doctrine of *In pari delicto, and* would enable a person who has paid money under an illegal agreement to recover it from the payee even after the illegal purpose has been carried out. Apart from this, it is hardly appropriate to talk of an agreement being *discovered* to be void (unlawful) where a person knows of the illegality from the very start. Perhaps on this ground, it has been held in cases of which *Nathu Khan* v. *Sewak Koeri,*[5] is the type, that Section 65 will not apply where both parties knew of the illegality at the time of the agreement itself. This view would deny to a repenting party to an unlawful agreement, any *locus penitentiae,* for he cannot recover even in cases where the illegal purpose has not been carried out.

But apart from the section, courts in India have applied the principle underlying Sec. 84 of the Trusts Act, and have accordingly held that where a party to an executory agreement for an unlawful consideration repents of the bargain and repudiates the same, he can recover monies paid or property

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1. *Hirjee Devaraj & Co.* v. *Maung Naun Shein,* (1924) 2 Ran. 414 : 84 IC 295 : (1925) Ran. 49.
2. **See** *Ram Das* v. *Balmokund Shah,* (1930) Lah. 1018 : 129 IC 278 (Money given to election agent to bribe voters—Withdrawal of candidature—Money paid recoverable).
3. *Deivanayaga* v. *Muthu Reddi,* (1921) 44 Mad. 329 : 59 IC 1003 : (1921) Mad. 326; *Ivaturi Brahmayya* v. *Kami Setti Mallamma,* (1924) 47 MLJ 652; (1924) MWN 600 : 20 LW 323 : 82 IC 14 : 1924 Mad. 849; *Kedarnath* v. *Prahlad Rai,* AIR 1960 SC 213; *Surasaibalini Debi* v. *Phanindra Mohan,* AIR 1965 SC 1364; *Pratap Chand Nopaji* v. *Kothke Venkatsetty & Sons,* AIR 1975 SC 1223.
4. (1887) 11 Bom. LR 693; **see also** *Gulabchand* v. *Fulbai,* (1909) 33 Bom. 411 : 11 Bom. LR 649 : 3 IC 748; *Ismail* v. *Dattatraya,* (1916) 40 Bom. 638.
5. (1911) 15 CWN 408; *Rudragowda* v. *Gangowda,* (1936) 39 Bom. LR 1124 : 173 IC 553; (1938) Bom. 54 **see,** *Bijay Cotton Mills Ltd.* v. *State of Ajmer,* AIR 1955 SC 33.

transferred,[1] but that if the illegal purpose has been carried out wholly or in a substantial part, he cannot recover.[2]

Benami Transfers.—The maxim, *in pari delicto,* has been often canvassed in connection with transfers of property *benami,* in order to defeat creditors. The leading case on the point is *Petherperumal* v. *Muniandi.*[3] That was a case in which in order to get rid of an equitable mortgage subsisting on the property, it was conveyed to another by a *benami* sale deed. In a suit by the equitable mortgagee it was found that the *benami purchaser* had notice of the equitable mortgage and was bound by it. Subsequently the mortgage was paid off and the vendor sued for the recovery of the property from the *benami* purchaser. The defence was that the object of the *benami* transaction was to perpetrate a fraud that the plaintiff was *particeps criminis* and therefore was disentitled from recovery.

The Privy Council observed:

> "The plaintiff in suing to recover possession of his property is not carrying out an illegal transaction but is seeking to put every one as far as possible in the same position as they were in before the transaction. Further the purpose of the fraud having been not only effected but also absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction. To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must according to the authorities be effected. Then alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he had parted with."

In the interpretation and application of these observations judicial opinion on the Indian High Courts has varied considerably. There are three sets of cases on this matter. One extreme view was that of the Madras High Court in a number of cases of which *Kamaya* v. *Mamayya*[4] and *Subbaraya* v. *Subbaraya*[5] are the types. The view of Coutts Trotter, J., in these cases was that

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1. *Gulabchand* v. *Fulbai,* (1909) 33 Bom. 411; *Ram Chand* v. *Audaito,* (1884) 10 Cal. 1054; *Srinivasa* v. *Sesha,* (1918) 41 Mad. 197; *Jiwana* v. *Malak Chand,* (1919) PR 113. **See also** observations of Varadachariar, J. in *Sesha Ayya* v. *Krishna Ayyar,* (1936) Mad. 225 : 43 LW 77 : 162 IC 68 : 70 MLJ 36 : 59 Mad. 562.
2. *Petherperumal* v. *Muniandi,* (1908) 35 Cal. 551 ; *Muthuraman* v. *Krishna Pillai,* (1906) 20 Mad. 72.
3. (1908) 35 Cal. 551. *Ayyangar J. Explained the principle in Surasaibalini Debi* v. *Phanindra Mohan,* AIR 1965 SC 1364.
4. (1916) 32 MLJ 484.
5. (1926) Mad. 1196 : 24 LW 500 : 98 IC 384; *Parthasarathy* v. *Kandaswami,* (1923) 45 MLJ 161; *Ramaswami* v. *Alamelu Ammal,* (1923) 46 MLJ 298; *Pachal Ammal* v. *Daivanai Ammal,* (1925) 22 LW 313; *Siddlingappa* v. *Hairasa,* (1907) 31 Bom. 405.

in the case of a *benami* conveyance with a view to defraud creditors, irrespective of whether the intended fraud is actually effectuated or not, it will not be open to a guilty party (transferor) to plead his own fraud in answer to a suit for possession based on such conveyance. The test propounded was that party fails who first has to allege the fraud in which he participated. This test was followed in a number of cases except for one dissentient judgment [1] and as late as 1933 a Bench of the Madras High Court in *Kotayya* v. *Mahalakshmamma,*[2] preferred to follow *Kamayya* v. *Mamayya* principally on the ground of *stare decisis.*

But subsequently it was pointed out in some cases that the observation of Coutts-Trotter, J., were inconsistent with the clear pronouncement of the Judicial Committee[3] and it was held that unless the contemplated fraud was effectuated in the sense that actual deprivation of some kind resulted by reason of the transaction, to the party intended to be defrauded, the defendant will not be precluded from pleading the *benami* character of the transfer. The matter has now been decided by a Full Bench in *Venkataramayya* v. *Pullayya* [4] which approved of the above cases and dissenting from the observations of Coutts-Trotter, J., held that in order to prevent a person who has been privy to a fraud from pleading it, the contemplated fraud should have been effectuated and that the mere fraudulent intention evidenced by the transaction was insufficient.

The third set of cases is represented by some of the decisions of the Allahabad, Calcutta and Lahore High Courts. The Lahore High Court has in a Full Bench [5] dissented from *Kamayya's case.* The essence of this view is that even if the contemplated fraud has been effected, it is open to one of the parties to the fraudulent agreement to show that the transaction was the result of fraud and collusion and attack the claim to recover the property made by one of the parties to the fraud. The ground of decision in these cases is that by preventing the defendant from showing the real nature of the transaction the Court will be making itself the instrument of the plaintiff and give effect to an

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1. *Venkataratnan* v. *Venkataswami,* (1929) Mad. 807.
2. (1933) 56 Mad. 646 : 64 MLJ 719 : 37 LW 645 : (1933) MWN 652 : 145 IC 308 : (1933) Mad. 457.
3. **See** *Subbaraya* v. *Venkatesa* (1934) Mad. 252 : 39 LW 357 : 150 IC 381 (Mere fact of creditor being delayed does not preclude fraudulent transferor from showing against transferee, the real character); *Venkatakrishnayya* v. *Venkataratnam,* (1935) Mad. 947 : 42 LW 452 : (1935) MWN 996 : 158 IC 854.
4. (1936) 59 Mad. 998 : 44 LW 294 : 164 IC 588 : (1936) MWN 676 : 71 MLJ 458 : (1936) Mad. 717 : following *Muthuranman* v. *Krishna,* (1906) 29 Mad. 72 (Question will be whether there has been part performance of a substantial character).
5. *Qadir Baksh* v. *Hakam,* (1932) 13 Lah. 713 : 139 IC 17 : (1932) Lah. 503 (FB); *Vilayat Hussain* v. *Md. Misran,* AIR 1962 SC 370 : (1923) 45 All. 396 : 72 IC 92 : (1923) All. 504 : *Raghupathi Chatterjee* v. *Narishinga Hari Das,* (1923) Cal. 90 : 71 IC; *Jadu Nath* v. *Rup Lal,* (1906) 33 Cal. 967.

agreement which is tainted with fraud and which had been brought into existence by the fraudulent act of both the parties and that in such circumstances public policy demands that the truth should be ascertained and if it is found that the parties are *in pari delicto* to the Court shall stay its hands and refuse its support to either confederate "letting the estate lie where it falls."

Severability.—Where the contract can be split into two parts, supported by distinct considerations, one part being legal and the other illegal, the legal part will be enforced. As pointed out in *Mahomed Khalilur Rahman* v. *Mohammad Muzammilullah,*[1] if a contract contains distinct covenants, some of which are legal and others illegal the Court can enforce the legal ones, but if the covenants are not severable, the whole contract is void for illegality. So also if there be one promise made on several considerations, some of which are legal and others illegal. Likewise, if several distinct promises are made for one and the same lawful consideration, and one or more of the promises are illegal, the law will enforce the legal ones. **[419]** When an agreement consists of two distinct promises and one of such promise becomes void, the entire agreement does not become invalid if such void part of the agreement can properly be severed.[2]

The test is whether a distinct lawful consideration can be found for the promise in question. In the above case a debtor incompetent to mortgage the property, (by virtue of Schedule 3, para 11, C.P.C.) had in another part of the deed, admitted receipt of consideration and given a personal undertaking to pay on demand. The Court held the latter covenant distinct and separable, and the therefore enforceable. Similarly, an agreement to pay additional rent for increase in area was enforced though coupled with a promise to pay enhanced rent which is illegal;[3] so too, a bond by a tenant for money borrowed was held enforceable, though there was a term as to taking possession of the holding in case of default which was forbidden by law.[4] Similarly, a promissory note in which one of two signatures was forged was held enforceable.[5] So too, a valid sale of lands was held separable from an invalid surrender of occupancy rights,[6] and a sale of a village share from a surrender of *sir* lands.[7] But, where the contract is not capable of being so split, and it has

1. (1933) ALJ 1522 : 144 IC 373 : (1933) All. 468.
2. *B.O.I. Finance Ltd.* v. *The Custodian,* AIR 1997 SC 1952, 1996 : 1997 (3) Bom. CR 655 : 1997 Bank J. 501 : (1997) 10 SCC 488 : 1997 (5) Supreme 334 : 1997 (2) Bank Cas 172 : 1997 (89) Com. Cas 74 : 1997 (2) Com. LJ 29 (SC).
3. *W.M. Grant* v. *Eckalaw,* (1922) Pat. 171 : 67 IC 49; *Baba Saheb* v. *Rajaram,* (1931) Bom. 264 : 33 Bom. LR 260 : 133 IC 254.
4. *Jarbhandan* v. *Badri Narain,* (1924) 45 All. 621 : 21 ALJ 480 : 83 IC 19 : (1924) All. 80.
5. *Madam Pillai* v. *Athinarayana,* (1925) 21 LW 532 : 87 IC 48 : (1925) Mad. 929.
6. *Bhagwat* v. *Anand Rao,* (1925) Nag. 302 : 86 IC 515 : *Asa Ram* v. *Ludeshwar,* (1938) Nag. 335 : 177 IC 6 (FB).
7. *Dharamchand* v. *Jhamsa,* (1931) Nag. 6 : 130 IC 91.

a single consideration, then if one or more of the objects of such consideration be unlawful then the whole contract becomes void and unenforceable. The case of *Saundathi Yellama Municipality* v. *Shripadbhat* [1] is an illustration in point. There the consideration was single, and the objects two, namely, lease of municipal taxes and tolls, the former being illegal. The Court held the consideration indivisible, and declared the contract void in entirety. Similarly, a promise to pay a pleader Rs. 500 and also convey a portion of the suit property, in case of success; [2] a promissory-note which included an item of gambling loss; [3] a personal covenant in a mortgage contravening the Agra Tenancy Act; [4] a mortgage of non-transferable holding along with other transferable property for a single consideration; [5] a promise to compensate a woman who served both as mistress and housekeeper; [6] a withdrawal of a pending prosecution which was part of the consideration; [7] sale of property, one item of consideration being an indemnity for a bail bond; [8] a partnership agreement by a licensee of electric supply (in contravention of the Electricity Act) containing a covenant to pay; [9] in all these cases; the promises were held indivisible and unenforceable. Where a part of the consideration for a sale transaction was the marriage of a minor whose marriage was prohibited under the Child Marriage Restraint Act, the sale deed was held to be void document. [10]

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1. (1933) 57 Bom. 278 : 143 IC 331 : 35 Bom. LR 163 : (1933) Bom. 132; *Dattatraya* v. *Savlo Sub Rao,* (1932) 34 Bom. LR 404.
2. *Kathu* v. *Viswanath,* (1925) 49 Bom. 619 : 27 Bom. LR 682 : 89 IC 190 : (1925) Bom. 470. **See also** *Harprasad* v. *Sheo Gobind,* (1922) 44 All. 486 : 20 ALJ 318 : 67 IC 793 : (1922) All. 392.
3. *Balgobind* v. *Bhaggu Mal,* (1913) 35 All. 558 : 21 IC 878.
4. *Harprasad* v. *Sheo Gobind,* (1922) 44 all. 486 : 20 ALJ 318 : 67 IC 763 : (1922) All. 134; *Tulsi Ram* v. *Sat Narain,* (1921) 43 All. 81 : (1921) All. 392; *Sheo narain* v. *Raj Kumar,* (1929) 27 LJ 479 : 116 IC 17; *Joseph* v. *Joseph,* (1926) 98 IC 700 : (1926) Ran. 186. **See also** *Dasrath* v. *Mt. Sanilala,* (1926) Oudh 270 : 93 IC 310 (Payment can independent transaction but the essence of a consideration for an illegal mortgage-recovery barred).
5. *Sittal* v. *Rai Ram Khelawan,* (1925) 47 All. 780 : 23 ALJ 521 : (1927) All. 543; **but see** *Dip Narain* v. *Nageshar,* (1930) 52 All. 338 : 28 ALJ 45 : (1980) All. 1 : 122 IC 872 (FB).
6. *Alice Mary Hill* v. *William Clarke,* (1905) 27 All. 266.
7. *Sri Rangachariar* v. *Ramaswami,* (1895) 18 Mad. 189; *Bani Ramachandra* v. *Jayawanti Govind,* (1918) 42 Bom. 339 : 20 Bom. LR 331 : 45 IC 566.
8. *Laxmanlal* v. *Mulshankar,* (1908) 33 Bom. 449.
9. *Ma Kyin* v. *Ong Boon,* (1937) Ran. 47 : 167 IC 707 : **see also** *Firm of Pratapchand Nopaji* v. *Firm of Kotrike Venkata Setty & Sons,* AIR 1975 SC 1223 : 1975 (3) SCR 1 : (1975) 2 SCC 208.
10. *Maheswar Das* v. *Sakhi Dei,* 1977 (2) CWR 823.

25. Agreement without consideration void, unless it is in writing and registered.—An agreement made without consideration is void, unless—

(1) It is expressed in writing and registered under the law for the time being in force for the registration of [documents][1] and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

or is a promise to compensate for something done.

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or unless

or is a promise to pay a debt barred by limitation law.

(3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

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1. This word was substituted for the word "assurances" by Sec. 2 and Sch. II of the Amending Act, 1891 (XII of 1891).

Illustrations

(a) *A* promises, for no consideration, to give to *B* Rs. 1,000. This is a void agreement.

(b) *A*, for natural love and affection, promises to give his son, *B*, Rs. 1,000. A puts his promise to *B* into writing and registers it. This is a contract.

(c) *A* finds *B's* purse and gives it to him. *B* promises to give *A* Rs. 50. This is a contract.

(d) *A* supports *B's* infant son. *B* promises to pay *A's* expenses in so doing. This is a contract.

(e) *A* owes *B* Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay *B* Rs. 500 on account of the debt. This is a contract.

(f) A agrees to sell a horse worth Rs. 1000 for Rs. 10. *A's* consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) *A* agrees to sell a horse worth Rs. 1,000 for Rs. 10. *A* denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not *A's* consent was freely given.

Requirement of Section 25 (3). To invoke Section 25 (3), firstly the promise to pay must refer to a debt of which the creditor might have enforced payment but for the law of limitation, *i.e.*, the consideration for the promise should be an identifiable debt, the recovery of which is barred by limitation; secondly, it is wholly or in part such a debt; thirdly, the promise must be in writing and signed by the person or his duly authorised agent.[1] Mere intention to pay is not sufficient; there must be a promise to pay,[2] the promisor need not be conscious that the debt was barred.[3]

1. *Srinivasa Raghavan* v. *Jayaraman*, (1975) 1 MLJ 414 : 88 MLW 797; Cf *Appayamma* v. *Narasimham*, (1975) 41 Cut. LT 5 of 1975 (1) CWR 292.
2. *Laxminarayan Patro* v. *State of Orissa*, (1975) 41 Cut. LT 180 : (1975) (1) CWR 67, Cf, *State of Orissa* v. *Chandran Singh*, 42 Cut. LT 244.
3. *Rao & Sons* v. *Bijayalaxmi Das*, AIR 1961 Orissa, 301.

Consideration Essential.—According to Section 2, clause (*h*), "an agreement enforceable by law is a contract" and Section 2, clause (*g*), says that "an agreement not enforceable by law is said to be void," and this section provides that an agreement is void unless supported by consideration as seen from Section 2, clause (*d*), is an act or abstinence done or promised by the promisee or any other person. According to Section 25, every agreement, in order to be enforceable by law, must be supported by consideration. A gratuitous promise to subscribe to a charitable object is not enforceable, unless the promisee has been put to some detriment by acting on the faith of the promise,[1] **[133]** an agreement to pay a pleader an additional sum in case of success is not actionable;[2] similarly no suit lies on a promise to pay a debt discharged by operation of law, *viz.*, insolvency.[3] Only three exceptional cases has been allowed in which consideration is dispensed with. A judgment debtor is not bound by his agreement to pay decretal amount before the stipulated date allowing dismissal of an objection as such agreement being not supported by consideration.[4]

Where the plaintiffs were orally permitted by the defendants to carry their timber through the property of the defendants, unless such an oral agreement comes within the exceptions to Sec. 25 of Contract Act, the agreement being without consideration is void.[5]

Exception 1.—The first exception is an agreement is in writing and registered, and is made out of natural love affection by a person standing in new relationship, such an agreement enforceable even without consideration. This is a combination of the two ideas of formal contract and good consideration in English Law. **[131]** Contracts between brothers,[6] or husband

1. *Kedar Nath* v. *Gorie Mahomed*, (1886) 14 Cal. 64; (Cf.) *Abdul Azeez* v. *Masum Ali*, (1914) 36 All. 268 : 12 ALJ 351, 33 IC 600; *Puspabala Ray* v. *L.I.C. of India*, AIR 1978 Cal. 221; *Ranbaxy Laboratories Ltd.* v. *Doon Apartment (P) Ltd.*, (1979) 1 Delhi 84; *Shree Ram* v. *Ratanlal*, AIR 1965 All. 83; *State of M.P.* v. *Firm Gopichand Sarjuprasad*, 1971 MPLJ 898 (Case of failure of consideration).
2. *Ramchandra* v. *Kalu Raju*, (1878) 2 Bom. 362. (Agreement by mother undertaking to pay to her younger son in the event of failure by elder son to pay valid). *U.P. Government* v. *Bhatta*, AIR 1956 All. 439, (Undertaking from servant not to return to duty-not enforceable) in *Bipin Behari* v. *Masrabali*, AIR 1961 Assam 173; *Dasarath* v. *Satyanaraian*, AIR 1963 Cal. 325 (Sale due itself consideration for contract of reconvenience); *Firm Gopal Co. Ltd.* v. *Firm Hazarilal & Co.*, AIR 1963 MP 37 (Mere meral duty to perform is not consideration).
3. *Naoroji* v. *Kazi Sidick*, (1896) 20 Bom. 636; *Sundiendu Mohan* v. *Mshitish* v. *Chunder*, (1933) 39 CWN 63; *P.J. Menon* v. *T. Mathia*, AIR 1956 TC 80 (Hypothecation of property when it has already been sold in court eviction—Held consideration failed on the date of hypothecation).
4. *Kamta Prasad* v. *IInd Addl. Dist. Judge, Mainpuri*, AIR 1997 All. 201, 203 : 1997 All. LJ 858 : 1996 All. CJ 1240 : 1996 (28) All. LR 597.
5. *Thresia* v. *Johny*, 2003 (1) Cur. CC 154 (Ker).
6. *Venkatasamy* v. *Rangaswamy*, (1903) 13 MLJ 428; *Bhiwa* v. *Shivaram*, (1899) 1 Bom. LR 495; *Vijay Ramra* v. *Vijaya Anand*, AIR 1952 All. 563 (Case of near relation).

and wife,[1] between a Mohammedan and his parents-in-law [2] if they proceed out of natural love and affection, have been held to be enforceable. But, where the document recites that the agreement has been entered into because of quarrels existing between the parties, it has been held that this clause will not be applicable.[3] In cases of gifts of immoveable property, which are governed by the Transfer of Property Act, the two requisites of nearness of relationship and natural love and affection are not necessary. A family settlement executed by the defendant agreeing to pay maintenance to his wife living separately cannot be rendered unenforceable on the ground of want of consideration.[4]

A Benami transaction in which no consideration moved must be held to be void unless the transactions come within any of the exceptions to Sec. 25 of Contract Act.[5]

Exception 2.—In English Law, past consideration is no consideration, but where the past consideration proceeds at the request of the promisor, it has been held that the subsequent promise couples itself with the request before and makes the promise enforceable. Similarly, where a person voluntarily does that which the defendant was legally compellable to do and the defendant subsequently makes a promise, it has been held that the subsequent promise would be enforceable. But these are not really exceptions. They are treated at the present day as implied contracts. **[148]**

Now, under the Indian Contract Act past consideration is good consideration. Nevertheless the two exceptions to past consideration found in English law are incorporated in Section 25, clause (2). This is really supererogatory as the word "consideration" itself in the interpretation clause has been defined as an act or abstinence already done or just done or promised

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1. *Poonoo Bibi* v. *Fyez Buksh,* (1874) 15 Bom. LR (Appn.) 5, contra *Mt. J.* v. *Mr. G.* (1926) Nag. 501 : 98 IC 217.
2. *Nisar* v. *Rahmat,* (1927) Oudh 146 : 100 IC 350; *W.T. Commr.* v. *Vijayaba Dowger Maharani Saheb,* AIR 1979 SC 982 : (1979) 2 SCC 213 : 1979 SCC 1 Tax 97 : 1979 (2) ITJ 238 : 117 ITR 784 : 1979 (1) Taxman 373 : 1979 (2) SCJ 325-1979 (3) TLR 76 : 1979 UP. TC 1101.
3. *Rajlukhy* v. *Boothnath,* (1900) 4 CWN 488; **but see** *Gurdit Singh* v. *Babu,* AIR 1953 Punjab, 282 (Restrictions against alienations in compromise held, not contrary to principles of equity or any provision of law); *Lalit Mohan Dutta* v. *Basudeb Dutta,* 80 CWN 774 (An agreement between father and sons to pay money if father does not require registration).
4. *Manali Singhal* v. *Ravi Singhal,* AIR 1999 Del. 156, 160 : 1999 (3) Civ. LJ 401 : 1999 (1) Cur. CC 356 : 1999 (77) DLT 693 : 1999 (1) DMC 355 : 1999 (1) Hindu. LR 648.
5. *Keshab Chandra Nayak* v. *Laxmidhar Nayak,* AIR 1993 Orissa 1, 8 : 1992 (1) Civ.LJ. 292 : 1992 (1) Bank.LJ. 325.

to do done by the promisee or any other person. Two conditions are necessary: (i) The act must have been [1] done voluntarily [2] unto the promisor;[3] (ii) The promisor must be a person competent to contract at the time when the service was rendered.[4] Therefore, the section will not apply to a contract by which a person ratifies on majority, a contract made during infancy.[5] It need hardly be added that the promisor must have been in existence when the act was done so that no company promoter can ordinarily sue for work done before the incorporation of the company.[6] The words of Section 25, clause (2) are wider than necessary and might give room to the argument that a service rendered in the past, though gratuitously, or otherwise than at the promisor's request, will support a subsequent promise.[7]

In *Commissioner of Income Tax* v. *Kameshwar Singh,*[8] the assessee Maharaja of Dharbanga purchased Government Securities as a result of correspondence between him and the 'Vicereine' of India. The assessee had agreed that he would purchase 13 lacks worth of securities and that the interest therefrom would be paid to the Viceroy's War Purpose Fund for the duration of the War. The question was whether the amount of interest paid by the assessee to the amount of interest paid by the assessee to the Fund was taxable in his hand under the Income Tax Act.

> "In computing the total income of an assessee—(c) all income arising to any person by virtue of a settlement or disposition whether revocable or not .....shall be deemed to be

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1. *Basanta Kumar* v. *Madan Mohan,* (1918) 23 CWN 639 : 46 IC 282. (Possible future-service will not be consideration under this clause), **see** *Madho Singh* v. *Jagamba Lal,* AIR 1960 Raj. 237.
2. *Kalipada* v. *Durgadas,* (1923) 27 CWN 769 : 73 IC 10 : (1923) Cal. 677; *Bithal Das* v. *Shankar Dat,* (1894) 17 All. 264; *T.V. Krishna Iyer* v. *Off. Liquidator,* AIR 1952 TC 99 (The payment of bonus will not come under sub-section (2) as the employees have rendered service in return for wages payable to them and into voluntarily); *Dr. Gopal* v. *Trimbak,* AIR 1953 Nag. 195 (Manager of family to make donations not enforceable).
3. *Durga Prasad* v. *Baldeo,* (1880) 3 All. 221; *Kothari Revashankar* v. *Gauriben Jayashankar,* AIR 1954 Sau. 8.
4. See *Indran* v. *Anthappa,* (1906) 16 MLJ 422; *Suraja* v. *Sukha,* (1928) 51 All. 164; *Arumugam* v. *Doraisinga,* (1914) 37 Mad. 38; *Bhola Ram* v. *Bhagat,* (1927) 8 LLJ 539 : 99 IC 318 : (1927) Lah. 24; **But see** *Ram Rattan* v. *Basant Rai,* (1921) 2 Lah. 263 : 64 IC 121: (1921) lah. 205.
5. *Nazir Ahmad* v. *Jiwan Das,* (1938) Lah. 159 : 177 IC 388 following *Gobind Ram* v. *Pirandatta,* (1935) Lah. 561 : 158 IC 243 : 16 Lah. 546.
6. *Ahmedabad Jubilee & S & W. Co.* v. *Chhotalal,* (1908) 10 Bom. LR 141; *Dr. S. Lakshmanaswami Mudaliar* v. *LIC,* AIR 1963 SC 1185 (Consideration passed by Insurance Company before it was taken over by LIC, donating two lakhs to a Trust was held to be void).
7. *Sindha* v. *Abraham,* (1896) 20 Bom. 755.
8. AIR 1953 Pat. 231 : 23 ITR 190.

income of the settlor or disponer, and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor.

Provided that for the purposes of this clause it shall not apply to any income arising to any person by virtue of a settlement or disposition which is not revocable for a period exceeding six years or during the lifetime of the person and from which income the settlor or disponer derives no direct or indirect benefit but that the settlor shall be liable to be assessed on the said income as and when the power to revoke arises to him".

The Patna High Court held that since agreement to pay the interest accruing from the securities by the assessee is not legally enforceable on account of want of consideration, the amount of interest agreed to be paid by the assessee was taxable in his hands and proviso to Sec. 16 (1) (c) of Income Tax Act.

Exception 3.—This exception of the English Law, has sometimes been incorrectly described by saying that a precedent moral obligation will support a subsequent promise. But, since recognition of a precedent moral obligation, with practically annihilate the doctrine of consideration, it has been put on the principle of a person renouncing the benefit of a statutory provision made for his or her protection and making a promise out of feelings of honesty or rectitude. **[153]** The formulation of this as an exception in Indian Law is unnecessary because the definition of "Consideration" will cover such a case. The clause enacts that such a promise must be in writing [1] and unless there is a definite promise, it will not come within the clause.[2] So the more striking of a balance more than three years of the date of the last item in an account is of no avail, unless there are words importing a promise to pay.[3]

PROMISE TO PAY.—The Lahore High Court had held, principally on the ground of *stare decisis* that where a balance is struck and over and above that interest is fixed or there is a promise to pay interest, than there is a

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1. *Bhagwan* v. *Munshi,* (1917) 69 P.R.; *Appa Rao* v. *Suryaprakasa Rao,* (1899) 23 Mad. 94; **see also** *Muthayee Achi* v. *Subbaiah,* AIR 1951 Mad. 903 : 64 LW 479 : 1951 (1) MLJ 573; *Maidens Hotel, Delhi* v. *Willmott,* (1935) Lah. 984 (Letter containing promise to pay time-barred debt is an agreement enforceable at law; but the letter is subject to penalty under the Stamp Act); *Ram Prasad* v. *Anandi,* (1938) Nag. 180 : 174 IC 374; *Manoj Kumar* v. *Nabadhir Chandra,* AIR 1978 Cal. 111 (Mortgage is satisfaction of time barred debt).
2. *Baru Mal.* v. *Daulat Ram,* (1936) Lah. 164 : 161 IC 703 (2); *Kesar Singh* v. *Sant Ram,* (1937) Lah. 865 : 169 IC 608 : 18 Lah. 234.
3. *Asirvatha Nadan* v. *Vedamuthu Nadan,* (1925) Mad. 1147 : 86 IC 942 (Oral statement of account under which barred debt is promised to be paid is ineffectual); *Shamlal* v. *Gulabchand,* (1935) Nag. 221 : 159 IC 447 (2); *Ramlal* v. *Karamchand,* (1938) Lah. 155 : 15 IC 446 (Mere implied promise to pay insufficient). **See also** *State of Orissa* v. *Chandan Singh,* (1976) 42 CLT 244.

promise to pay within the meaning of Sec. 25(3).[1] The discussion in *Shadivas* v. *Prabhu,*[2] is instructive. This case arose under the following circumstances :

The suit was to recover an amount of Rs. 300/-. The defendant raised a number of contentions, which need not be mentioned. His main ground was that the debt dated back to the year 1928 and was the debt of his father and that any acknowledgments given by him (defendant) were not sufficient to keep alive the cause of action upto the date of the present suit. It appeared that the origin al debt was incurred in February 1928 and was for an amount of Rs. 142/-. It appeared that there was an acknowledgment about one month later for Rs. 250/- the difference representing interest. On the 6th of March 1931, there was another acknowledgment for Rs. 300/-. On the 1st of March 1934 there was another acknowledgment for Rs. 300/-, Rs.100/- being shown to have been paid and on the 24th of March 1937 there was again an acknowledgment for Rs. 300/- and there were also later acknowledgments, all within three years of each other. The acknowledgment of the 24th of March 1937, however, was made more than three years after the acknowledgment immediately before it.

The Trial Court decided the suit in favour of the plaintiff mainly, it would seem, on the ground that there was no reason why a false claim should be made. On the question of limitation it merely looked at the last acknowledgment of the year 1943 and finding the suit to be within three years of the date of this acknowledgment held the suit to be within time.

In appeal, the learned Senior Subordinate Judge considered what really was the main question in the case, namely whether the acknowledgment of the 24th March, 1937 could be held to be a promise to pay in writing and therefore came within clause (3) of Sec. 25 of the Indian Contract Act; for, if the acknowledgment could not be held to be a promise to pay in writing then the cause of action had ceased to be enforceable for all later acknowledgments were in identical terms with the acknowledgment of the 24th March 1937.

The promise to pay necessary to bring a case within clause 3 of Sec. 25 of the Indian Contract Act must be in writing. Under Sec. 9 of the Contract Act such a promise is an express promise. I should have thought it beyond question that words such as 'promise to pay' or 'I undertake to pay' must appear in the document. It is urged, however, that the Punjab High Court has taken a different view and I am referred to '*Shani Prakash* v. *Harnam.*[3] That was a case where there was not only an acknowledgment of balance but also a statement of future interest payable, although the word 'payable' did not find place in the

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1. *Shanti* v. *Harnan,* ILR (1938) 23 Lah. 193 : (1938) Lah. 234 : 174 IC 277.
2. AIR 1953 Punj. 28.
3. ILR 19 Lah. 193 (FB).

written agreement. It was held by the Full Bench, although I think with considerable reluctance, that in view of previous authority of the Lahore High Court it must be held that this was sufficient to bring the agreement within Sec. 25 (3) of the Contract Act. In a later case—*Shib Ram-Punnun Ram* v. *Faiz* [1] the question came up whether an acknowledgment containing words such as *'baqi rahe lene lekha kar ke'*, *'baqui rahe lene'*,*'baqi rahe dene'*, *'baqi lene'* or *'baqi dene'* amounted to mere acknowledgment chargeable with stamp duty of one anna only under Article 1, Schedule I of the Indian Stamp Act and constituted an agreement or bond chargeable with duty under Articles 5 and 15 respectively of the First Schedule. In the judgment of this later case emphasis was laid upon the necessity of dealing with each case on its own merits. It was held that words such as *'baqi dene'* and the other expressions I have set out amounted to mere acknowledgments. They did not import a promise to pay and therefore did not fall within the category of agreements of bonds.

The whole difficulty in these matters has arisen from the importation into India considered to be required by observations of the Privy Council, particularly in *Molram* v. *Saith Rupchand* [2] of the rules of English law now considered well-established, namely, that an unconditional acknowledgment by a debtor contains an implied promise to pay and further furnishes to the creditor a fresh cause of action. These rules did not spring from any fundamental principle of law but were judge-made to avoid a rigid rule of limitation imposed by the Statute of James I. In India, a signed acknowledgment of liability made in writing before the expiration of the period of limitation is enough to start a fresh period of limitation, and it is enough not only when the acknowledgment is coupled with a refusal to pay. When the debt has become barred by limitation there is Sec. 25 (3) of the Contract Act and there can be no doubt under the section itself that the written promise to pay falling within this furnishes a fresh cause of action. The doctrine that an acknowledgment without written promise made before the expiry of the period of limitation should furnish a fresh cause of action is for India quite unnecessary. In *Maniram's, case* the question was only whether the particular document amounted to an acknowledgment for the purpose of Sec. 19 of the Limitation Act and it is not easy to understand why reference to English principles was made. I have had some experience of the unfortunate results of the importation of the rule of fresh cause of action. In places where the ignorant and illiterate debtor is not protected by legislation which not only enables but requires the Courts to go behind transactions and ascertain their true nature, the debtor having given successive acknowledgments of amounts rising in rapid progression has often found himself ruined by a suit based on the latest acknowledgment without the Court having inquired into the true nature of the transaction. The general

1. ILR 23 Lah. 282.
2. 33 IA 165.

law contained in the Usurious Loans Act is not always enough to afford protection. Conditions in India are by no means the same as in England.

In the present instance, however, the acknowledgments are simple acknowledgments of the form (*'baki rahe'*) and even under the later Full Bench decision of the Lahore High Court would not amount to promises to pay and therefore would not give fresh causes of action to the creditor under Sec. 25 (3) of the Contract Act. I consider therefore that the learned Judge below was right in holding that the cause of action had not survived by reason of lapse of more than three years between the acknowledgment of the year 1934 and that of the year 1937." [1]

This has been followed in *Raianchand Damanmal* v. *Khet Singh.*[1] Equally interesting is the Madras case *Ethirajulu Naidu* v. *Chinni Krishnan Chettiar,*[2] the appellant Ethirajulu Naidu is alleged to have been paid a loan of Rs. 7000/- by the respondent in the year 1959 at an interest of 12% per annum. On demand from the respondent the appellant is alleged to have paid a sum of Rs. 500/- towards interest on 30-5-1964 and demanded an account and account stated was prepared and furnished to him and the same was duly signed by the appellant after verification. It was further alleged that on 30-3-1965, the appellant paid a further sum of Rs. 500/- towards interest and thereafter neglected and failed to pay the balance.

The appellant denied any such borrowing and also specifically denied any repayment towards interest and acknowledgment on the account stated. The appellant's case was that he was supplying snuff boxes prepared by him from tin sheet material received from the respondent, as the respondent was snuff dealer. The blank signature of the appellant was said to have been taken in respondent's note book whenever labour charges were paid to him. The appellant was an illiterate person and only knew to sign for purpose of bank transactions in the course of business.

In an appeal, it was pleaded *inter alia that* the respondent's claim is barred by limitation because on the respondents own showing the loan is alleged to have been advanced, in 1959 and there was no repayment made in writing by the appellant towards the said loan upto 1964 and in the absence of such payment in writing within three years from the date of the loan or an unconditional acknowledgment of the liability in writing within the said period, the loan must have become barred by limitation even as early as 1963. It was further contended by the appellant that even if the alleged account stated were construed as an acknowledgment, the acknowledgment itself having been made after the debt had become barred by limitation would be ineffective to save the respondents claim from the bar of limitation.

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1. AIR 1954 Madhya Bharat, 11.
2. AIR 1975 Mad. 333 : (1975) 1 Mad.LJ. 5 : 88 Mad.LW. 265.

Maharajan J., held that under Sec. 25 (3) of the Indian Contract, a promise to pay a time barred debt would be valid and enforceable provided it is made in writing and signed by the person to be charged therewith or by his agent generally or specially authorised in that behalf, to pay whole or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

Pointing out the distinction between acknowledgment under Sec. 18 of the Limitation Act, 1963 and promise within the meaning of Sec. 25 (3) of the Contract the learned Judge held that while the acknowledgment under Limitation Act in order to be valid must be made before the expiry of the period of limitation, a promise under Sec. 25 (3) of the Contract Act to pay a debt may be made after the debt has become barred by limitation. Both have the effect of creating a fresh starting point of limitation.

The learned Judge held that the document which purports to be an account stated may conceivably amount to an acknowledgment, but it is of no avail to the respondent because it is an acknowledgment of time barred debt. Further, as it contains no express words promising to pay a time barred debt it will not avail the respondent either.

The learned Judge held that since the benami transaction was designed to avoid an aggravation of the income accrued from the property and the business along with the salary received by the respondent from the Courts of Wards, the agreement was to defeat the provisions of the Income Tax Act and therefore hit by Sec. 23 of Contract Act. Also since the benami conveyance was designed to achieve an illegal purpose being achieved the maxim *"in pari delicto potier est conditio possidentis"* applies in the case. But however the learned Judge added that on the basis of Respondent's claim to possession of property is independent of and wholly disassociated from the illegal transaction of the original benami purchase, his claim must succeed.

In order that a document may be made the bar of a suit it should contain an express promise to pay in writing and not merely an implied promise to pay, with an acknowledgment signed. It is settled law that if there is an acknowledgement along with a stipulation to pay interest, which is the integral part, then there is a promise to pay in writing, which satisfies the requirements of Section 25 (3).[1]

A letter written by Railway in which it is stated that a pay order for certain amount had been sent to the plaintiff in full and final settlement of his claims, was held to be not sufficient to satisfy the requirements of Section 25 (3).[2] A promissory note executed in renewal of a prior promissory note, barred

1. *Chasan Lal* v. *Manji,* (1962) 12 Raj. 839.
2. *Sriram Arjundas* v. *G.G. in Council,* AIR 1952 Cal. 443.

on the date of the renewed note, will be plainly within this clause.[1] To support such a contract, the liability must be that of the promisor, enforceable against him but for the Statute of Limitation. So a promise to pay the barred debt of others will not come within the exception.[2] However if a person who is in possession of the property is liable to be proceeded against in an action that would be sufficient to put him under an obligation to pay the debt for purpose of Sec. 25 (3). The obligation need not be personal but an obligation in the sense of action being maintainable against the person in respect of the property in his hands. The words "a person charged therewith", in 25 (3), need not refer only to a person who was initially or originally liable but may refer to third parties who have undertaken the liability, though not personally by reason of owning the properties.[3] The maker's knowledge or want of knowledge that the claim is barred does not affect his liability.[4]

Where the claim for payment towards the supply of certain items to the Executive Engineer in response to the order placed with him is said to have

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1. *Mumtazuddin* v. *Nazar Mahomed,* (1936) 63 Cal. 759 : 40 CWN 474; *Bansidhar* v. *Banerjee,* (1936) 40 CWN; *MST Bhoori* v. *Gulab Singh,* AIR 1958 Raj. 10; *Ram Mangal* v. *Achhaibar Prasad,* AIR 1954 Pat. 575 (*Parasnath* v. *Bindeshrai,* AIR 1954 All. 33 ref. to the case in *Chandrakumar* v. *Ramdin Dwan Poddar,* held to be not correctly decided).
2. *Nazir Ahmad* v. *Jiwan Das,* (1938) Lah. 159; *Abani Bilas* v. *Kanti Chandra,* (1934) Cal. 178 : 38 CWN 253 : 148 IC 1035; *Pestonji* v. *Meherbai,* (1928) 30 Bom. LR 1407 : (1928) Bom. 539 : 112 IC. 740; *Asa Ram* v. *Karan Singh,* (1929) 51 All. 913 : 28 ALJ 901 : 119 IC 109 : (1929) All. 586; *Raja of Ramnad* v. *Subramania Chettiar,* (1928) 52 Mad. 465 : 36 LW 35 : 116 IC 827 : (1928) Mad. 1201 (Son promising to pay father's time barred debt Section 25 (3) has no application); *Chunnilal* v. *Chakkilal,* (1937) Nag. 327 : 172 IC 493. **But see** *Champaklal* v. *Rayachand,* (1932) 34 Bom. LR 1005 : (1932) Bom. 522; *Kundan Lal* v. *Raghu Nandan,* (1936) 38 PLR 85 : 170 IC 424: (1937) Lah. 484; *Tulabai* v. *Narayani,* AIR 1972 Bom. 72; *Govindan Nair* v. *Achutan Niar,* AIR 1940 Mad. 678. Dist. from *Nagarmal* v. *Bajrangilal,* AIR 1950 PC 15. (A manager of a HUF joint family as such is not competent to bind the other members of the family by a promise to pay a debt already time barred); **see** *Singana Thevan* v. *Ayyasami Thevan,* AIR 1953 Mad. 706 (A master-was held, not competent to alienate the property to discharge a time barred debt of servant to bind the servant. The decision in AIR 1936 Pat. 45 was dissented. This Madras decision requires a consideration in the context of the present state of Hindu law.)
3. *Adiraja* v. *Beeranana,* AIR 1957 Mad. 14; **see** *Lakshmianna* v. *Darausa,* AIR 1951 TC 93 (The case of the defendant was that the suit was barred by time. However it was added that should the court arrive at the conclusion that the suit is maintainable, proper provision should be made for complying by the debtor. It was held to be an acknowledgment of liability). **See** *Shri Rama Metal Works* v. *N.S.I. Corporation,* AIR 1977 Karn. 25 "S" an arranging to pay the amount in promise to pay).
4. *Bangsidhar* v. *Banerjee,* (1936) 40 CWN 130; **But see** *Ramaswami* v. *Kuppuswami,* (1910) 20 MLJ 656. **See** *Muthayee Achi* v. *Sabbiah,* AIR 1951 Mad. 903 (the decision in 20 MLJ 656 is no longer good law Reference to the debt being barred not necessary in *Sri Kapaleswarar Temple* v. *Tirumavakarasu,* AIR 1975 Mad. 164 : 87 MLW (64). (Tenant undertaking to pay arrears of time-barred rent-held plaintiff entitled to recover).

been barred by limitation, writing of letters subsequently by the Executive Engineer stating that financial sanction has yet to be received, amounts to renewal of time barred debt and thereby the limitation period gets extended for another period of three years.[1]

Where a debt is barred by limitation and the same has been acknowledged by the borrower the period of filing the suit is saved and commences from the date of acknowledgment.[2]

Where the defendant acknowledges the execution of time barred pro-notes and partly paid the debt, the promise to pay a debt barred by limitation period is good consideration and binding on the defendant.[3]

This section differs from an acknowledgment under Section 19 of the Limitation Act, which must be made before the expiry of the period of limitation, while a promise under this section may be made at any time.[4] Whether the writing amounts to an acknowledgment or a promise is in each case a question of construction.[5] In any event, there must be an express promise to pay as distinguished from a mere acknowledgment, even though it may imply a promise to pay.[6] In *Rakiyappa* v. *Nataraja,*[7] where on the facts it appeared

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1. *V.N. Enterprise* v. *State of Assam,* 2005 (2) CTLJ 42 (Gau).
2. *Baldev Raj Agarwal* v. *State Bank of India,* 2002 (4) Civil LJ 716 (DB) (Ori).
3. *Adivelu* v. *Narayanachari,* 2005 (30) AIC 300 (Karn) : ILR 2005 Kar 1470.
4. *Mani Ram* v. *Rupchand,* (1906) 38 Cal. 1047; *Mangonlal* v. *Amirchand,* (1928) 52 Bom. 521 : 112 IC 24 : (1928) Bom. 319; *Ramaswami* v. *Kuppuswami,* (1910) 20 MLJ 656 (Promise must be made with the consciousness of the debt being barred); *Davindar Singh* v. *Lacchmi Devi,* (1930) Lah. 985; *Fadililal* v. *Roopchand,* (1928) Nag. 124 : 106 IC 661.
5. *Deoraj Tiwari* v. *Indrasan,* (1929) Pat. 705 : 120 IC 470 : (1929) Pat. 258 (Distinction pointed out); *Prahlad* v. *Bhagwan Das,* (1926) 49 All. 496 : 100 IC 593; *Govind* v. *Sarju,* (1908) 30 All. 268; *Viswa Mittar* v. *Abdul Rahim,* (1929) Lah. 511 : 117 IC 377; *Magan Lal* v. *Amichand,*(1928) 52 Bom.521; *Deo Dutt* v. *Mahraj Lal,* (1929) Oudh 529 : 121 IC 33.
6. *Satyaketu* v. *Romeshchander,* (1933) 60 Cal. 714 : 37 CWN 325 : 146 IC 834 : (1933) Cal. 658; *Sasikanta* v. *Sonaulla,* (1929) 33 CWN 965 : 121 IC 412; (1929) Cal. 444; *Balakrishna* v. *Jayashankar,* (1938) Bom. 460 : 40 Bom. LR 1010 : 178 IC 174; *Girdhari Lal* v. *Bishun Chand,* (1932) 54 All. 506 : (1932) ALJ 279 : 140 IC 783 : (1932) All. 461; *Abdul Rafiq* v. *Bhajan,* (1931) 53 All. 963 : (1932) ALJ 77 : 137 IC 243 : (1932) All. 199; (Cf.) *Mukhi Lal* v. *Gul Mahomed,* (1933) Lah. 209 : 141 IC 617; *Chela Ram* v. *Official Receiver,* (1937) 18 Lah. 562 : (1937) Lah. 382; *Kesar Singh* v. *Sant Ram,* (1937) 18 Lah. 234 : 169 IC 608 : (1937) Lah. 865; *Baru Mal* v. *Daulat Ram,* (1936) Lah. 164; *Punjab Ram* v. *Jowaya,* (1933) Lah. 47 : 141 IC 425; *Devender* v. *Lachmi Devi,* (1930) Lah. 985; *Gopi* v. *Singh Ram,* (1929) Lah. 695 : 11 LLJ 277 (Balance entry containing distinct promise) : and **see** *Ganesh* v. *Mallu Mal,* (1931) All. 375 : 131 IC 867; *Raj Narain* v. *Ram Sarup,* (1930) 28 ALJ 552 : (1930) All. 467 : 123 IC 820; *Allah Baksh* v. *Hamid Khan,* (1931) ALJ 56 : (1931) All. 160 : 130 IC 702; *Kanai Lal* v. *Babu Lal,* (1930) Pat. 604; *Babu Lal* v. *Badri Das,* (1930) Nag. 236.
7. (1932) MWN 52 : 131 IC 62 (1) : (1932) Mad. 219 : **see also** *Bhansarlal* v. *Navalkishan,* AIR 1958 MP 21; *Gulab Chand* v. *Bhima,* AIR 1972 MP 54; **see** *Dasappasetty* v. *Vedavathanamasia,* 1972 Mys. 283 : 1972 (1) Mys. LJ 551: (An application for loan made by defendants to third party, a land mortgage bank for payment, does not amount to a promise to pay); *Sambayya* v. *Shamsher Khan,* AIR 1963 AP 337 (Debtor appearing as a witness and acknowledging debt—Does not fulfil requirement of Sec. 25 (3).

that a debtor had made only an arrangement for payment of the debt by some one else, the Court declined to infer that a fresh contract or promise had made so as to attract the provisions of this section, and held that it was a mere acknowledgment. But in *Ibrahim Mallick* v. *Lalit Mohan* [1] an oral promise for consideration between a decree-holder and debtor, whereby the date of payment under an executable decree was extended beyond the period of limitation for execution of the decree, was held enforceable, though it was neither an acknowledgment within Sec. 19 of the Limitation Act nor a promise within Sec. 25 Cl. (3) of the Contract Act.

Where the debtor wrote, "The account having been checked, the sum of Rs. 6,459 was found due from me. I admit the amount to be due from me" it was held that there was no promise to pay within the meaning of the section.[2] An offer to pay compensation is not a promise of the kind mentioned in this section. [3]

Where in reply to a notice by the landlord demanding arrears of rent including time-barred rent, the tenant stated that rent could be collected in cash or cheque without disclosing the amount of rent. It was held that it did not amount to an agreement to pay a time-barred rent within Section 25(3). [4]

The promise to pay may be contained in a letter. [5] A statement by the promisor in respect of amount due, "I am arranging to pay the amount will be a promise to pay within Section 25(3). [6]

In *Sequira* v. *Noronha,* [7] the Judicial Committee have pointed out that cases of account stated (*i.e.*) an account which contains entries on both sides,

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1. (1923) 50 Cal. 794 : 19 IC 489 (Cf.). *Nath Sah* v. *Durga Sah,* (1935) ALJ 1256 : 58 All. 382 : (1936) All. 160.
2. *Basheshar Nath* v. *Baij Nath,* (1938) Lah. 264 : 178 IC 259 compare *Nihalu Ram* v. *Radhu Ram,* (1934) Lah. 835 ("Dewne kite" is an acknowledgement construed as promise to pay).*Siyamsunder* v. *Parlakinedi Muncipality,* AIR 1964 Orissa 111; *Bindae Dasya* v. *Chota,* 16 Cal. WN 636; *Venkatappayya* v. *Venkatappaya,* AIR 1946 Mad. 72; (Conditional offer rejected by other party-does not amount to a promise within the meaning of Sec. 25 (3) to save limitation).
3. *Union of India* v. *Bikaner Textiles,* AIR 1961 Raj. 211; *Firm Hathisingh* v. *Shah Ratilal,* AIR 1979 Guj. 110 : 20 Guj.LR 484. ("Baki Deva" mean "the balance which is over no promise to pay).
4. *Daulat Ram & Sons* v. *Nath,* AIR 1981 Delhi 354 : (1980) 2 Rent CR 741 : (1981) 19 DLT 77.
5. *Srinivasa Raghavan* v. *Jayaraman,* (1975) 1 MLJ 414 : 88 MLW 797; *Indian Hume Pipe Co. Ltd.* v. *Mysore State Electricity Board,* (1977) 2 Karn. LJ 495.
6. *Shri Ram Metal Work* v. *The National Small Industries Corporation,* (1977) 1 Karn. LJ 173 : AIR 1977 Karn. 24.
7. (1934) AC 332 : (1934) 38 CWN 813 : 59 CLJ 494 : 36 PLR 57 : 151 IC 90 : 11 OWN 997: (1934) MWN 702 : 40 LW 12 : (1934) PC 144 : 67 MLJ 103; *State of Rajasthan* v. *Haridas,* AIR 1982 Raj. 185 (a) (if); *Pattanchand* v. *Khet Singh,* AIR 1949 Nag. 229 (To take an implied promise to pay as a "promise in writing to pay" for the purpose of Sec. 25(3) is to make Sec. 19 of the Limitation Act, 1908 otherwise); *Ram Bahadur Singh* v. *Hanuman Singh,* AIR 1957 Raj. 29 (What is account stated explained), **see** *Chetty on Contracts* (24th Edn.) page 1899; *Ghanabharan* v. *Radha Kishan,* AIR 1958 All. 313.

and in which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid, will not come within the ambit of Sec. 25 (3). What happens in such cases is that the items on the smaller side are set off and deemed to be paid towards the items on the larger side, and there is a promise for good consideration to pay the balance, arising from the fact that the items have been so set off and paid in the way described.

"**Limitation of suits.**"—In *Niaz Ahmed* v. *Parsottam* [1] it was held that the term limitation of suits must be liberally construed so as to include limitation for applications also.

"**Agent authorised in that behalf.**"—A Collector, who is an agent to the Court of Wards,[2] a guardian of a minor,[3] a pleader,[4] these are not agents within the meaning of the section; but an executor is such agent.[5]

"**Debt**".—It means a definite ascertained sum,[6] it is a sum payable in respect of a money demand recoverable by action,[7] it would include a decree debt,[8] it will cover obligation due under contract containing escalation clause in respect of price,[9] but it is not necessary that the promise should refer in terms to the barred debt.[10] The previous loan may be connected by oral evidence with the new instrument.[11]

Explanation 1.—Where a transaction amounts to a gift (*i.e.*) where it is the unilateral act of one person, and not a contract between two persons there is no room for invoking this section at all.[12]

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1 (1931) 42 All. 374 : (1931) ALJ 153 : 129 IC 545; (1931) All. 154.

2. *Suryanarayana* v. *Narendra,* (1895) 19 Mad. 255.

3. *Mankya Bewa* v. *Pushpacharan,* (1928) 115 IC 263 : (1928) Cal. 850.

4. *Bansidar* v. *Bapulal,* (1923) 21 ALJ 713 : 75 IC 309.

5. *Pestonji* v. *Bai Meherbai,* (1928) 30 Bom. LR 1407 : 112 IC 740 : (1928) Bom. 539.

6. *Doraisami* v. *Vaithilinga,* (1917) 40 Mad. 31 (Promise to pay sums found due on taking accounts is not a debt) **see also** *Shoebachan* v. *Madho Saran,* AIR 1952 Pat. 73; *Rama Pattar* v. *Viswanath,* (1922) 45 Mad. 345 : 15 LW 130 : 66 IC 155 : (1922) Mad. 23 : (1922) MWN 27 : 41 MLJ 567 (Liability of joint family member for a debt binding on the family is within this section).

7. *Bharat National Bank* v. *Bishan Lal,* (1932) 13 Lah. 448 : 135 IC 673 : (1932) Lah. 212; following *Sabju* v. *Noordin,* (1899) 22 Mad. 139.

8. *Heera Lal* v. *Dhunput,* (1878) 4 Cal. 500; *Shripatrav* v. *Govind,* (1890) 14 Bom. 390; *Abani Bilas* v. *Kanti Chandra,* (1934) Cal. 178 : 38 CWN 253; *Billings* v. *Uncovenanted Services Bank,* (1880) 3 All 781.

9. *Indian Hume Pipe Co. Ltd.* v. *Mysore State Electricity Board,* (1977) 2 Karn. LJ 495.

10. *Ganapathy* v. *Muniswami,* (1909) 33 Mad. 151; *Smith* v. *Heptonstall,* (1938) Ran. LR 6: 177 IC 63 : (1938) 134 (Per Roberts, CJ). *Abdulla Kin* v. *Maung Ne Dun,* (1929) 7 Ran. 292; *Mathu Sheck* v. *Baikuntanath,* (1908) 18 CLJ 261; *Ramaswami* v. *Kuppuswami,* (1910) 20 MLJ 656 : (1910) MWN 547 (Consciousness of debt being barred is essential); *Bhawani Misser* v. *Peari,* (1913) 18 CLJ 321 : 21 IC 254; *Shandhura Singh* v. *Kehr Singh,* (1936) Lah. 1016.

11. *Mumtazuddin* v. *Nazar Mahomed,* (1936) 63 Cal. 759 : 40 CWN 474.

12. *Gopal Saran* v. *Sita Devi,* (1932) 36 CWN 392 : 34 Bom. LR 470 : 35 LW 250 : 62 MLJ 212: 135 IC 753 : (1932) ALJ 703 : (1932) PC 34.

Explanation 2.—Generally, adequacy of consideration is not enquired into by Courts of Law and parties are free to make any bargain they please.[1] Mere inadequacy of consideration cannot be pleaded and the contract cannot be rendered void on that ground.[2] Where free consent and valid execution established inadequacy of consideration becomes irrelevant.[3] But where the question is whether the consent was free or not, adequacy of consideration is an important piece of evidence to help the Court to come to a conclusion. And a party seeking to set aside transaction on the ground of inadequacy of consideration must show such in adequacy as will involve the conclusion that he either did not understand what he was about or was the victim of some imposition.[4] **[154]**

Mere inadequacy of consideration as provided in Explanation II to Section 25 would not be sufficient to invalidate a contract unless such inadequacy affects the question of free consent to contract in the circumstances like fraud, misrepresentation, or any other such circumstances which may weigh powerfully with the Court of equity.[5]

Where Shares were transferred for Rs. 1/- by the share holder in favour of husband, the contract is void for absence of consideration as there is no *consensus ad idem between* the parties and mere acquiescence of transferor did not amount to consent.[6]

Where the validity of a contract in a transaction of sale of land was challenged on the ground of meagre consideration, mere week state of mind of the seller is not a good ground to set aside the contract when evidence is given to show that the sale proceeds were spent on legal necessity.[7]

26. Agreement in restraint of marriage void.—Every agreement in restraint of the marriage of any person, other than a minor, is void.

Restraint of Marriage.—Agreements in restraint of marriage are bad, as being opposed to public policy. According to law, marriage and the married status being the right of every individual, any agreement, which

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1. *Kedari* v. *Atmaram*, (1866) 3 *B.H. C.A.C.* 11; *Bhimbhat* v. *Yaswant*, (1901) 25 Bom. 126; *Adm. General of Bengal* v. *Juggeswar*, (1878) 3 Cal. 112; *Taluk Board, Koilpatty* v. *Zamindar Sivagiri*, (1937) 1 MLJ 50 : (1936) MWN 569 : 44 LW 353 : 164 IC 697 : (1936) Mad. 709.
2. *Raj Kumar Rawala* v. *Manabendra Banerjee*, 2006 (2) CTLJ 92 (Cal) (SN).
3. *Ram Chandra Singh* v. *Basdeo Singh*, (1982) 8 All. LR 340 : AIR 1982 All. 437.
4. *Devji Shivji* v. *Karsan Das*, AIR 1954 Pat. 280.
5. *Ranganayakamma* v. *K.S. Prakash*, AIR 2005 Kant 426 : 2005 AIHC 4410 (Karn).
6. *John Tinson & Co Pvt. Ltd.* v. *Surjeet Malhan*, AIR 1997 SC 1411, 1412 : 1997 (1) All. WC 652 : 1997 (88) Com Ca 750 : 1997 (1) SCJ 388 : 1997 (1) UJ 487 (SC) : 1997 (1) Cur. CC 435.
7. *Dharam Singh* v. *Sadhu Singh*, AIR 1997 P&H 198, 204 : 1996 (2) Cur. LJ 624.

prevents a person from marrying, is void.[1] A partial restraint is not necessarily bad. In Indian Law, Minors are excepted on the grounds of public policy.

A difficulty arises in the application of the rule, because among some important communities in India polygamy was permitted as in regard to Muslims. In the case of Hindus the Hindu Marriage Act, 1955, insists on monogamy though polygamy was permissible before the Act. Does this restriction apply to a second marriage ? Following the literal reading of the section, it has been held that it applies also to second marriages.[2] It is, however, submitted that a *bona fide* agreement that during the lifetime of the first wife, the husband should not marry a second wife might be enforceable, because there is nothing wrong or opposed to public policy in such an agreement.

A *Kabinnamah* by which a Mahommedan husband authorises his wife to divorce herself, in case of his marrying another is not void under the section.[3] Similarly a defeasance clause in a *wakf* intended to operate in the event of re-marriage of a Mohammedan widow, upon rights given to her under the deed, is neither illegal not immoral.[4] **[383].**

Marriage Brokage Contract—Marriages ought to take place out of love and affection, or at any rate, out of deliberate intention or choice. But, where persons actuated by monetary considerations, try to bring about marriages, such contracts are void, as being opposed to public policy.[5] A contract to procure a wife in marriage for reward is unenforceable.[6] In *Devarayan* v. *Muthuraman*[7] an agreement between two parents to marry their minor children, and on failure, to pay a penalty, was held not enforceable, as the effect of such a contract is to give third parties a pecuniary interest in bringing about the marriage.

As the personal law of the Hindus recognises the Brahma and Asura forms of marriages where monies are usually paid to the bridegroom or his

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1. *Lowe* v. *Pears,* (1768) 18 ER 160; *Re Bathe,* (1925) Ch. 377; *Shahzada* v. *Md. Rasul,* (1934) Pesh. 22 : 148 IC 1051.
2. *U. Ge Zan* v. *Hari Prau,* (1914) 24 IC 777 : 7 LBR 304; *Khalilul* v. *Mariam Bibi,* (1921) 51 IC 804.
3. *Mahram Ali* v. *Ayesa Khatum,* (1915) 19 CWN 1226 : 31 IC 562; *Badu Mia* v. *Badrennessa,* (1919) 29 CLJ 230 : 40 IC 803.
4. *Latafatunnissa* v. *Shaharbano,* (1932) Oudh 108 : 139 IC 292; *Khorshed Maneck* v. *The Official Trustee,* AIR 1948 Bom. 319. (A clause in the will of a Parsee directed that if any legitimate should marry a non-Parsee the interest should lapse. It was held that the request was not void).
5. *Baldea Das* v. *Mohamaya,* (1911) 15 CWN 447 : 9 IC 652 (Disposal of Minor by guardian for pecuniary gain); *Jagdiswar* v. *Sheo Baksh,* (1919) 51 IC 856; *Abbas Khan* v. *Nur Khan,* (1920) 1 Lah. 574 : 58 IC 167.
6. *Vaithyanathan* v. *Gangaraju,* (1893) 17 Mad. 9; *Venkatanarasimha* v. *Govindakrishna,* (1937) MWN 1274; *Bakshi Das* v. *Nadu,* (1905) 1 CLJ 261.
7. (1913) 37 Mad. 393 : 24 MLJ 310 : (1913) MWN 200 : 18 IC 515; **see also** *Ganpat* v. *Lahana,* (1928) 106 IC 803 : 24 NLR 66 : (1928) Nag. 89 : 10 NRJ 258; *Fazal Rahim* v. *Nur Mahomed,* (1935) Pesh 121 : 157 IC 736.

parents, or to the girl or to her parents, in consideration of marriage, questions have arisen whether promises to pay money would be enforceable or whether monies already paid could be recovered back. In *Venkatakrishna* v. *Venkatachalam,*[1] a Full Bench of the Madras High Court has held that though the Asura form of marriage is legal, yet monies promised is respect thereof cannot be recovered, being monies due under a marriage brokage contract. Following this, it has been held that where monies promised to the bridegroom or his parents are paid such monies cannot be recovered even after the marriage takes place. But, where monies are paid or partly paid, but the marriage does not take place, it has been held on the principle of *Hermann* v. *Charlesworth* [2] that the monies could be recovered on the ground that the illegal purpose has not been carried out. Thus, in *Srinivas* v. *Sesha,*[3] where a sum of Rs. 1,100 was promised to be paid to the parent of the bridegroom but the marriage fell through and the suit was to recover the Rs. 400 actually paid, the Court held the money recoverable. [385] Where a father gave his married daughter in marriage to another in consideration of land being transferred, the transfer of land being for immoral purpose is opposed to public policy. It is also settled law that no third person can make money out of marital relationship between the parties.[4]

27. Agreement in restraint of trade void.—Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1—**Saving of agreement not to carry on business of which good-will is sold.**—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business, therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

[5][x x x x]

Restraint of trade.– A contract restraining an individual from carrying on a lawful trade or profession is absolutely void. This was the state

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1. (1908) 32 Mad. 185; *Baldeo* v. *Jumna,* (1899) 23 All. 495; *Dulari* v. *Vallabdas,* (1889) 13 Bom. 126; *Baldeo* v. *Mohamaya,* (1911) 15 CWN 447.
2. (1905) 2 KN 123.
3. (1918) 41 Mad. 197; *Bhan Singh* v. *Kaka,* (1933) Lah. 849 (The contemplated marriage not coming off, plaintiff held entitled to return of money, given). **But see** *Ram Sumram* v. *Gobind,* (1926) 5 Pat. 646 : 99 IC 732 : (1926) Pat. 582 (Dowry paid as consideration for marriage cannot be recovered when the marriage is performed). **See also** *Sonphula* v. *Gansuri,* (1937) Pat. 330 : 169 IC 901; *Sadhu Singh* v. *Jamnadas,* (1937) Sind 211 : 171 IC 1005.
4. *Kamla Bai* v. *Arjan Singh,* AIR 1991 MP 275, 279.
5. Exceptions 2 & 3 repealed by Act IX of 1932.

of law in England in the 16th century. But, in course of time the disadvantages of such a rigid rule were felt, since apprentices were unable to learn business, as no one would teach them, fearing possible rivalry and no tradesman could retire from his business, or sell his business for no one would purchase it. So, the law defeated its own purpose and it was gradually recognized that though a general restraint might be bad, a partial restraint may be good.

But, in the leading case of *Nordenfelt* v. *Maxim Nordenfelt Co.*,[1] it was decided by the House of Lords that the test is not whether the restraint is general or partial, but whether the restraint is reasonable, reasonable in the interests of the person for whose benefit it is made and, reasonable in the interests of the community. In the case of *The Vancouver Malt & Sake Brewing Co.* v. *The Vancouver Breweries* [2] the Judicial Committee have reaffirmed the above well established test as to the legality of contracts in restraint of trade. Their Lordships have further pointed out that in regard to contracts of this kind, a bare covenant not to compete will not be upheld, and that the courts will not support a transaction which in effect is a" purchase of protection against mere competition."

The Division Bench of Bombay High Court referring to the reasonableness of the restraint has observed :

"The legal position that appears to be fairly crystalised in India is that while construing the provisions of Section 27 of the Contract Act, neither the test of reasonableness nor the principle of restraint being partial is applicable unless it falls within the Exception appended to Section 27. The reasonableness of the restraint is not envisaged by Section 27. Under Section 27 of the Contract Act restrictive covenant extending beyond the terms of the contract is void and not enforceable."[3]

An agreement between a professional boxer and Manager-cum-promoter by which the boxer agreeing to participate only in the boxing matches arranged by the promoter and the promoter shall have an option to extend initial period of contract for further period of three years if the boxer achieved championship status, was held to be unreasonable amounting to restraint of trade.[4]

The attempt in all such cases must be to reconcile the two opposing notions of freedom of trade and freedom of contract for it is a paramount

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1. (1894) AC 535. **See also** *Dveyfux* v. *Reynold,* 1957 I WLR 9.
2. (1934) AC 181: (1934) PC 101 : 66 MLJ 510 : (1934) ALJ 457 : 39 LW 618 : 150 IC 232 (PC).
3. *Zaheer Khan v. Percept D'Mark (India) Pvt. Ltd.,* AIR 2004 Bom 362 : 2004 (4) BankCas 181.
4. *Watson* v. *Prager,* 1991 All ER 487.

public policy that the courts are not to lightly interfere with freedom of contract.[1] **[387]**

Employer and Employee.—In *Superintendence Company of India (P) Ltd.* v. *Krishan Murgai*[2] a decision of the Supreme Court, A.P., Sen, J. observed: The courts view with disfavour a restrictive covenant by an employee not to engage in a business similar to or competitive with that of the employer after the termination of his contract of employment. The true rule of construction that when a covenant or agreement is impeached on the ground that it is in restraint of trade the duty of the Court is, first to interpret the document or agreement itself, and to ascertain according to the ordinary rules of construction what is the fair meaning of the parties. If there is an ambiguity it must receive a narrower construction than the wider. The restraint may not be greater than necessary to protect the employer nor unduly harsh and oppressive to the employee. In the case before the Court, clause (10) of the service agreement provided: "That you will not be permitted to join any firm of our competitors or run a business of your own on similar lines, directly or indirectly, for a period of two years, at the place of your last posting after you leave the company." It was held that the word "leave" was intended by the parties to refer only to a case where the employee has voluntarily left the services of the appellant company and where the respondent's services were terminated by the company the restrictive covenant would be inapplicable and therefore not enforceable against the respondent at the instance of the appellant company.[3] In the case of the employer and the employed, a restraint is considered reasonable. If it is for the *bona fide* protection of the trade secrets of employer and for preventing the employee from soliciting or enticing away the trade customers of the employer. But where an employee agreed with the employer not to make use of his knowledge and experience gained by him upon his termination, the employee cannot be restrained from making use of such knowledge or experience for the benefit of other employers since such knowledge or experience forms part of assets.[4] **[394]** Where an employee by an agreement is restrained from disclosing information about secrecy of work after leaving the employment, the restriction is reasonable when the contract is made during the period of employment but however the restriction is unreasonable if the contract is made after the period of employment.[5] Service

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1. *Herbert Morries* v. *Saxely,* (1916) AC 688; *Bansidar* v. *Ajudhia,* (1925) Oudh 120 : 82 IC 333. **See** *Khural Municipality* v. *Firm Kaluram Hiralal,* AIR 1944 Nag. 73 (Bye-laws framed by a municipal committee for regulating to a particular track cannot be challenged as being in restraint of track).
2. 1980 BLJR 417 on appeal from *Krishan Murgai* v. *Superintendence Company of India (P) Ltd.,* AIR 1979 Delhi 232.
3. 1980 BLJR 417 on appeal from *Krishan Murgai* v. *Superintendence Company of India (P) Ltd.,* AIR 1979 Delhi 232.
4. *Sandhya Organic Chemicals (P) Ltd.* v. *United Phosphorous Ltd.,* AIR 1997 Guj. 177
5. *Weiler International Electronics Pvt. Ltd., Pune* v. *Punita Velu Somasundaram,* 2003 (2) Civil LJ 720 (Bom).

agreements under which an employee agrees not to compete with his employer during the term of the service are not void.[1] In *Charlesworth* v. *Mac Donald* [2] the defendant undertook not to practise independently while in plaintiff's service as an assistant and on breach of the undertaking, was restrained by an injunction from practising. Restraint of trade imposed on employee to operate after expiry of contract of service is void.[3] A letter of appointment of a person as advisory of committee restraining the appointee from carrying on the business activities similar to those of as carried on by the plaintiff cannot be rendered unenforceable since the restraint is operative only during the subsistence of the agreement.[4] When an agreement is challenged as being in restraint of trade the onus is upon the party supporting the contract to show that the restraint is reasonably necessary to protect his interests. Once this onus is, discharged, the onus of showing that the restraint is nevertheless injurious to the public is upon the party attacking the contract.[5]

Where the respondent has agreed with his employer that he would not serve any other person after leaving the employment of the petitioner and also would not make use of the confidential information for the benefit of other employer engaged in a similar field of activity, the agreement is void being in restraint of trade particularly when no evidence was offered to show that the respondent has used the confidential information to the adverse effect of the petitioner.[6]

In an English case,[7] it has been decided that where an employee makes an invention or discovery in the course of his employment and in doing that which he was engaged and instructed to do, during the time of his employment and during working hours and using his employer's materials, there is an implied term in his contract of service that such invention or discovery becomes the property of his employers. It has also been held in the said case that such an implied term is not excluded by the fact that the express terms of the contract contain clauses regarding inventions, which are in law unenforceable.

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1. *Gaumont British Picture Corpn.* v. *Alexander,* (1936) 2 AER 1686; *Niranjan Shankar Golikari* v. *Century Spg. & Mfg. Co. Ltd.,* AIR 1967 SC 1098 : 1967 (2) SCR 378 : 1967 (1) LLJ 740 : 1967 (14) FLR 337; *Bakelite Hylam Ltd.* v. *S.J. Hasan,* (1985) 1 Lab. LJ 438 summarises the legal position.
2. (1898) 23 Bom. 103; *Indo Burma Oil Fields* v. *Burma Oil Co.,* (1921) 64 IC 794.
3. *Krishna Murgai* v. *Superintendence Company of India (P) Ltd.,* AIR 1979 Delhi 232; Cf. *Agricultural Supplies (Ipswich) Ltd* .v. *Rushimere,* 1968 Lah. IC 819 (Ch.D).
4. *M/s. Sociedade de Formento Industrial Ltd.* v. *Ravindranath Subraya Kamat,* AIR 1999 Bom. 158, 163 (DB) : 1999 (4) Bom. CR 809 : 1999 (3) Civil Court C 255 : 2000 (1) Mah LJ 148 : 1999 (2) Mah LR 402.
5. *Niranjan Shankar Golikari* v. *Century Spinning and Manufacturing Co. Ltd.,* AIR 1967 SC 1098 : 1967 (2) SCR 378 : 1967 (1) LLJ 740 : 1967 (14) FLR 337.
6. *Sanmar Speciality Chemicals Ltd.* v. *Dr. Biswajit Roy,* AIR 2007 Mad 237.
7. *Triplex Safety Glass Co.* v. *Scorah,* (1938) 1 Ch. 211.

Where an employee entered into a contract of employment containing a restrictive trade covenant to be operative after the termination of employment, and when the employer repudiates the contract by giving one month's notice, the employee is released from the obligation under the contract and the restrictive trade covenant shall not be binding on the employee. [1]

After the expiry of the agreement between the appellant company and the respondent Zaheer Khan a popular cricketer in the Indian Team, the injunction seeking to restrain the respondent cricketer from appointing another media agent to manage his media affairs cannot be granted and no interference of the Court is called for in the matter.[2]

Where there was an agreement between the plaintiff and defendant by which the defendant had agreed not to engage himself in any other business concern dealing with the business of the plaintiff for a period of five years after he seizes to be the employee of the plaintiff, the agreement is prohibited under Sec. 27 being in restraint of trade.[3]

An agreement prohibiting an employee already working on a higher post to claim the benefit of higher post is hit by Sec. 23 being opposed to public policy. [4]

Where the plaintiff company sent the defendant, an employee, to the West Germany to undergo training, meeting all the expenses of his training on the execution of a bond by the defendant that he would serve the employer after his return, the suit claiming liquidated damages of Rs. 30000 by the employer company can be decreed and the agreement cannot said to be executed under compulsion and also cannot be said to amount restraint of trade.[5]

Non-solicitation clause between the parties : Where the petitioner company and the respondent company have entered into contract with the non-solicitation clause agreeing that they will not solicit the employees of each other, the non-solicitation clause applies only to the contracting parties and there can be no bar on the employees of the petitioner company who leaves its employment and joins the respondent company and vice versa.[6]

RADIUS AGREEMENTS.—Where there is no other way of reasonably protecting the employer against possible competition from the

1. *Rock Refrigeration Ltd.* v. *Jones*, 1997 (2) All. ER 1.
2. *Percept D'Mark (India) Pvt. Ltd.* v. *Zaheer Khan*, 2006 (2) CCC 102 (SC).
3. *R. Babu* v. *TTK LIG Ltd.*, 2004 (2) CCC 565 (Mad).
4. *Secretary-Cum-Chief Engineer* v. *Hari Om Sharma*, 1998 (4) Supreme 420 : 1998 (3) JT 654 : 1998 (3) Scale 388 .
5. *Nazir Maricar* v. *Marshall Sons & Co. (India) Ltd., Calcutta*, 2005 (2) CTLJ 32 (Mad) (DB).
6. *Wipro Limited* v. *Beckman Coulter International S.A.*, 2006 (2) CTLJ 57 (Del).

employee, the covenant is drawn up in the form of what is called a radius agreement, prohibiting an employee from setting up business within a given area. [1]

The Indian Law, however, has reproduced the English Law as it obtained in the 16th century, presumably on the ground that India is industrially backward. The general principle then, is that, subject to some exceptions [2] every restraint is bad. Section 27 is exhaustive. Exceptions other than those stated in the statute cannot be engrafted. [3]

In *Nur Ali Dubash* v. *Abdul Ali,* [4] an agreement not to carry on the business of Dubash for a period of three years, and not to perform the services of stevedore to other ships than those mentioned in the agreement was held void under this section. Again, it was held in *Thanga Velu* v. *Mukunda,*[5] that a covenant not to supply coolies in consideration of payment by a rival contractor is void. Similarly a contract to sell particular goods to one person alone during a certain period, where the buyer was under no obligation to buy, was pronounced void in *Shaik Kalu* v. *Ram Saran.*[6] But an agreement on similar lines providing for an obligation on the other side to buy was held binding in *Carlisles Nephews & Co.* v. *Ricknanth.*[7] An agreement by a grower of betel vine to sell the betel leaves grown by him in a particular village only to the plaintiff and none else is not one in restraint of trade within the prohibition in Section 27.[8] In *Abdul Karim* v. *Seikh Dubar,*[9] however, the Oudh Court held that such an agreement fell within the mischief of Sec. 27 on the ground that the section contemplates partial restraint also. But, that decision appears to

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1. **See** *Empire Meat Co.* v. *Patrick,* (1938) 1 AER 606; (Butcher's business Radius of 5 miles held reasonable); *Fitch* v. *Dews,* (1921) 2 AC 158 (Solicitor's business 7 miles no limit of time held reasonable); *Mason* v. *Provident Clothing and Supply Co.,* (1913) AC 7243; *Putsman* v. *Taylor,* (1927) 1 KB 741. **See also** *Karan Chand Thapar & Bro. (P) Ltd.* v. *L.H.H. Jethanan Dani,* 76 CWN 338; *Gopal Paper Mills* v. *Malhotra,* AIR 1962 Cal. 61; *Sunil Chand* v. *Aryodays Spg. & Wvg. Mills,* AIR 1964 Guj. 115 (Difference between English law and Indian law pointed out); *Lalbha D & Co.* v. *Chittranjan,* AIR 1966 Guj. 189 : 1965 (2) LLJ 284, 1965 (11) FLR 299 : 1966 (7) Guj. LR 493; *Solikari* v. *Century S. & Co.,* AIR 1967 SC 1098 : 1967 (2) SCR 378 : 1967 (1) LJ 740 : 69 Bom. LR 55 : 1967 (2) SCJ 317 : 1967 (2) SCA 318; *Superintendence Co. of India* v. *Krishan Murgai,* AIR 1980 SC 1717 : 1980 (3) SCR 1278 : (1981) 2 SCC 246 : 1981 (1) LLJ 121; *Eastham* v. *New Castle United Football Club,* (1964) Ch. 413. Ch. D.
2. *Mackenzie* v. *Sriramiah,* (1889) 13 Mad. 472.
3. *Krishna Murgai* v. *Superintendence Company of India (P) Ltd.,* AIR 1979 Delhi 232.
4. (1892) 19 Cal. 765.
5. (1914) MWN 108 ; 21 IC 768.
6. (1909) 13 CWN 388; *Abdul Karim* v. *Seikh Durbar,* (1937) Oudh 445 : 170 IC 479.
7. (1882) 8 Cal. 809, **see also** *Sadagopa* v. *Mackenzie,* (1891) 15 Mad. 79; *Subba Naidu* v. *Haji Badsha,* (1902) 26 Mad. 168 : 13 MLJ 13.
8. *Jiravenkada Moopanar* v. *Subbiah Moopanar,* (1963) MWN 117 : 79 MLW 676.
9. (1937) Oudh 445 : 170 IC 479.

have overlooked the fact that as there was a legal obligation cast on the buyer to buy, the restraint was reasonable and that therefore the case fell within the principle of the previous case. In *Harbilas* v. *Mahadeo* [1] the defendant agreed to sell a certain quantity of silica sand to the plaintiff and undertook not to sell to four specified factories and to pay damages at a certain rate in case of breach of the undertaking. In a suit for damages on breach, the agreement was construed as one in restraint of trade, even though the actual degree of restriction was not clear from the document. On the other hand a contract for supply on credit of goods for sale in a particular market, containing a stipulation that if the goods were sent by the buyer to any other market a higher rate would be charged, was held not to be in restraint of trade [2] and similarly, an agreement between two owners of adjacent lands as to holding of markets on their lands by turns was held enforceable in *Pothi Ram* v. *Islam Fatima.* [3] It would seem that the cases, which hold that monopolies are opposed to public policy, are based on the theory of trade being free, in the interests of the community. [4]

Where the defendant was appointed as advisory of the plaintiff company carrying on the business activities of mineral ore, marketing of soft drinks and aerated water, the letter of appointment containing a clause that the defendant during such appointment shall not float similar business activities as those of plaintiff's is legally enforceable against the defendant and not void being in restraint of trade. [5]

Where the respondent employee while joining the service of the appellant company has agreed not to get engaged himself directly or indirectly in any business similar to that of the respondent company in the State, of West Bengal Orissa and Bihar except with permission of the company in writing for a period one year after leaving the service the company, the agreement being hit by Sec. 27 is un enforceable. [6]

However, agreements, which restrain an employee's freedom of action after the period of service, are absolutely void and there is no question of reasonableness of restraint as in English Law. **[358]** The cases of *Oakes & Co.* v. *Jackson* [7] and *Brahmaputra Tea Co.* v. *Scarth* [8] (already discussed) are illustrations. In *Cohen* v. *Wilkies,* [9] the Court refused to enforce an agreement

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1. (1931) All. 539 : 130 IC 482.
2. *Prem Sook* v. *Dhurum Chand,* (1891) 17 Cal. 320.
3. (1915) 37 All. 212 : 13 ALJ 281 : 27 IC 871. **But see** *Mohammed* v. *Ona Mohammed,* (1922) 70 IC 881.
4. **See** *Somu Pillai* v. *Municipal Council Mayavaram,* (1905) 28 Mad. 520; followed in *Devi Dayal* v. *Narain,* (1928) Lah. 33 : 100 IC 859.
5. *Sociedade de Fomento India Ltd.* v. *Ravindranath Subraya Kamat,* AIR 1999 Bom. 158, 163.
6. *Indo Flogates Ltd.,* v. *Hemanta Bhattacharya,* 1994 (2) Civil LJ 517 (Ori).
7. (1876) 1 Mad. 134.
8. (1885) 11 Cal. 545.
9. (1912) 16 CWN 534 : 14 IC 215.

not to perform plays any-where than in the plaintiff's theatre, even after the termination of the period of engagement.

Standard form of contracts between employer and employee— In case of employment contract between the employer and employee, there is a tendency on the part of employer to insert those terms, which are favourable to him in a printed or standard form, leaving no real meaningful choice to the employee except to give assent to all such terms. In such a situation the parties cannot said to be in even position possessing equal bargaining power. Where the parties are put on unequal terms the standard form of contract cannot be said to be the subject matter of negotiation between the parties and the same is said to have been dictated by the party whose higher bargaining power enable him to do so.[1] In service contracts the consent of the employee to the clause empowering the employer to terminate the services of the employee with three months notice or in lieu of it three months salary appears to have been obtained by means of undue influence. But in fact they cannot be brought under Sec. 16 (1) of the contract Act but they should be denounced under Sec. 23 being opposed to public policy. Where a Standard form of contract is entered into by the Government or its instrumentality with a private person containing unreasonable, unfair and irrational terms, such terms cannot be binding being opposed to public policy, since the other party who is a weaker party accepting the dotted line contract neither have the power to bargain or to assume to have equal bargaining power.[2]

In the most celebrated case *Central Inland Transport Corporation Ltd.* v. *Brojo Nath,*[3] the Supreme Court held Rule 9 of Service Discipline and Appeals of 1979 framed by the corporation empowering the corporation to terminate the service of permanent employees with three months notice, to be unfair, unreasonable and unconscionable and opposed to public policy.

In *O.P. Bhandari* v. *I.T.D.C.,*[4] the Supreme Court of India however deviating to the extent of lesser degree from its earlier stand vindicated in *Central Inland Water Transport case* making a distinction between managerial cadre employee (described as Gold Collar employees) and other ordinary employees upheld the termination clause in case of highly placed employees if he is considered to be wanting in performance or integrity.

The Supreme Court once again reiterating its stand in *Delhi Transport Corporation* v. *D.T.C. Mazdoor Sangh,*[5] struck down clause 9 of Service Regulations

1. *Unikool Bottlers* v. *Dhillon Cool Drinks, Pepsi Food Ltd.,* AIR 1995 Del. 25.
2. *LIC of India* v. *Consumer Education & Research Centre,* AIR 1995 SC 1811 : (1995) 2 SCC 482 : 1995 (2) UJ 442 : 1995 (84) CC 168 : 1995 (4) JT 366.
3. AIR 1986 SC 1571 : (1986) 3 SCC 156 : 1986 (3) Com.LJ 1.
4. AIR 1987 SC 113.
5. AIR 1991 SC 101 : 1991 Supp. (1) SCC 600 : (1991) 1 LLJ 395.

framed by management of D.T.C. empowering the management to remove any permanent employee from service without assigning any reason, on the ground of being unreasonable and opposed to public policy.

Where a printed condition on the receipt issued by a launderer is one-sided purporting to restrict his liability unreasonably or arbitrarily is opposed to public policy.[1]

Regulation of goods and Services through franchise agreement:— There is a growing trend to regulate distribution of goods and services through franchise agreements providing for grant of franchise by the franchiser on certain terms and conditions to the franchisee. Such agreements often incorporate a condition that the franchisee shall not deal with competing goods. Such condition restricting the right of the franchisee to deal with competing goods is for facilitating the distribution of the goods of the franchiser and it cannot be regarded as in restraint of trade.[2]

The appellant a cable operator having entered into a franchise agreement for a period of five years agreeing to receive satellite signals only from the respondent SCV Units of Sun TV Pvt. Ltd. and not to avail the services from any third party during the currency of the agreement cannot shift his allegiance during the period of agreement with the respondent.[3]

Trade Combinations.– One further question arises namely, whether the section applies to agreements between firms with a view to maintain price levels and prevent underselling. The point directly arose in *Daulat Ram* v. *Dharm Chand*[4] and *Bholanath* v. *Lachmi Narain*[5] and it was held that such a combination was valid, though it may indirectly hurt a rival. **[409]**

In this connection, the observation of Scrutton, L.J., in *English Hop Growers* v. *Dering*[6] *may* be noted. "The Courts will view restraints of trade which are imposed between equal contracting parties for the purpose of avoiding undue competition and carrying on trade without excessive fluctuations and uncertainties with more favour than they will regard contracts between master and servant in unequal positions of bargaining."

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1. *R.S. Deboo* v. *M.V. Hindlekar,* AIR 1995 Bom. 74.
2. *Gujrat Bottling Co. Ltd.* v. *Coca Cola Company,* AIR 1995 SC 2372 : (1995) 5 SCC 545 : 1995 (84) CC 618 : 1995 (2) UJ 698 : 1995 (6) JT 3.
3. *Prasad Mathew, Metro Entertainment Network, Chennai* v. *S.C.V. Unit of Sun T.V. Pvt. Ltd.,* 2004 (1) CTLJ 422 (Mad).
4. (1934) Lah. 110 : 146 IC 1030 (Owners of factories agreeing that only one factory shall be worked and the profits divided).
5. (1931) 53 All. 316 : (1931) ALJ 84. **See also** *Kubernath* v. *Manali,* (1912) 34 All. 587; *Haribai* v. *Sharaf Ali,* (1897) 22 Bom. 861; *Fraser & Co.* v. *Bombay Ice Mfg. Co.,* (1905) 29 Bom. 107.
6. (1928) 2 KB 174 **see** *Chitty on Contracts* 24th Edn. pages 970, 992, 1603 and 1606.

Agreements for knock-out.—An agreement whereby a person undertakes to pay money to another in consideration of the latter not bidding against him at an auction, has been held valid.[1]

"To that extent void,"– These words seem to have been used with a view to Sec. 24. If the agreement is divisible, it may be possible to enforce that portion which does not fall within the mischief of this section. But where it is not divisible it is void in *toto*.[2]

Exception 1.– The exception saves an agreement in restraint of business in case of sale of good-will, subject however to the following conditions:

(1) The seller can be restrained only from carrying on a *similar* business;

(2) The restraint can apply only so long as the buyer is carrying on a similar business, so that if the buyer ceases to carry on the business, it is open to the seller to resume his business;

(3) It can operate only within specified local limits and therefore, cannot be a general restraint; and

(4) The Court must consider the restraint reasonable.

In *Chandra Kanta* v. *Prafulla Mallick*,[3] the Privy Council held in a case of sale of a good will in respect of plying a ferry, that the restraint imposed was reasonable and enforceable. And in a case decided before the passing of the Contract Act, *Auchterlonie* v. *Charles Bill*,[4] it was held that an agreement on the sale of goodwill, not to compete in the business of carriers was not in restraint of trade.

Section 27 is general in terms and unless a particular contract can be distinctly brought within exception (1) there is no escape from the prohibition.[5]

Exception 2 & 3.—As these belonged rather to the law of partnership than to the law of general contracts the Legislature has repealed these two

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1. *Rungiah Goundan* v. *Hajee*, (1911) 10 IC 627; *Nand* v. *Bhagat*, (1931) Lah. 595 : 134 IC 101; (Cf.) *Ram Lal* v. *Rajendranath*, (1933) 8 Luck. 233 : 142 IC 595 : (1933) Oudh 124 (If the object is to deprive rival decree holder of the fruits of his decree, contract is void); *Mahomed Meera* v. *Savvasi Vijaya*, (1900) 23 Mad. 227; *Hari* v. *Naro*, (1894) 18 Bom. 342; *Doorga Singh* v. *Sheo Prasad*, (1889) 16 Cal. 194; *Maung Sein Htin* v. *Ghee Pan*, (1925) 3 Ran. 275 : 92 IC 270 : (1925) Ran. 275.
2. *Parasullah Mallick* v. *Chandra Kant*, (1917) 21 CWN 979 : 39 IC 177.
3. (1922) 48 Cal. 1030 : 48 IA 508 : 24 Bom. LR 602 : 26 CWN 345 : (1922) PC 157 : 65 IC 271 : 41 MLJ 657.
4. (1868) 4 MHCR 77; (Cf.) *Madhub Chunder* v. *Raj Coomar*, (1875) 14 Ben. LR 76.
5. *Hariprasad* v. *Mst. Beni Bai*, 1970 Jab. LJ 189 : 1970 MPLJ 55.

exceptions and has reproduced them in Section 11, Clause 2, Section 36, Clause 2, Sections 54 and 55, Clause 3 of the Partnership Act, Act IX of 1932.

Where the wife whose husband was a partner in a partnership firm carried on the business of providing placement services similar to that of partnership firm, the contention of the respondent partner that clause 22 in the deed of partnership which prohibited the partners from engaging themselves in similar business directly or indirectly through any of its relatives is not binding on his wife on the ground that she was not a party to the contract cannot be sustained.[1]

28. Agreements in restraint of legal proceedings void.—[2][Every agreement,—

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or

(b) Which extinguishes the rights of any party, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.]

Exception 1—**Savings of contract to refer to arbitration dispute that may arise**—This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

[3][x x x x]

Exception 2—**Saving of contract to refer questions that have already arisen.**—Nor shall this section render illegal any

1. *Jitendra Singh Chhabra* v. *Rajeev Taneja*, 2005 (1) CTLJ 46 (Del).
2. Subs. by Act 1 of 1997.
3. The Second Clause of Exception 1 to Sec. 28 repealed by Act 1 of 1877 and the mentioned Act is repealed by Act 47 of 1963.

contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.[1]

Restraint of legal Proceedings—This section prohibits agreements, which have for their object the restraining of an individual from enjoying the fundamental right of resorting to a Court of Law for redress and relief.[2] A filed a suit to recover Rs. 500, lakhs from B. The suit amount included a security deposit of Rs. 1,70,000/- lying with B on account of various contracts entered into between the parties. B contended that A was entitled to receive the security deposit but added a condition that A should execute a no-demand certificate as required by a clause in the agreement between them. A 'contended that the purpose of the condition was to compel A to negotiate with B privately out of Court and thus to restrict him from enforcing his rights by the usual legal proceedings and such a condition was void under this Section. The Court held the clause in the agreement merely laid down the procedure to be gone through in claiming the return of the security deposit; it did not preclude A from seeking remedy in respect of these deposits by having recourse to Court of law.[3]

Where the Executive Committee of East Bengal Club has been authorised under its Rules for taking action against its members challenging the election process of the club by resorting to court of law, the rules are unlawful and opposed to public policy as no citizen can be restrained from approaching the Court when he has a justifiable cause.[4]

A filed a suit for possession of premises against B and for arrears of rent, and the same was decreed. In execution, he obtained an order of attachment of moveables of B. In consideration of B agreeing not to appeal against the decree. A allowed him one month's time to pay the balance decree amount and vacate the premises. B later on challenged the agreement on the ground that it put a restriction on him to take legal proceedings and therefore it was void.

It was held that the undertaking not to appeal against the decree was lawful consideration and the agreement was valid.[5]

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1. Cf. the Arbitration Act, 1940 (10 of 1940) and the Companies Act, 1956 (1 of 1956).
2. *Union of India* v. *M/s. Feroze & Co.*, AIR 1962 J&K 66.
3. *Coringa Oil Co.* v. *Koegler*, (1876) 1 Cal. 466; *Mulji* v. *Ransi*, (1909) 34 Bom. 13; *National Petroleum Co.* v. *Rebello*, (1935) Nag. 48 : 157 IC 315. The view taken in AIR 1935 Nag. 48 is dissented from in *H.K. Dada (India) Ltd.* v. *M.P.S. Mills Ltd.*, AIR 1954 Mad. 845.
4. *Tapash Majumdar* v. *Pranab Dasgupta*, AIR 2006 Cal 55.
5. *Gousmohiddin* v. *Appasaheb*, 1976 Kant. 90.

Similarly a landlord obtained an exparte order against a tenant and in execution, of the decree when the bailiff went to deliver possession to the landlord the tenant made an endorsement in the delivery warrant "I undertake to vacate possession of the premises.....without raising objection to this course and without taking further proceedings in any Court against the order of eviction. I accept the finality of the order".

Later on the tenant filed a revision petition against the order of eviction contending that the undertaking given by him came within the mischief of this section and therefore it was void and he was within his rights in filing the revision petition.

The Madras High Court dealt with the point in a lucid way in the following manner:

"The fact that such an endorsement was made by the petitioner in the Civil Revision Petition is not denied before me. Consequently the only question that arises for consideration is what is the legal consequence of this endorsement made by the revision petitioner. According to the learned Counsel for the respondent in the revision petition, in view of the above endorsement made by him, the revision petitioner had disabled himself from filing the civil revision petition and this Court has to dismiss the civil revision petition. In support of this contention, the learned counsel drew my attention to two decisions, namely, one of the Allahabad High Court in *Ahant Das* v. *Ashburner and Co.*[1] and the other of the Calcutta High Court in *Protab Chunder Dass* v. *Arathoon*[2] and also to a Bench decision of this High Court in *Dr. Thirumal Rao* v. *Ranganatha Mudaliar,*[3] wherein a reference to the decisions of the Allahabad High Court and the Calcutta High Court cited above has been made. The decision of the Allahabad High Court is directly in point. In that case, there was an agreement whereby the judgment-debtor bound himself not to file an appeal if the decree-holder would give the judgment-debtor time to satisfy the decree and it was held that agreement was not hit by the Section 28 of the Contract Act. The Court observed—

> "He forewent his right to question in appeal the decision which had been passed by an ordinary tribunal. Such an agreement is, in our judgment, prohibited neither by the language nor the spirit of the Contract Act and an appellate Court is bound by the rules of justice, equity and good conscience to give effect to it and to refuse to allow the party bound by it to proceed with an appeal".

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1. (1875-77) PLR 1 All. 267 (FB).
2. (1882) ILR 8 Cal. 455.
3. (1949) 1 Mad. LJ 280.

The Bench of this Court in the decision referred to already distinguished the above decision on the facts of the case before the Bench of this Court. In the case dealt with by the Bench of this Court a letter was given by the tenant against whom an order for eviction was passed to the following effect—

> "As you have brought a warrant of possession against me in the above E.P. for the ground floor No. 95, Thyagaraja Road. Thyagarayanagar. I request you time for today and I assure you that I will give complete possession of the said place by tonight."

With reference to this language the Bench observed—

> "*Prima facie* there is nothing in the letter expressly waiving the right of appeal, a right which the petitioner was entitled to under Sec. 12 of the Act. We are unable to hold that there is any implied undertaking not to file an appeal, which can be gathered from the language of the letter. The petitioner was faced with a warrant of possession and the prospect of being turned out of the house unceremoniously by the plaintiff. He therefore requested time till the night to surrender possession. Merely because he prayed for and obtained time to comply with the order of eviction passed by the Rent Controller, it cannot be said that he had elected to treat the order of the Rent Controller as final and/or that he had abandoned his right of appeal"

While referring to the decisions of the Allahabad High Court and the Calcutta High Court mentioned already, namely *Anant Das* v. *Ashburner & Co.*[1] and *Protab Chunder* v. *Arathoon* [2] the Bench observed—

> "The learned advocate for the respondent referred us to cases in *Anantdas* v. *Ashburner & Co.* [3] and *Protab Chunder Dass* v. *Arathoon* [4] in which in consideration of a concession or indulgence from the decree-holder the judgment-debtor agreed not to file an appeal. They can have no bearing whatever on the facts of this case".

The facts of the present case are nearer to the facts of the cases dealt with in the decisions of the Allahabad High Court and the Calcutta High Court referred to already than to the facts in the case dealt with by the Bench of this Court in the decision mentioned above. The endorsement which I have extracted will clearly show that the petitioner in the revision petition had

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1. (1875-77) ILR 1 All. 267 (FB)
2. (1882) ILR 8 Cal. 455.
3. (1875-77) ILR 1 All. 267 (FB).
4. (1882) ILR 8 Cal. 455.

asked for and obtained a reasonable time for vacating the premises and also had stated that he accepted the finality of the order of eviction and that he would not be taking any further proceedings in any Court against the order of eviction. In view of this categorical stipulation to which the revision petitioner bound himself, I am clearly of the opinion that the petitioner in the Civil Revision Petition cannot be permitted to prosecute the revision petition, contrary to the said agreement which, as pointed out by the Allahabad High Court in *Anantdas* v. *Ashburner & Co.*[1] is not opposed to any principle of law".[2]

The distinction noticed by the Madras High Court between *Dr. Thirumal Rao* v. *Ranganatha Mudaliar*[3] and the decisions of the Allahabad and Calcutta High Court is very nice and at once important.

An accused in a criminal case was convicted under Section 379 Cr. PC. He entered into an agreement with the complainant whereby the letter was allowed to retain certain property and to enjoy it during her lifetime and she was not to contest the appeal by the accused. The accused succeeded in the appeal and conviction and sentence were set aside. The agreement was challenged later on as being opposed to law. The Patna High Court held that the agreement was not enforceable.[4]

The Patna High Court preferred the view in *Mujebar Rahman* v. *Muktashed Hossain*[5] and *Dwijendranath* v. *Gopiram Govindaram*.[6]

If a person sets the machinery of the criminal law into action on the allegation that the opponent has committed a non-compoundable offence and by the use of this coercive criminal process he compels the opponent to enter into an agreement, that agreement would be treated as invalid for the reason that its consideration is opposed to public policy. Once the machinery of the criminal law is set into motion on the allegation that a non-compoundable offence has been committed, it is for the criminal court and criminal court alone to deal with that allegation and to decide whether the offence alleged has in fact been committed or not. The decision of this question cannot either directly or indirectly be taken out of the hands of criminal courts or dealt with by private individuals.

Where the parties to a pending criminal case with regard to offences under Sections 420, 465, 468, 477 read with Sec. 107 and 120-B I.P.C. some of which are non-compoundable, entered into an agreement on the date of

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1. (1875-77) ILR 1 All. 267 (FB).
2. *Balakrishnan* v. *Venkatachalam,* (1980) 1 MLJ 175 : 92 LW 749.
3. (1949) 1 MLJ 280.
4. *Matt Jaggilodu* v. *Matta Byramma,* AIR 1941 Patna 349.
5. 16 Cal. WN 854.
6. AIR 1926 Cal. 59.

hearing of the criminal case whereby the parties agreed to refer their dispute to arbitration in consideration of the complainant withdrawing the criminal case and the dispute was actually referred to arbitration on withdrawal of the case, it was held that the arbitration agreement was invalid under Sec. 23 Contract Act as being opposed to public policy." [1]

A clause in an arbitration agreement providing that the award shall be accepted by the parties and any objection thereto shall be null and void and should not be put forth in any Court of law was held to be void as imposing a restriction on the right of the party affected to institute legal proceedings. [2] It may be noticed that the words 'void' and 'illegal' are used indifferently.

Curtailing period of limitation.—Contracts, which curtail the period of limitation, are specially prohibited by this section. Where an agreement seeks to curtail the period of limitation and prescribes a shorter period than what is prescribed by law, such an agreement intending to restrict the party from enforcing his right in Court is hit by Sec. 28. But, however, an agreement not intending to curtail the period for enforcement of right but provides for forfeiture or waiver of right itself if not action is commenced within the period specified under agreement is valid. In other words curtailment of period of limitation is not valid but extinction of the right itself if not exercised within the prescribed period is allowed to be enforced.[3] There may be agreements, which do not limit the time for enforcing any rights but only provide that failure to enforce them within a stipulated time shall operate as a release or forfeiture of such rights. This class of agreements is untouched by the present section. Clauses of this kind are usually found in policies of insurance.

Thus in *Ghose* v. *Reliance Insurance Co.*, [4] a policy contained a clause limiting the liability of the company to claims made within a year of loss or damage. *In Rainey* v. *Burma Insurance Co.*, [5] a policy contained a clause to the effect that rights should cease if not enforced within three months after rejection of claim.

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1. *V. Narasima Raju* v. *Gurumurthy Raju*, AIR 1963 SC 107 : 1963 (3) SCR 687; *Kamini Kumar* v. *Birendra Nath*, AIR 1930 PC 100; *Sudhindra Kumar* v. *Ganesh Chandra*, AIR 1938 Cal. 840; *Bhowanipur Banking Corporation Ltd.* v. *Durgesh Nandini Dassi*, AIR 1941 PC 95.
2. *Rambilas Mehto* v. *Babu Durga Bijai Prasad Singh*, AIR 1965 Patna 239.
3. *National Insurance Co.* v. *Sujir Ganesh Nayak & Co.*, AIR 1997 SC 2049, 2054
4. (1934) 11 Ran. 475 : (1934) Ran. 15; *Dawood Tar Mohd.* v. *Queensland Ins. Co.*, AIR 1949 Cal. 390; *G.G. in Council* v. *Firm Badri Das*, AIR 1951 All. 702; *Dominion of India* v. *Rupchand*, AIR 1953 Nag. 169.
5. (1925) 3 Ran. 383; **see also** *Baroda Spng. & Wvg. Co.* v. *Satyanarayan Marine & Fire Insurance*, (1914) 38 Bom. 344 : 15 Bom. LR 948 : 21 IC 694; *Ruby General Insurance Co. Ltd.* v. *Bharat Bank Ltd.*, AIR 1950 EP 352; *Pearl Insurance Co.* v. *Atma Ram*, AIR 1960 Punjab 236; *Kerala Electrical & Allied Engineering Co.* v. *Canara Bank*, AIR 1980 Kerala 151 : 1980 KLT 170; *New Delhi Municipality* v. *M/s. Tirath Ram*, AIR 1980 Delhi 185; *Vulcan Insurance Co.* v. *Maharaj Singh*, AIR 1976 SC 287 : (1976) 1 SCC 943 : 1976 (2) SCR 62.

In *Girdhari Lal* v. *Eagle Star and British Dominion Insurance Co.*,[1] the clause was to the effect that there would be a forfeiture of all benefits under the policy in case of failure to sue within a specified period after rejection of the claim and in *Haji Shakoor Gany* v. *Hinde & Co.*,[2] a bill of lading contained a clause that all suits for any loss or damage should be brought within a year after the date of delivery. In all these cases, the Courts have consistently held that a clause of this character does not come under Section 28 of the Indian Contract Act and is enforceable. **[373]**

Where the fidelity guarantee bond provides that the liability of the promisor to arise for breach of contract subject to the restriction that the promisee shall have no right under the bond after the expiry of six months from the date of termination of contract, the period of limitation for filing a suit or instituting a legal proceeding could be regarded as commencing from the date when the promisor expressly refuses to perform his promise from the date the conduct of the promisor amounts to refusal to perform.[3]

Extending the Period of limitation.—Cases sometimes occur where parties agree to extend the period of limitation. **[373]** In *Gobardhan* v. *Dau Dayal*,[4] a Full Bench of the Allahabad High Court has held that contracts extending the period of limitation are void under Section 23, as defeating the provisions of the Limitation Act.

Reference to arbitration.—The exceptions are intended to save contracts to refer to arbitration present or future disputes. Thus, an agreement whereby a tramway employee agreed that the certificate of an arbitrator shall be final, as to the company's right to retain his deposit, was upheld in *Aghorenath* v. *Calcutta Tramways*.[5] Similarly, in *Ganges Manufacturing Co.* v. *Indira*,[6] a contract providing that differences should be referred to the arbitration of

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1. (1924) Cal. 186 : 80 IC 637; **see also** *South British and Marine Insurance Co. Ltd.* v. *Brojo Nath*, (1909) 36 Cal. 516. **See** *Punam Chand* v. *General Assurance Society Ltd.*, AIR 1974 Cal. 335, relying on *Wazir Chand Mahajan* v. *Union of India*, AIR 1967 SC 990 : 1967 (1) SCR 303; *National Insurance Co.* v. *Calcutta Dock Labour Board*, AIR 1977 Cal. 492.
2. (1932) 34 Bom. LR 634 : 138 IC 793 : (1932) Bom. 330; **see also** *Haji Shakoor Gany* v. *Volkart Bros.*, (1931) Sind 124 : 133 IC 77; *Prithvi Nath Malla* v. *Union of India*, AIR 1962 J&K 15.
3. *Food Corporation of India* v. *New India Assurance Co. Ltd.*, AIR 1994 SC 1889 : 1994 (1) JT 703 : (1994) 3 SCC 324 : 1994 (1) Scale 591 : 1994 (2) UJ 197 : 1994 (1) CCC 596.
4. (1932) 54 All. 573 (FB) : (1932) ALJ 365 : (1932) All. 273; **see also** *Balle Pragada* v. *Thamanna*, (1917) 40 Mad. 701 : 4 LW 48 : 35 IC 575 (Covenant not to plead limitation bar is not enforceable); *East India Co.* v. *Oditchurn Paul*, (1849) 5 MIA 43, **but see** *Mohd. Ahmed* v. *Panna Lal*, AIR 1954 Raj. 222; *Firm Sarup Chand* v. *Union of India*, AIR 1953 MB 63; *Moti Lal* v. *State*, AIR 1959 Pat. 58; *Oudh Commercial Bank Ltd.* v. *Bind Bansikuer*, AIR 1939 PC 80; *Chhatra Pati* v. *Hari Ram*, AIR 1940 All. 423.
5. (1885) 11 Cal. 232 (Cf., *Kuppusami* v. *Smith & Co.*, (1896) 19 Mad. 178.
6. (1906) 33 Cal. 1169; **see also** *Chaitram* v. *Bridhichand*, (1915) 42 Cal. 1140 : 34 IC 681; *J.B. & Oil Mills* v. *Commrl. Union Assurance Co.*, AIR 1979 Cal. 56.

the Bengal Chamber of Commerce was held enforceable. In *Gainda Lal* v. *Rameshwar Das* [1] an agreement between grain merchants on similar lines for submission of differences to arbitration was upheld. So too in *Secretary of State* v. *Saran Bros.* [2] an agreement with the Secretary of State by which the plaintiff undertook to abide by decision of the Deputy Commissioner in matters relating to the contract was held valid. Where a Foreign Shipping Company appointed an agent in India in connection with its shipping business and the agency agreement provided for referring the disputes to an arbitrator appointed by the Foreign Shipping Company, the enforceability of the arbitration award is not barred on the ground that the award given by the foreign arbitrator who is a high ranking officer is in violation of public policy in India.[3]

The exception, however, applies, however, applies only to that class of contracts in which the parties have agreed that no action shall be brought until some question of amount has been decided by arbitrators.[4]

Where parties to the dispute having appointed arbitrators, participated in arbitration proceeding and suffered the award, the arbitration proceedings cannot be nullified on the plea that the arbitrators are situated in foreign country when the parties have with their eyes open willingly entered into the agreement.[5]

The question whether an agreement to refer to arbitration without an order of Court in a *pending* suit, is excluded by the section, has been answered in the negative in *Chanbasappa* v. *Baslingayya,*[6] by a Full Bench of the Bombay High Court.

Where the contract contained a bar / prohibition as against the arbitration of any claim, the award is to be set aside by the court, but in the absence of any such prohibition/ bar the court has no jurisdiction.[7] Where a clause in the agreement restricted the parties from seeking the right of

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1. (1937) ALJ 823 : (1937) All. 650 : 171 IC 584, relied on in *Himta* v. *Ram Narain,* AIR 1943 Ajmer 43; *Union Construction Co.* v. *Chief Engineer,* AIR 1960 All. 72; *Rai* v. *Union of India,* AIR 1955 J&K 36; *New Zealand Insurance Co.* v. *N.H. Factory,* AIR 1955 Punj. 113.
2. (1932) Oudh 265 : 139 IC 362 following 11 Cal. 232 foot note 2 ante, in *Central Govt. of India* v. *Chhotalal,* AIR 1949 Bom.359; *State of Bihar* v. *Ram Bhushan,* AIR 1964 Pat.326.
3. *Transocean Shipping Agency (P) Ltd.* v. *Black Sea Shipping,* AIR 1998 SC 707, 712 : 1998 (1) Supreme 244.
4. *Coringa Oil Co.* v. *Koegler,* (1876) 1 Cal. 466; *Uttam Chand* v. *Balmokand,* (1929) Sind 55 : 107 IC 435 (No limitation for suit till question of amount is decided).
5. *Atlas Export Industries* v. *Kotak & Co.,* AIR 1999 SC 3286, 3288 (DB) : (1999) 7 SCC 61 : 1999 (7) Supreme 589 : 2000 (1) SCJ 93 : 1999 (9) SRJ 219.
6. (1927) 51 Bom. 908 : 29 Bom. LR 1254 : 105 IC 516 : (1927) Bom. 565 (FB).
7. *Pure Helium India Pvt. Ltd.* v. *Oil and Natural Gas Commission,* AIR 2003 SC 4519 (DB) : (2003) 8 SCC 593 : 2003 (8) Supreme 264 : 2003 (3) Arb. LR 409 : 2003 (3) R.A.J. 484 (SC).

arbitration if it is not claimed within a stipulated period when the contract itself had been arrived at and even the work executed before the amendment to Sec. 28 has been made, such clause in the contract cannot said to be governed by the subsequent amendment to Sec. 28 of the Contract Act.[1]

Where a contract, which was said to be an International Commercial Contract provided Clause 13 for dispute redressal mechanism through arbitration and the contract was to be governed as per English law, the clause in question being in the nature of unilateral covenant deprives the plaintiff from enforcing its rights under the contract through the ordinary tribunals setup by the State or through alternative dispute mechanism, makes the contract void.[2]

"**Contract**".—The use of the word 'contract' in the section shows that it is intended to exclude other cases (*e.g*) decrees.[3]

Affecting jurisdiction of Courts.—Parties cannot by agreement confer jurisdiction on courts to try suits not cognizable under the Civil Procedure Code. An agreement that one of the courts having jurisdiction alone shall try the dispute is not hit by this section.[4] Where two or more competent courts can entertain a suit consequent upon, apart of the cause of action having arisen therewith, if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute which might arise as between themselves, the agreement would be valid and such contract which is clear unambiguous and explicit and not vague is not hit by Sec. 23 and 28 of the Act.[5] Where more than one court have jurisdiction the parties are free to choose any one of the competent court to decide there dispute and once the parties having exercised their choice by mutual agreement, the choice is binding on them and cannot resort to a court of different jurisdiction.[6] The principle that where the several courts have concurrent jurisdiction under the law to try a case the parties are free to submit themselves to one of the courts having jurisdiction does not apply to a case where the parties by an agreement submit

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1. *Continental Construction Ltd.* v. *Food Corp. of India,* AIR 2003 Delhi 32, 35 : 2002 (49) Arbi. LR 192.
2. *Emmsons International Ltd.* v. *M/s. Metal Distributors (UK),* AIR 2005 NOC 280 (Delhi)
3. *Ram Ghulam* v. *Janki Rai,* (1885) 7 All. 124.
4. *Achratlal* v. *Vijiam,* AIR 1925 Mad. 1145 : (1925) 49 MLJ 189 : 22 LW 70; *Ranunag International Ltd.* v. *Minisea Foods,* AIR 1983 NOC 105 (Delhi).
5. *Angile Insulations* v. *M/s Davy Ashmore India Ltd.,* AIR 1995 SC 1766, 1767 : (1995) 4 SCC 153 : 1995 (5) JT 179 : 1995 (3) Scale 203 : 1995 (1) SCJ 540 : (1995) 2 BC 372.
6. *Shri Ram City Union Finance Corpn. Ltd.* v. *Rama Mishra,* AIR 2002 SC 2402 : (2002) 9 SCC 613 : 2002 AIRSCW 2617 : 2002 (94) Cut. LT 409 (SC) : 2001 (1) Orissa LR 164 (SC).

themselves to a court lacking jurisdiction for deciding the dispute as it would be void being opposed to public policy.[1] This view has been accepted by the Supreme Court;[2] If the court has the jurisdiction to adjudicate conferring

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1. *Nailesh H. Doshi* v. *G.P. Pharma,* 2003 AIHC 1913 : 2003 (1) ALD 745 : 2003 (1) LS 81 : 2003 (1) An. WR 175.
2. *Hakam Singh* v. *Gammon (P) Ltd.,* AIR 1971 SC 740 : 1971 UJ (SC) 167; *Union of India* v. *N.B. Bulgare,* AIR 1973 Cal. 526. (A clause in the Bill of Lading that "any dispute arising under this bill of lading to be decided in Bulgaria according to Bulgarian law" held to ouste the jurisdiction of Indian Court; **see also**, *Lasochkina Odessa Ussr* v. *Union of India,* AIR 1976 AP 103 : 1975 APLJ 364; *Lakshminarayana Ramnivas* v. *Triesta,* AIR 1960 Cal. 155; *Societa* v. *Lakshminarayana,* AIR 1959 Cal. 669; *Lakshminarayana* v. *C.G. Esiortazione,* AIR 1960 Cal. 545; *Libro Mining Works* v. *Baldota Bros.,* AIR 1962 AP 452; *Kaliappa Chettiar & Sons* v. *C.L.S. Co.,* AIR 1954 Trav. C 461; *Swedish East Asia Co. Ltd.* v. *H&M (Ind.) Ltd.,* AIR 1962 Cal. 601; *Thakurdas Bhudarsao* v. *Industrial Stores Co.,* 1971 MPLJ 1052; *Bombay Goods Carriers (P) Ltd.* v. *Sha Multhanmul Hastimal & Sons,* (1973) 2 Mys. LJ 370 (The parties cannot even by agreement confer jurisdiction on a Court which has no jurisdiction); *Continental Drug Co. Ltd.* v. *Chemicals & Industries Ltd.,* AIR 1955 Cal. 161; *Hakam Singh* v. *Gammon India Ltd.,* AIR 1971 SC 740: 1971 (3) SCR 314 : (1971) 1 SCC 286 : 1971 UJ 167; *National Tar Products* v. *H.P.S.E. Board, Simla,* AIR 1979 Delhi 255; *Surajmall* v. *Kalinga Iron Works,* AIR 1979 Orissa 126; *Swanduran* v. *T.T. Electric Supply Co. Ltd.,* AIR 1975 Mad. 103 : (1974) 2 MLJ 431 : 87 LW 655., *Saifm Chemical Industries* v. *Bird & Co.,* AIR 1979 Mad. 16; *Savani Transport* v. *Mudaliar & Co.,* AIR 1979 Mad. 21; *Hoosen Kasam Dada (India) Ltd.* v. *M.P.S. Mills Ltd.,* AIR 1954 Mad. 845; *Jhun Jhunwala Bros.* v. *Subbaramier,* AIR 1968 Mad. 194; *Sueman Bhanji* v. *Emandi Pydiraju,* 1960 Jab. LJ 1129 : 1960 MPLJ 1359; *Hassani Stores* v. *Larsen & Toubro,* 1961 Ker. LT 314; *T. Anjaneyulu* v. *Sri Ramakrishna Textiles,* 1977 And. LT 75 : (1977) 1 An. WR 105; *Tulsiram* v. *Thejeet Goods Carrier Branch Jhansi,* AIR 1977 NOC 189 (All) ; *Tarlokchand Butail* v. *Union Co-operative Fire & General Insurance Society Ltd.,* AIR 1977 NOC 332 (HP); *Ghatse & Patil (Transport) Ltd.* v. *Madusudan Ramkumar,* AIR 1977 Bom. 299; *Balsukh Refractories & Ceramics* v. *Hindustan Steel,* AIR 1977 Cal. 20; *Sampatrai Dassani* v. *Toshiba Anand Lamps Ltd.,* AIR 1978 NOC 164 (Cal.); *C.K. Prasad* v. *Mohammad Munir Alam,* AIR 1983 NOC 33 (Pat.). **See also** *Jaishree Luxury House* v. *Kathotia Sons,* AIR 1980 Raj. 42.

   (Condition in the order form that "any legal proceeding in respect of any matters or claims or dispute on any account shall be instituted by purchaser in Delhi alone" bill issued also containing the words "subject to Delhi jurisdiction". It was held that seller could maintain the suit in the Court at Jaipur where the Contract was made) AIR 1975 Guj. 72 held to be not good law in view of AIR 1971 SC 740). **But see** *Snehalkumar Sarabhai* v. *E.T. Organisation,* AIR 1975 Guj. 72 (The Court could ignore the stipulation in the agreement if it is oppressive). **See also** *R.G. Transport Co.* v. *United India Fire & General Insurance Co.,* AIR 1980 Guj. 184; *M/s. Bombay Andhra Transport Co.* v. *Barkatlal,* (1982) 2 An. WR 83. *New Great Insurance Co. of India* v. *Kampagni,* AIR 1964 Bom. 71 ; *Renown Biscuit Co.* v. *Kamalanathan,* AIR 1980 Mad. 28; *Tedikapalle Anjaneyalu* v. *Sriramakrishna Textiles,* ILR (1977) 1 AP 105 : 1977 Andh. LT 75; *New Great Insurance Co. of India* v. *United Equipments & Stores (P) Ltd.,* AIR 1970 Cal. 221; *Achratlal* v. *Vijiam,* (1925) 49 MLJ 189 : 22 LW 70 : 90 IC 1919 : (1925) Mad. 1145; *Milton & Co.* v. *Ojha Automobile Eng. Co.,* (1931) 57 Cal. 1280 : 130 IC 252 : (1931) Cal. 279; *Gopal Das* v. *Hari Kishan,* (1936) ALJ 704 : (1936) All. 514 : 163 IC 919; *Khandesh Lakshmi Vilas Mills* v. *Vinayak Atmaram,* (1935) Bom. 198 : 37 Bom. LR 157 : 156 IC 277; *Haji Abdulla* v. *Stamp,* (1924) Bom. 381 : 26 Bom. LR 224 : 80 IC 523; *Jagannath* v. *Burma Oil Co.,* (1929) Lah. 605 : 119 IC 481; *Kidri Prasad* v. *Kosala,* (1923) Lah. 425 : 75 IC 590. **But see** *Abanese* v. *Auto Supply Co.,* (1929) 122 IC 488; *National Petroleum Co. Ltd.* v. *Meghraj,* AIR 1937 Nag. 334.

exclusive jurisdiction in courts at a particular place is not hit against public policy and Sec. 23/28 of the Contract Act.[1] Where the parties to a hire purchase agreement in connection with the supply of commercial vehicles was executed at Bombay with a condition that the courts at Bombay shall have an exclusive jurisdiction, the agreement is not affected by Sec. 28 when the two courts have jurisdiction and the parties have agreed to vest the jurisdiction in one of them.[2] In an agreement not to appeal, in consideration of time to pay decree amount;[3] or in consideration of the other party not appealing in a case where the decree was party in favour of both;[4] but an agreement restraining execution is void;[5] so too, an agreement that one suit shall be decided in accordance with the result of another suit;[6] or an agreement allowing parties to control the court's discretion in the admission of evidence.[7] But it is only the particular stipulation, which is void and not the whole contract.[8]

In a suit for recovery of damages for short delivery of goods filed by the Insurance Co. in the court at Hyderabad where goods were delivered and the shortage certificate issued, the territorial jurisdiction of the court at Hyderabad cannot be excluded on the ground that as per the lorry receipt given, only the courts in Calcutta shall have jurisdiction to entertain the suit.[9]

When all the ingredients of the transaction like placing and accepting the order and payment of advance and final payment took place at Bombay, the plaintiff and the defendant must have deemed to agree to confine the jurisdiction of courts in Bombay to the exclusion of other courts.[10]

Where the parties having agreed that the territorial jurisdiction of the Court will be confined to Faridabad Court, filing of suit by the plaintiff in Delhi Court cannot be entertained.[11]

In a money suit recovery, the contention of the defendants that the Delhi Court in which the suit was filed does not have territorial jurisdiction cannot be entertained, when the defendants have admitted that they have

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1. *Rajaaram Maize Products* v. *M.P. Electricity Board, Jabalpur,* AIR 1999 MP 44.
2. *Delhi Bottling Co. Ltd.* v. *M/s. Times Guarantee Financials Ltd.,* AIR 2003 NOC 7 (Delhi).
3. *Hakim Bashir* v. *Saiyed,* (1930) 5 Luck. 391; *Pratap Chunder* v. *Arathoon,* (1882) 8 Cal. 455 (Payment in instalments); *Anant* v. *Ashburner,* (1876) 1 All. 267.
4. *Bhrigurnath* v. *Annapurna,* (1934) Pat. 64 : 153 IC 1098.
5. *Muthia Chetty* v. *Govindoss,* (1921) 44 Mad. 919 : 69 IC 337.
6. *Rajah of Venkatagiri* v. *Chinta Reddi,* (1914) 37 Mad. 408 : 15 IC 378.
7. *Narayan* v. *Moti Lal,* (1875) 1 Bom. 45.
8. *Maritimma Italiana Steamship Co.* v. *Burjor,* (1930) 32 Bom. LR 43 : (1930) Bom. 85.
9. *M/s. East India Transport Agency* v. *National Insurance Co. Ltd.,* AIR 1991 AP 53.
10. *Hanil Era Textiles Ltd.* v. *Puromatic Filters (P) Ltd.,* (2004) 4 SCC 671 : 2004 (3) Supreme 287 : 2005 (1) CTLJ 118 (SC).
11. *Caprihans India Ltd.* v. *R.T. Packaging Limited,* 2005 (2) CTLJ 393 (Del).

received payments at Delhi and as such the initial cause of action has arisen within territorial jurisdiction of Delhi Court.[1]

Even where the parties to contract specifically agree that the courts in Delhi alone shall have jurisdiction, mere statement in the agreement is not sufficient to confer jurisdiction on Delhi Courts when they lack inherent jurisdiction.[2]

Merely because parties to the contract have agreed to settle the disputes in courts at Delhi, the consent between the parties cannot vest jurisdiction on the Courts in Delhi. [3]

In the absence of a concluded contract, between the parties, no party can rely on the exclusive jurisdiction of court for filing a suit. [4]

Ordinarily it is open to the contracting parties to restrict the jurisdiction of the court to one of two or more courts, which would otherwise have jurisdiction. To ask a plaintiff and an insurance company both domiciled in India to fight litigation in a foreign country envisages considerable hardship of foreign exchange. Where the contracting party of another country seeks to impose a restriction on the choice of forum on Indian Courts, it would be reluctant to entertain the same because of the extreme difficulty of an Indian litigant of pursuing his cause in a foreign land. [5]

29. Agreements void for uncertainty.—Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Illustrations

(a) *A* agrees to sell to *B* "a hundred tons of oil". There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) *A* agrees to sell to *B* one hundred tons of oil of a specified description known as an article of commerce. There is no uncertainty here to make the agreement void.

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1. *New Holland Tractors (India) Pvt. Ltd.* v. *Raja Industrial Works,* 2005 (2) CTLJ 493 (Del).
2. *Ranbaxy Fine Chemicals Ltd.* v. *National Enterprises,* 2005 (2) CTLJ 358 (Del).
3. *Golden Peakock Overseas Ltd.* v. *Ranjit Industries,* 2005 (2) CTLJ 483 (Del).
4. *Rajasthan State Electricity Board* v. *Dayal Wood Works,* AIR 1998 AP 381 : 1998 (2) ALD 599 : 1998 (3) ALT 160 : 1998 (1) APLJ 426.
5. *Simac Group (India) Private Ltd.* v. *Deutsche Seereederal,* (1982) 23 Guj. LR 268.

(c) *A*, who is a dealer in coconut oil only, agrees to sell *B* "one hundred tons of oil". The nature of *A's* trade affords an indication of the meaning of the words, and *A* has entered into a contract for the sale of one hundred tons of coconut oil.

(d) *A* agrees to sell to *B* "all the grain in my granary at Ramnagar". There is no uncertainty here to make the agreement void.

(e) *A* agrees to sell to *B* "one thousand maunds of rice at a price to be fixed by *C*". As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) *A* agrees to sell to *B* "my white horse for rupees five hundred or rupees one thousand". There is nothing to show which of the two prices was to be given. The agreement is void.

Contracts void for uncertainty.—We have already said that a proposal or an offer must be certain or at least be capable of being made certain [1] **[36]** and again that consideration must be real and competent and not loose or vague. [2] **[159]** This section only says that where the terms of a contract are uncertain or ambiguous, the contract is void and unenforceable.[3] Where the terms of the agreement pleaded cannot be considered to be one the meaning of which is not certain or capable of being made certain, the agreement is not void for uncertainty.[4] The date of contract is not a term of the contract, so uncertainty as to such date is not hit by Section 29.[5] But, where it is possible to put a reasonable construction on the agreement, the court would certainly do so, though courts decline to take upon themselves the responsibility of making a contract for the parties. Stipulation in a lease agreement that the lessee shall pay prevalent market rent in case he did not vacate the premises by a specific date is not void for uncertainty.[6] Ambiguous terms may be enforced based on custom or usage of trade.[7]

1. **See** *Guthing* v. *Lynn*, (1831) 109 ER 1130; *Taylor* v. *Portington*, (1855) 44 ER 1130; *Taylor* v. *Portington*, (1855) 44 ER 128 : 109 RR 147; *Montreal Gas Co.* v. *Vasey*, (1900) AC 595; *Taylor* v. *Brewer*, (1813) 105 ER 108; *Aziz Khan* v. *Duni Chand*, (1913) 20 IC 812 : 305 PLR 1913.
2. *Rosher* v. *Williams*, (1875) 20 Eq. 210; *Braybrooke* v. *Meredith*, (1843) 60 ER 106 : 60 RR 339; *Stuckley* v. *Cooke*, (1671) 21 ER 732.
3. *Gopal Rao* v. *Gana*, (1922) 63 IC 48.
4. *Shobhat Devi* v. *Devi Phal*, AIR 1971 SC 2192.
5. *Bhramarbar Sahu* v. *Basudev Das*, 1971 (2) CWR 532 : 37 Cut. LT 1022.
6. *Remington Rand of India Ltd.* v. *Sohanlal*, AIR 1984 Cal. 153; *Brown* v. *Gould*, (1971) 2 All. ER 1515.
7. *Magnun Films* v. *Golcha Properties (P) Ltd.*, AIR 1984 Del. 162.

Where in a contract of sale relating to shares there is an ambiguity about the number of shares intended to be sold and the consideration payable to the seller, the agreement being vague is void and cannot be enforced.[1]

An agreement to pay whatever rent the landlord may fix is void for uncertainty.[2] An agreement to pay certain sum when asked to pay is void for uncertainty.[3] So is an agreement to pay cash rent instead of grain without fixing the rate of commutation[4]; so, also a reference to arbitration without specification of the matter of the reference.[5] So too, is an indefinite promise to pay out of the debtor's property[6] or a bond charging "all the property" of the executants as collateral security[7] (to the extent of the security). But a mortgage of all indigo cakes manufactured from crops to be grown on the lands of the mortgagor during a certain period is not void.[8] An agreement to sell "at a concession rate" is void,[9] but not an agreement to grant a renewal of a lease on such conditions as shall seem reasonable at the time of renewal.[10] Where a contract to reconvey was in favour of four persons but it was impossible to determine beforehand which among them would first exercise the option under the contract, it was held that even if more than one person chose to do so or all of them attempted to do so simultaneously, there was absolutely no uncertainty attached to the obligations and rights *inter se* between the persons in whose favour the contract of recoverance was executed. The contract was, therefore, not void for uncertainty within Section 29.[11] Again a contract is not void merely because no time for performance is specified.[12] And in Madras case, where there was a definite contract for the sale of a certain forest land and the price per acre had been fixed, but the actual area was unascertained, it was held that there was no uncertainty about the contract.[13] Similarly,

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1. *N.K.Giriraja Shetty* v. *N.K.Parthasarathy Setty,* AIR 2006 Kant 180 : 2006 AIHC 1720 (Karn) : 2006 (3) AIRKarnR 136 : 2006 (3) KantLJ 1.
2. *Ramaswami* v. *Rajagopala,* (1887) 11 Mad. 200.
3. *Pushpa Balaray* v. *LIC of India,* AIR 1978 Cal. 228.
4. *Muthiah* v. *Periyan Kone,* (1920) MWN 15 (16).
5. *Adhibai* v. *Cursandas,* (1886) 11 Bom. 199; *Barkat Ram* v. *Anant Ram,* (1915) 31 IC 632 (Partnership terms uncertain—Agreement held void).
6. *Bheri Dorayya* v. *Maddipatu Ramayya,* (1880) 3 Mad. 35.
7. *Deojit* v. *Pitambar,* (1876) 1 All. 275.
8. *Baldeo* v. *Miller,* (1904) 31 Cal. 667.
9. *Tirumala Chetty* v. *Srinivasa,* (1929) 52 Mad. 300 : (1929) MWN 93 : 29 LW 329 : 121 IC 753 : (1929) Mad. 243 : 56 MLJ 318.
10. *Secretary of State* v. *Volkart Bros.,* (1927) 50 Mad. 595 : 25 LW 525; *Ram Sunder* v. *Kali Narain,* (1927) Cal. 889 : 104 IC 527.
11. *Kanakahabhupathi Chettiar* v. *Govindarajulu Naidu,* AIR 1964 Mad. 219 : (1964) 2 MLJ 135 : ILR (1963) Mad. 975.
12. *Mohamad Jan* v. *Fazal-ud-din,* (1924) 46 All. 514 : 22 ALJ 400 : (1924) All. 657.
13. *Suppa Pillai* v. *Secy. of State,* (1934) MWN 49; *Prafulla Kumar Chotray* v. *Union of India,* 48 Cut. LT 294 (Renewal clause in a lease deed found to be not vague or uncertain).

where a person guaranteed payment of loans by the principal debtor without any limit of time or amount, it was held that there was no uncertainly and that the contract was enforceable. [1]

Where the seller has promised not to enforce the payment of cheque given to him by the buyer towards the price of the goods until such time the buyer has received the goods, the agreement between the parties is void as there was uncertainty with regards to the time when the money was to be received.[2]

Where the agreement for sale pleaded by the plaintiff shows that the price of the properties was fixed, the properties to be sold were definite, the plaintiff was put in possession in pursuance of the agreement, the entire sale price was to be paid before a specified date, that all amounts paid by plaintiff before that date were to be adjusted towards sale price and on the payment of the balance on the specified date the vendor was to execute the sale deed it cannot be said to be void for uncertainty. [3]

Under Cl. 6 of an agreement the buyers were to obtain the import licence and to communicate the number thereof to the sellers not later than February, 29, 1958, and in the event of their failure to do so for any reason whatsoever the sellers were entitled "at their discretion" either to carry over the goods or to ask the buyers to pay for the contracted goods and take delivery in British East Africa. By a subsequent letter, the sellers confirmed that "if necessary" they would carry over the contracted goods for two months namely, March and April subject to payment of charges. It was contended that the words "if necessary" were entirely vague and did not show necessarily for whom, when, and why.

It was held that argument had no force whatsoever. By the letter the sellers said that, if necessary, that is to say if the buyers found it difficult to supply the number of the import licence, the contract would be carried over to March and April. By the amendment, the sellers surrendered to a certain extent their absolute discretion. The clause meant that the contract was not extended to March and April but that the sellers would extend it to that period, if occasion demanded. Since both the parties agreed to this letter and the buyers confirmed it, it could not be said that there was no consensus *ad idem* or that the whole agreement was void for uncertainty. [4]

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1. *Sambamurthi* v. *Kanniah,* (1937) MWN 760.
2. *Kalyan Singh* v. *Ranjot Singh,* AIR 2002 HP 180 : 2003 (1) Arbi. LR 425 : 2003 (1) Civil LJ 623 : 2002 (2) Shimla LC 382.
3. *Sobhat Devi* v. *Devi Phal,* AIR 1971 SC 2192.
4. *M/s. Dhanrajamal Gobindram* v. *Shamji Kalidas & Co.,* AIR 1961 SC 1285 : 1961 (3) SCR 1020.

The Supreme Court held that the conditions mentioned in the proposal seeking extension of time for performance of the contract are so vague and uncertain and not possible to ascertain in definite terms to what period performance was intended to be postponed and therefore the agreement is rendered void by Sec. 29 of Contract Act.[1]

When the agreement pleaded by the plaintiff cannot be considered to be one the meaning of which is not certain or capable of being made certain, it was held that Section 29 has no application.[2]

Where no provision is made for determining the consideration, for agreement it is void for uncertainty.[3]

The agreement for presumption that if either party desired to sell the property he should sell it to the other for a price to be fixed by 'panchas' meant arbitrators without specifying the number of arbitrators was held to be void for uncertainty.[4]

When an agreement for reconveyance does not specify any time limit, it is not invalid as being vague.[5]

The principle is in determining the question whether a contract is void for uncertainly it has to be ascertained whether the agreement is capable of being made certain. The document might have been couched in terms, which might introduce an element of uncertainty, but the court has to consider all the circumstances of the case to see whether the terms are capable of being made certain.[6]

30. Agreements by way of wager void.—Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Exception in favour of certain prizes for horse-racing.—This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

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1. *Keshavlal Lallubhai Patel* v. *Lalbhai Trikumlal Mills Ltd.*, AIR 1958 SC 512.
2. *Sohbhet Devi* v. *Devipal*, 1971 UJ (SC) 395.
3. *Ranbaxy Laboratories Ltd.* v. *Doon Apartment*, ILR (1979) Delhi 84.
4. *Puttappa Edeppakurli* v. *Hassanab Usmansab Mujamid*, (1975) 1 Karn. LJ 36.
5. *Varudayammal* v. *Balasubramanyam Gounder*, (1979) 1 MLJ 294 : 92 LW 92 : ILR (1979) 2 Mad. 66.
6. ILR (1978) 2 All. 173; **see also** *Khiwaraj Chorda* v. *Esso Standard Eastern Inc.*, (1975) 2 MLJ 65 : 88 Mad. LW 470.

SECTION 294-A OF THE INDIAN PENAL CODE NOT AFFECTED

Nothing in this section shall be deemed to legalise any transaction connected with horse-racing, to which the provisions of Section 294-A of the India Penal Code (45 of 1860) apply.

What is wager.—A wager has been defined as an agreement to pay money or money's worth, on the happening of a specified uncertain event. The event may be one, which might or might not happen, or may be sure to happen, though no one knows when. Again it need not be an event to happen in the future, but may be a past event, the result of which is unknown to the contracting parties (*e.g.*,) the result of an election held the previous day at a distant place or the height of a well-known building. **[337]**

A wagering contract is described to be a contract by which two persons professing to hold opposite views touching the issue of a future (not necessarily) uncertain event, mutually agree that, dependent on the determination of the event, one shall win from the other, and the other shall pay or hand over to him, a sum of money or other stake, neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose and there being no other real consideration for the making of such contract.[1]

The essence of wager then, is a gain or a loss to either party according as the event happens one way or the other.[2] If there is only gain and not loss, or of there is only loss and not gain, the contract will not be a wager. As Birdwood, J., said,[3] —"If one of the parties has the event in his own hands, the transaction lacks an essential ingredient of a wager." Jenkins, C.J., said,[4] —"It is of the essence of a wager each side should stand to win or lose according to the uncertain or unascertained event in reference to which the chance or risk is taken." That is to say, it must be the intention of *both the parties* to the wager.[5] This is the view taken by the Supreme Court.[6]

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1. *Rameshwar Das* v. *New Jooria Bazar Sugar Co.*, (1926) Sind 202 : 94 IC 371.
2. **See** (1876) 1 QB 189; *Thacker* v. *Hardy*, (1878) 4 QBD 685; *Carlill* v. *Carbolic Smoke Ball Co.*, (1892) 2 QBD 484 (490); *Venkataratnam* v. *Hanumanta Rao*, (1935) MWN 491 : 41 LW 57 : 156 IC 651 : (1935) Mad. 135.
3. *Dayabhai* v. *Lakshmichand*, (1885) 9 Bom. 358.
4. *Sassoon* v. *Tokersey*, (1904) 28 Bom. 616.
5. *Karuna Kumar* v. *Lankaran*, (1933) 60 Cal. 856 : (1933) Cal. 759. **See** *Tod* v. *Lakshmidas*, (1892) 16 Bom. 441; *Perosha* v. *Maneckji*, (1898) 22 Bom. 899; *Ajudhia* v. *Lalman*, (1902) 25 All. 38; *Eshoor Doss* v. *Venkatasubba Rao*, (1895) 18 Mad. 306.
6. *Gherulal Parkash* v. *Mahadeodas Maiya*, AIR 1959 SC 781 : 1959 Supp. (2) SCR 406; **see also** *Badridas Kothari* v. *Meghraj Kothari*, AIR 1967 Cal. 25; *Rajaram* v. *S.K.C.K. Firm*, AIR 1964 AP 537; *Ratanlal* v. *Firm Mangilal Mathuralal*, AIR 1963 MP 323; *Firm of Pratapchand Nopaji* v. *Firm of Kotrike Venkata Setty & Sons*, AIR 1975 SC 1223 : 1975 (3) SCR 1 : (1975) 2 SCC 208 (Nature of badla transactions explained); *Shewkissen Mohata* v. *Mangal Chand Mahato*, AIR 1941 Cal. 341; *Firm Ram Krishna Das* v. *Firm Mustaddi Lal*, AIR 1942 All. 170; *Ebrahim* v. *Austin Demel*, AIR 1946 PC 63; *Khimji Punjal* v. *Devshi Bhanji*, AIR 1950 Kutch 24; *Nand Kishore* v. *Lachmi Narain*, AIR 1954 Raj. 24; *Kumajisaremal Firm* v. *Devadattam*, AIR 1958 AP 216; *Lakshmi Narayana* v. *Nanjain*, AIR 1965 AP 136.

An agreement therefore, between two persons that they should wrestle at a certain place on a certain day, that the party failing to appear must forfeit a certain sum to the other, and that the winner must get a part of the gate collections is not objectionable on the ground of being a wager.[1]

Insurance Contracts.—Insurance contracts are not really wagering contracts, because there is no possibility of any gain; the real underlying principle in insurance contracts is to indemnify the individual from loss whether by fire, accident or death. **[339]** In *Alamai* v. *Positive Government Security Life Insurance Co.,*[2] it was held that where the insurer has no interest in the life or object insured, the policy is void. The *bona fide* insurer is not speculating at all, but is interested in the preservation of the thing insured.

Chit Funds.—The question as to whether chit fund transactions are wagers has been answered in the negative by a Full Bench of the Madras High Court in *Narayana* v. *Vellachami*[3] though previously, there was some difference of opinion. But a Full Bench of five judges have by a majority of four held in *Sesha Ayyar* v. *Krishna Ayyar,*[4] that the chit fund is a "lottery" within the meaning of the word in Sec. 294–A of the India Penal Code in as much as the distribution of the monthly "prize" is governed by chance or lot. The Full Bench has added however that the claim of the subscribers for refund of the subscriptions would be governed by Sec. 84 of the Trusts Acts, and that the doctrine of *in pari delicto* will not defeat their claim. In *Venkataramana* v. *Sanyasayya,*[5] an arrangement by which certain persons were to subscribe one rupee each every week and at the end of the week, prizes were to be drawn and one of the subscribers was to get a gramophone and go out of the transaction and the other members should go on paying increased subscription till the twentieth week, when all those who had not drawn a prize were to get a gramaphone each was held not to offend against the present section. But this case has been dissented from in a Bench decision of the same High Court.[6] **[340]** The object of

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1. *Babasaheb* v. *Rajaram,* (1931) Bom. 264 : 33 Bom. LR 260, referring to *Shoolbred* v. *Roberts,* (1899) 2 QB 560.
2. (1898) 23 Bom. 191; *Brahma Dutta Sharma* v. *Life Insurance Corporation,* AIR 1966 All. 472; (Cf.) *Vappa Kanda Marakayar* v. *Annamalai Chetty,* (1901) 25 Mad. 561 (Promise to repay a loan, conditioned on safe arrival of a ship held a wager). **See also** *Northern I.G. Ins. Co.* v. *Kanwarjit Singh,* AIR 1973 All. 357 : (1973) All. LJ 84 : 1973 All. WR 76.
3. (1927) 50 Mad. 696 : 103 IC 318 : (1927) MWN 545 : 26 LW 796 : 52 MLJ 687 : (1927) Mad. 583; **see also** *Kamatchi* v. *Appavu,* (1863) 1 MHCR 449; *Nagappa* v. *Arunachala,* (1925) 47 MLJ 876; *Veerannan* v. *Ayyachi,* (1925) MWN 857; **see also** *Shunmuga* v. *Kumaraswami,* (1925) MWN 655 : 90 IC 420 : (1925) Mad. 870.
4. (1936) 50 Mad. 562 : 70 MLJ 36 : 43 LW 77 : (1936) MWN 89 : 162 IC 68 : (1936) Mad. 225.
5. (1934) 66 MLJ 76 : (1934) Mad. 136 : 149 IC 489.
6. *Public Prosecutor* v. *Munusami,* (1934) 57 Mad. 923 : (1934) MWN 265 : 40 LW 26 : 67 MLJ 163 : 150 IC 1119 : (1934) Mad. 464.

Sec. 30 in declaring agreements by way of wager is that people must make use of their time, energy and labour for fruitful and better work which is useful for themselves, their family and society and to prohibit them in indulging in the games of chance and thereby to make earning. Any agreement therefore to pay prize money on lottery ticket amounting to wager is void.[1]

Any prize alleged to have been won in a lottery cannot be claimed although such lottery is organised with the permission of the Government since neither the State nor the Central Act can alter the nature of the agreement for payment of prize money on the lottery ticket from preventing to acquire the character of wagering contract and as such the transaction has to be declared by the court as void.[2]

Wagers and commercial transactions.—[352] Very often, we find wagers in the guise of commercial transactions of sale and purchase of goods at a future date. In *Kong Yee Lone & Co.* v. *Lowjee Nanjee,*[3] the Judicial Committee observed:

> "If the circumstances are such as to warrant the legal inference that they (the parties) never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of goods should vary from the contract price at the given time, that is not a commercial transaction, but a wager on the rise or fall of the market."

Therefore, to make a contract of this kind a wager there must be from the outset, a common intention of the parties not to make or accept any delivery and to deal only in differences.[4]

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1. *Subhash Kumar Manwani* v. *State of M.P.,* AIR 2000 MP 109, 110 : 2000 (2) Arbi. LR 61 : 2000 (1) MPLJ 153 : 2000 (2) Rec. Civ R 572.
2. *Subhash Kumar Manwani* v. *State of M.P.,* AIR 2000 MP 109, 110.
3. (1901) 29 Cal. 461; *Mulchand* v. *Kanhaiya Lal,* (1929) ALJ 262 : 112 IC 791 : (1929) All. 134; *Sassoon* v. *Tokersey,* (1904) 28 Bom. 616 : 6 Bom. LR 521; *Universal Stock Exchange* v. *David Strachan,* (1896) AC 166. **See also** *Ramgopal* v. *Govind Das,* AIR 1944 All. 196; *Mohadeodas* v. *Gherulal,* AIR 1958 Cal. 703; *Firm J. Seetharam Anjaneyulu* v. *V.S. & Co.,* AIR 1958 AP 438 : 1958 (2) An.WR 30 : 1958 ALT 706; *Central Brokers* v. *N.K. Murthy,* AIR 1954 Mad. 696 : 1954 (1) MLJ 457 : 1954 MWN 149 : ILR 1954 Mad. 966 : 67 MLW 445 : 1954 ALT (W) HC 20 (Mere speculation, where it does not amount to wager); *Surajmal* v. *Doongarmal,* AIR 1959 Raj. 27 : ILR (1958) 8 Raj. 1162 (How the intention to wager has to be gathered and how a wagering contract has to be distinguished from a highly speculative transaction stated); *Firm Hasamilal* v. *Bhuralal,* AIR 1961 Raj. 52 : ILR (1960) 10 Raj. 1304; *Murlidhar Banwarilal* v. *Kishore Lal Jagannath,* AIR 1960 Raj. 296 : ILR (1960) 10 Raj. 412; *Pannalal* v. *Lalchand,* AIR 1960 Cal. 261 (Speculation does not necessarily involve a contract of wager). *Pandurangian Chetty* v. *Ulchalailluri Nanunathian,* (1961) 2 And. WR 304 : 1961 ALT 901; *Jethmal Madanlal Jokotia* v. *Nevatia & Co.,* AIR 1962 AP 350 : (1962) (1) An. WR 331 : 1962 (2) ALT 41.
4. *Rangasa* v. *Hukumchand,* (1930) Nag. 111 : 120 IC 406; *Haranarayan* v. *Radhakisan,* (1923) Nag. 324 : 75 IC 906; *Vithalsa Narayan* v. *Raoji Bhoy & Co.,* (1934) Nag. 129 : 151 IC 63.

That is to say, there must be proof that the contracts were entered into upon terms that the performance of the contracts should not be demanded but the difference only should become payable.[1] Therefore where a forward contract of sale by one party to another with provision for delivery by a certain date was followed up some time later by a contract of resale by the buyer to the seller at a lesser price, also absolving the parties from all liability under the prior contract, the Court held the transaction was not a wager, as the resale was not in the contemplation of the parties at the time of the original contract.[2]

The question whether it is a mere agreement for payment of differences has to be decided with reference to the position of the parties, their course of dealings and the general nature of the business. A great disparity between the magnitude of the transactions agreed upon, and the performing capacity of the individual, as disclosed by his status and antecedents may easily give rise to an inference that the transaction is a mere wager. In the Privy Council case mentioned above, their Lordships said:

> "When the two classes of contracts are compared, the one class suitable to traders..... the other extravagantly large..... the rational inference that neither party ever intended completion is strengthened into a moral certainty."

But in *Dady* v. *Madhuram*[3] where a stock jobber had transactions for half a crore, the Court held that the magnitude of the transactions was not *per se* evidence of wager as the defendant was a big stock jobber.

On the other hand, where the agreement is made through a broker in the open market, it may be possible to infer an intention to enter into a genuine transaction.[4] But, even here, the fact that previous transactions through the broker were settled by payment of differences may give rise to legitimate inference against the genuineness of the transaction.[5] The instructions given to the broker by either party may also give a clue to the character of the

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1. *Sukhdewadass* v. *Govindoss,* (1928) 51 Mad. 96 : 55 IA 32 : 47 CLJ 144 : 30 Bom. LR 238 : 27 LW 453 : 26 ALJ 484 : 107 IC 29 : (1928) PC 30 : 54 MLJ 30.
2. *Mahomed Valli Patel* v. *East Asiatic Co.,* (1936) 14 Ran. 347 : 164 IC 654 : (1936) Ran. 319; *Sitaram* v. *Chamanlal,* AIR 1952 Hyd. 95.
3. (1903) 5 Bom. LR 768; *Chimanlal* v. *Nayamatrai,* (1937) 39 Bom. LR 1083 : 173 IC 205 : (1938) Bom. 44 : *Lakshminarayana* v. *Nanjiah,* AIR 1965 AP 136; *Narayanan* v. *A.C.C.,* AIR 1952 TC 435; *Venkata Rangayya* v. *Narayana,* 64 Mad. LW 870.
4. (Cf.) *Tod* v. *Lakshmidas,* (1892) 16 Bom. 441; *Hanumanthiah* v. *Thimmaiah,* AIR 1954 Mad. 87 : 1953 (2) MLJ 310 : 1953 MWN 632; *Rangiah Chettiar* v. *Parthasarathi Iyengar,* AIR 1964 Mad. 258.
5. *Doshi Talakshi* v. *Shah Ujamsi,* (1899) 24 Bom. 227.

transaction. In *Eshoor Doss* v. *Venkatasubba Rao,*[1] a common broker had acted for both parties: it was evident from the instructions given to him that each party was more anxious to settle differences than to buy or sell. In the circumstances, the Court held it was a mere agreement to pay differences.

Where the transaction consists of a sale and resale between seller and buyer, the simultaneity of the transactions may justly lead to an inference that the parties intended to trade in differences merely; so too, where the sale and resale are not simultaneous but the resale was agreed upon between the parties at the time of sale.[2]

In *Bhagwan Das* v. *Burjorji,*[3] and *Ram Din* v. *Mansa Ram,*[4] it was pointed out that the merely speculative character of a transaction is not enough to render it void as a wagering contract. There must be affirmative proof that the contracts were not intended to be performed, and that only differences should be payable.[5] Unless the parties to the contract intended at the time of entering into the contract that it should not be what it purports to be but that it should be a transaction which was to be settled only upon the difference between the contract rate and the market rate prevailing at the time fixed for completion of the contract the transaction does not amount to a wager.[6] The mere fact that the parties had from excessive caution provided, for the consequence of breach by either party, by inserting a condition that one or other should pay the loss, will not be conclusive in favour of wager.[7] Nor will the mere fact that one party was, to the knowledge of the other, a speculator who never intended to

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1. (1895) 18 Mad. 306; *Kesarichand* v. *Merwanjee,* (1899) 1 Bom. LR 263; *Biseswar Lal* v. *Basi Ali,* (1921) 33 CLJ 533 : 64 IC 809 : (1921) Cal. 362.
2. *Mahomed Valli Patel* v. *East Asiatic Co.,* (1936) 14 Ran. 347 : 164 IC 654 : (1936) Ran. 319.
3. (1918) 42 Bom. 373 : 20 Bom. LR 561 : 34 MLJ 305 : (1918) MWN 315 : 16 ALJ 241 : 7 LW 577 : 44 IC 284; **see also** *Ramkrishna* v. *Ratanchand,* (1931) 53 All. 190 : (1931) ALJ 458: 35 CWN 841 : 33 Bom. LR 988 : 53 CLJ 561 : (1931) MWN 733 : 34 LW 175 : (1931) PC 136 : 132 IC 613 : 61 MLJ 665 (PC); *Sri Niwas* v. *Ram Deo,* (1922) 43 All. 585 : 19 ALJ 522: 64 IC 65 : (1922) All. 360; *Ali Moolla Industrial Corporation* v. *Esmail,* (1925) Ran. 284 : 90 IC 676; *Hazari Lal* v. *Kesho Das,* (1923) 21 ALJ 153 : (1923) All. 273.
4. (1929) 51 All. 1027 : (1929) ALJ 1140 : (1929) All. 890. **See also** *Emperor* v. *Thavarmal Rupchand,* (1929) 53 Bom. 367 : 116 IC 251 : (1929) Bom. 157; *Kanwar Bhan Sukha* v. *Ganpat Rai,* (1926) 7 Lah. 442; *Sukhdeodoss* v. *Govindoss,* (1928) 51 Mad. 96 : 27 LW 453 : 47 CLJ 144 : 30 Bom. LR 238 : 26 ALJ 484 : (1928) PC 30 : 107 IC 29 : 54 MLJ 130 ; **see also** *Sassoon* v. *Tokersey,* (1904) 28 Bom. 616 (There is a danger of confounding speculation with agreements by way of wager) *Narayanan* v. *A.C.C.,* AIR 1952 Trav. C 435.
5. *Bisheshar Dayal* v. *Jwala Prasad,* (1914) 36 All. 426 : 12 ALJ 817 : 25 IC 415; *Narain Rao* v. *Hanumantram,* (1930) Nag. 273 : 124 IC 453; *Aya Ram* v. *Sadhu Lal,* (1938) Lah. 781.
6. *Mohamed Valli Patel* v. *East Asiatic Co.,* (1936) 14 Ran. 347 : 164 IC 654 : (1936) Ran. 319.
7. *Balwant* v. *Mishri Lal,* (1925) Bom. 115 : 26 Bom. LR 1194 : 85 IC 177; *Kudar Mal* v. *Qadir Ahmed Ali,* (1924) Nag. 290 : 78 IC 966. **See also** *Narbada Shankar* v. *Mathura Das,* (1910) 12 Bom. LR 1058.

give delivery be material, in the absence of an express or implied understanding between the parties.[1] In a case where there is no proof of the contract is question being a wagering contract, the mere fact that the plaintiff has not established that he had made payment to third parties on the defendant's behalf or entered into enforceable liability on his account will not disentitle him from recovering.[2]

A firm A carried on the business of commission agents both at Indore and Jodhpur. B from Jodhpur entered into several forward contracts for purchase and sale of bullion through the firm at Indore. These transactions proved unprofitable to B and the loss aggregated to a sum of Rs. 21,423-1-6. The entire amount was paid to third parties at Indore by A on behalf of B and A received in all, a sum of Rs. 11,457-8-0 which B paid from time to time, towards these losses, to A's firm at jodhpur. A therefore, filed a suit in Jodhpur Court to recover the balance with interest. B pleaded *'inter alia'* that the transactions in suit amounted to wagering contracts, which were illegal according to the Notification, dated 3-6-1943 issued under the Defence of India Rules and hence the suit was not maintainable.

It was held that the suit was really not one to enforce any contract relating to purchase or sale of bullion, which came within the prohibition of the notification. It was a suit by an agent claiming indemnity against the principal, for the loss, which the agent had suffered in carrying out the directions of the principal. The right to such indemnity was founded on Sec. 222 Contract Act.[3]

Wager and Teji Mandi transaction. – "A Teji Mandi transaction consists of an ostensible sale by A to B of a double option of becoming either the purchaser from A or the seller to him, of certain goods on a future date, at a price fixed." In *Sobhagmal* v. *Mukundchand.*[4] the Privy Council approved of *Manilal* v. *Allibhai,*[5] and held that there is no presumption that Teji Mandi contracts are wagers.

Nazarana Contracts. – It has been held by the Lahore High Court that what are called *Nazarana* contracts are similar to Teji Mandi, and are in the nature of wagering transactions.[6]

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1. *Bhagwan Das* v. *Burjorji,* (1918) 42 Bom. 373.
2. *Ganesh Das* v. *Har Bhagwan,* (1932) Lah. 273 : 138 IC 542.
3. *Sugan Chand* v. *Fulchand,* AIR 1957 MP 194.
4. (1926) 51 Bom. 1 : 53 IA 241 : 26 LW 844 : (1926) MWN 830 : 98 IC 338 : 51 MLJ 809 (PC).
5. (1922) 47 Bom. 263 : 24 Bom. LR 812 : 68 IC 481 : (1922) Bom. 408; **see also** *Lakshmi Narain* v. *Bala Prashad,* (1938) Lah. 825. *Virjeedaya & Co.* v. *Ramakrishna Rice & Oil Mills,* AIR 1956 Mad. 1101.
6. *Pirthi Singh* v. *Matu Ram,* (1932) Lah. 356 : 138 IC 241.

Burden of proof.–Oral evidence is admissible to prove that an apparent agreement for sale and purchase of goods is no more than a covenant to pay differences.[1]

The burden is on the party who asserts it is a wager.[2] The Court has to look at all the surrounding circumstances; it must go behind and beyond the transactions, as they appear on the face of them and ascertain the true nature of the dealings between the parties.[3] The Court has to consider whether the documents expressing the legal obligation are a mere guise to clothe in legal form a transaction, which was inherently unlawful.[4] The conduct of the parties, their ability to perform and the general character of the business are all relevant circumstances.[5]

English law of Wagers.– In England gaming or wagering transactions are of two kinds, games for sports and games for other purposes. Games for sports have been declared illegal by the Gaming Act of 1835. Games for other purposes have been declared null and void by the Gaming Act of 1845. The difference between the two cases is that if the transaction is void, it is unenforceable only as between the parties; but, if the transaction is illegal, even collateral transactions entered into with knowledge become unenforceable. In 1892, another enactment was passed by which monies paid *under or in respect* of wagering contracts void by the Gaming Act of 1845 were

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1. *Lok Nath* v. *Gopal Singh,* (1936) Lah. 215 : 161 IC 713 (Even recital in contract that actual delivery is contemplated does not debar oral evidence); **see** *Gangadas* v. *Jekisondas,* (1923) 25 Bom. LR 520 : 73 IC 1032; *Rajmal* v. *Budansaheb,* (1922) 24 Bom. LR 115 : 66 IC 943 : (1922) Bom. 81; *Sirur* v. *Bhamia,* (1925) Mad. 330 : 20 LW 971 : 85 IC 410; *Kundan Lal* v. *Qadir Ahmed,* (1924) Nag. 290 : 78 IC 966; *Radhomal* v. *Holomal,* (1921) Sind 99 : 66 IC 489.
2. *Beni Madhab* v. *Sadasook,* (1904) 32 Cal. 437 (FB); *Vishala Narayana* v. *Raoji,* (1934) Nag. 129 : 151 IC 63; *Chimanlal* v. *Nayamatrai,* (1937) 39 Bom. LR 1083 : (1938) Bom. 44; *Mannalal* v. *Bihari Lal,* AIR 1956 Madh. Bha. 38 : 1955 MBLJ HCR 307 : MBLR 1955 Civil 265; *Ram Dev Jai Deo* v. *Sethkaku,* AIR 1950 EP 92 (Pucca Adatia system); *Sheo Narain* v. *Bhallar,* AIR 1950 All. 352; *Shantilal* v. *Madanlal,* AIR 1954 All. 789 (Pakka Adatia and Kaccha Adatia-distinction pointed); *Walyati Ram* v. *Bhagwandas,* AIR 1960 Punj. 471; *Firm Murlidhar* v. *Firm Kishorelal,* AIR 1960 Raj. 296; *Jethmal* v. *Nevatia & Co.,* AIR 1962 AP 350; *Dhruv Chhotelal* v. *Gulabray,* AIR 1954 Sau. 99; *Suganchand* v. *Fulchand,* AIR 1957 MP 194 : 1957 MPLJ 390 : 1957 MPC 299 : 1957 LLJ 568; *Sukhram* v. *Baldeodas Manilal,* AIR 1957 MP 138 : 1957 MPC 238 : 1957 MPLJ 368 : 1957 JLJ 498; *Kantilal* v. *Ranchhodas,* AIR 1953 Bom. 98 (Goti transactions explained); *Ram Avtar* v. *Ram Jivan,* AIR 1956 Hyd. 131 : ILR 1956 Hyd. 477.
3. *Perosha* v. *Manekji,* (1898) 22 Bom. 899; *Doshi Talakshi* v. *Shah Ujumsi,* (1899) 24 Bom. 227; *Harmukhraj* v. *Narotamdass,* (1907) 9 Bom. LR 125; *Motilal* v. *Govindram,* (1905) 30 Bom. 83 : 7 Bom. LR 385; *Lok Nath* v. *Gopal Singh,* (1936) Lah. 215 : 161 IC 713; *Bashi Ram* v. *Ram Sahai,* (1934) Lah. 85.
4. **See** *Arjunsa* v. *Mohanlal,* (1937) Nag. 345 : 172 IC 812.
5. *Mohamed Valli Patel* v. *East Asiatic Co.,* (1936) 14 Ran. 347 : 164 IC 654 : (1936) Ran. 319; *Chimanlal* v. *Nayamatrai,* (1937) 39 Bom. LR 1083 : (1938) Bom. 44.

declared to be not recoverable and no commission or reward in respect of a wager could be claimed in a Court of law. Now, this was specifically directed against agents being employed to bet for or on behalf of principals. **[341]**

INDIAN LAW.—In India, these complications do not exist, for this section merely says that a wagering transaction is void. The position is the same as if the Gaming Act of 1845 alone was in force. But, where a wagering transaction falls within Section 294-A of the Indian Code, even collateral transactions will be tainted and the mere sanction of the Government in particular cases of lotteries will not have the effect of nullifying this section of the Indian Contract Act.[1] **[348]**

Effect of a Wagering Contract.– The section provides that the winner shall not be entitled to sue for recovery of his winnings. But the loser has the *locus penitentiae* and can recover the amount deposited with the stakeholder at any time before it is paid out to the winner. The Rangoon and Madras High Courts have so held.[2]

Wagers are only void, and therefore collateral transactions will not be affected.[3] The word 'void' in the section does not mean 'unlawful' it would, therefore, follow that a broker may sue for his commission in respect of a wagering transaction,[4] and an agent may recover from the principal losses incurred by him over wagers on behalf of the principal.[5] Conversely, the principal may recover moneys received by an agent on his behalf in respect of such transactions.[6] Where a defendant gave a cheque to the plaintiff in

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1. **See** *Sir Dorabji Tata* v. *Edward F. Lance,* (1918) 42 Bom. 676 : 19 Bom. LR 697 : 41 IC 869 (War Loan Lottery).
2. *Maung Po* v. *Maung Aung,* (1926) 3 Ran. 543 : 93 IC 105 : (1926) Ran. 48; *Ratnakalli* v. *Vachalapu,* (1928) Mad. 434 : 109 IC 377.
3. *Gulam* v. *Padamsi,* (1923) Nag. 48 : 69 IC 186. **But see** *Rajaram* v. *S.K.C.K. Firm,* AIR 1964 AP 537; *Ratanlal* v. *Firm Mangilal Mathuralal,* AIR 1963 MP 323.
4. *Jagat Narain* v. *Sri Kishan,* (1910) 33 All. 219; *Bisheshar* v. *Jwala Prasad,* (1914) 36 All. 426 : 12 ALJ 817 : 25 IC 415; *Daya Ram* v. *Murlidhar,* (1927) 49 All. 926 : 25 ALJ 693 : 102 IC 605 : (1927) All. 823.
5. *Pirthi Singh* v. *Matu Ram,* (1932) Lah. 356 : 138 IC 241; *Choudhary Bidhi Chand* v. *Kachhumal,* (1923) 45 All. 503 : 73 IC 477 : (1923) All. 585; *Arjan Das* v. *Walaiti Ram,* (1928) Lah. 420 : 108 IC 58; *Ally Moola Industrial Corporation* v. *Esmail,* (1925) Ran. 284 : 90 IC 676; *Chekka* v. *Gajjila,* (1904) 14 MLJ 326; *Pringle* v. *Jafar Khan,* (1883) 5 All. 443; *Pirthi Singh* v. *Mamchand,* (1935) Lah. 761 : 156 IC 539 (Principal bound to recoup payment by agent for *badla* transactions).
6. *Hardeo Das* v. *Ram Prasad,* (1927) 49 All. 438 : 25 ALJ 223 : 100 IC 774; (1927) All. 238; *Maung Po* v. *Brama Din,* (1929) 7 Ran. 300 : 119 IC 740 : (1929) Ran. 244; *Ram Prasad* v. *Ramji Lal* (1927) 25 ALJ 736 : (1927) All. 795 : 103 IC 218; *Bholanath* v. *Mulchand,* (1903) 25 All. 639; *Shibho Mal* v. *Lachman Das,* (1901) 23 All. 165; *Muthuswamy* v. *Veeraswamy,* (1936) Mad. 486 : 43 LW 51 : (1936) MWN 572 : 70 MLJ 433; *Kshiteendranath Ray Chaudhuri* v. *Madaneshwar Chatterji,* (1937) 63 Cal. 1234 : 169 IC 177 : (1937) Cal. 29.

consideration of not being posted as a defaulter under the Rangoon Turf Club rules, a suit on foot of the cheque was held maintainable.[1] **[341]** On the same principle, money lent for gaming purposes or to liquidate a gambling debt has been held to be recoverable.[2]

A raffle is not illegal, nor is it opposed to public policy. A collateral contract of agency for sale of raffle tickets is not an agreement by way of wagering and is perfectly valid and enforceable.[3]

Bombay Act III of 1865. – It must however be mentioned that the general rule set out above has been abrogated, so far as the Presidency of Bombay is concerned, by Bombay Act III of 1865.[4] By Section 1 of that enactment all contracts knowingly made to further or assist the entering into or carrying out agreements by way of wager, and all contracts by way of security for performance of such agreement or contract are rendered null and void. The result is therefore that even collateral transactions are avoided, and that even loser on a wagering transaction cannot recover from the stakeholder.[5] **[349]**

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1. *Banwari* v. *Moolla,* (1929) 7 Ran. 263 : 119 IC 215 : (1929) Ran. 24; *Leicester & Co.* v. *Mullick,* (1923) 27 CWN 442. **See also** *Nooreys* v. *Seffert,* (1937) 2 AER 187 (Forbearing to report—New consideration).
2. *Aya Ram* v. *Sadhu Lal,* (1938) Lah. 781; *Subbaraya* v. *Devendra,* (1884) 7 Mad. 301; *Bani Madho* v. *Kaunsal,* (1900) 22 All. 452.
3. *Augustina* v. *Changanacherry Municipality,* 1982 Ker. LT 361.
4. *Ramchandra* v. *Gangabison,* (1910) 12 Bom. LR 590.
5. *Dayabhai* v. *Lakshmichand,* (1885) 9 Bom. 358.

CHAPTER III

Of Contingent Contracts

31. "Contingent Contract" defined.—A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract does or does not happen.

Illustration

A contracts to pay B Rs.10, 000 if B's house is burnt. This is a contingent contract.

Contingent Contracts. – The word "contingent" in this section and the rest of the chapter appears to have been borrowed from the English Law of real property. The more familiar term in the English law of contracts is 'conditional' (e.g.,) see Section 1, clause (ii) of the English Sale of Goods Act; "A contract of sale may be absolute or conditional."

Characteristics.– The essential features of a 'contingent contract' are the uncertainty and futurity of the event to which it is related. It is this dependence on some uncertain future event, which distinguishes the contingent contract from, say, a contract, which is postponed till the happening of a certain event. A contract of insurance is the commonest instance of a contingent contract.

Secondly the event must be collateral to the contract. It must be in a sense unessential to the transaction, although the transaction itself is made to depend upon it. It follows therefore that reciprocal promises are out of the category of contingencies for they are in no sense 'collateral' to the contract. If A promises to pay B Rs. 100 if B will sell his horse to A, it is not a contingent contract. But if A agrees with B to sell C certain land at a fixed price, in case the land is decreed to A in a suit then pending, it is a contingent contract.[1] Where by a statute property is not transferable except with the permission of the authority, an agreement to transfer the property must be deemed subject to the implied condition that the transferor will obtain the permission of the authority concerned.[2] So where A gives B certain documents for use in a litigation and B promises to pay a certain sum contingent on the result of the litigation, the contract is valid and enforceable on the happening of the event,

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1. *Ismal* v. *Daudbhai,* (1900) 2 Bom. LR 118.
2. *Nathulal* v. *Phoolchand,* AIR 1970 SC 546 : (1970) 3 SCWR 175 : 1970 All. LJ 742 : 1970 Mah. LJ 674 ; Cf. *Abdul Satar Haji* v. *Shah Manilal,* AIR 1970 Guj. 12.

as contemplated in the agreement.[1] Likewise a contract to sell land of which the vendor is a joint owner, as and when the joint owners agree to partition will be enforceable only on the happening of the event (*i.e.,*) the partition.[2]

Again the contract may be conditional, not on any external event, but on the voluntary act or the future conduct of one of the parties or of a third party. To take an instance of the latter kind, where land is to be sold at a valuation to be made by a third party, such a valuation is a condition precedent and if, for any reason, the valuation is not made, the contract cannot be enforced.[3] Similarly, where a contract is for work to be done to the satisfaction of a third person, it is necessary that the person should approve of the work before the contract could be enforced. In such cases the decision of such person is conclusive except where there is clear proof of collusion between him and the party liable to pay.[4] **[434]** The case of *Secretary of State* v. *Arathoon,*[5] is another illustration of this class of cases. In this case the contract was for the supply of timber, one condition being that the quality must be approved by a certain named person. On the rejection of goods supplied consequent on the non-approval by the third party, a suit was brought for breach of contract and the Court held that it was only a contingent contract and that it was not open to the plaintiff to impugn the reasonableness or otherwise of the third party's approval.

Where the contingency is the mere will of one of the parties (*e.g.,*) a promise to pay whatever the promisor is minded, there is hardly any contract at all, and no legal obligation is incurred, and therefore such cases need not be considered. But, this must be distinguished from cases where the promise is to pay for work to be done to the satisfaction of one of the parties. In such cases, if approval cannot be reasonably withheld, the condition is deemed to

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1. *Venkataratnam* v. *Hanumanta Rao,* (1935) MWN 491: 41 LW 57 : 156 IC 651 : (1935) Mad. 135 (It was unsuccessfully argued that the contract was a wagering contract); **see also** *Smallman* v. *Smallman,* (1971) 3 All. ER 717.
2. *Kirpal Das* v. *Manager Encumbered Estates,* (1936) Sind. 26 : 162 IC 639. **See also** *Saindas Frangu Ram* v. *Ram Saran Das,* AIR 1964 Punj. 481; *Pahunchi Lal* v. *Man Singh,* AIR 1971 All. 444; *Durga Prasad* v. *Lilavati,* AIR 1972 All. 396; *Aberfoyle Plantation Ltd.* v. *Cheng,* (1959) 2 All. ER 910; *Re Longland Farm,* (1968) 3 All. ER 552; *Northern Indian Iron & Steel Co.* v. *State of Haryana,* AIR 1976 SC 1100 : (1976) 2 SCC 877.
3. *Foster* v. *Wheelar,* (1883) 38 Ch.D. 130; Cf. *Firth* v. *Midland Ry. Co.,* (1875) 20 Eq. 100; *Smith* v. *Peters,* (1875) 20 Eq. 511.
4. *Clarke* v. *Watson,* (1865) 144 ER 460.
5. (1879) 5 Mad. 173; **see also** *Aghorenath* v. *Calcutta Tramways,* (1885) 11 Cal. 232 (Contract providing that deposit may be forfeited for breach of duty—the contingency being a certificate by a named person regarding breach of duty).

be satisfied.[1] Contract of life insurance is a contingent contract within the meaning of this section.[2] Agreement to purchase a property is not a contingent contract.[3]

32. Enforcement of contracts contingent on an event happening.—Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible such contracts become void.

Illustrations

(a) *A* makes a contract with *B* to buy *B's* horse if A survives *C*. This contract cannot be enforced by law unless and until *C* dies in *A's* lifetime.

(b) *A* makes a contract with *B* to sell a horse to *B* at a specified price, if *C*, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until *C* refuses to buy the horse.

(c) *A* contracts to pay *B* a sum of money when *B* marries *C*. *C* dies without being married to *B*. The contract becomes void.

Section 32 vis-a-vis Section 56.– Section 32 stands on a different footing from Section 56. The main distinguishing feature between them is that Section 32 will come into play when the contract is dissolved by its own force, whereas Section 56, will occupy the field when he contract crumbles down due to an impact of a violent nature with an outside force.[4]

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1. *Braunstein* v. *Accidental Death Insurance Co.*, (1861) 121 ER 904; *Hudson* v. *Buck*, (1877) 7 Ch. D. 683 : (Cf.) *Curtis Moffat* v. *Wheeler*, (1929) 2 Ch. 224; *Tredegar* v. *Harwood*, (1929) AC 72; *Andrews* v. *Belfield*, (1857) 140 ER 622. **See** *W.T. Commr. Mysore* v. *Vijayaba Dowger Maharani Saheb*, AIR 1979 SC 982 (Agreement by mother to pay the younger son in the event of elder son not paying-Held enforceable contract); *Rairam* v. *Hilla*, AIR 1949 FC 135 (Negative condition deemed satisfed if the condition is rendered impossible); *Nathulal* v. *Phoolchand*, AIR 1970 SC 546 : (1970) 2 SCR 85; *Firm of Peddanna* v. *K.V.S.S. Sons*, (Agreement between counsel and client).
2. *Chandulal* v. *I.T. Commr., Gujarat*, AIR 1967 SC 816 : 1967 (1) SCR 921. **See also** 1980 Tax LR 778 (Delhi) : 1979 Ker. LJ 429; *Manavalan* v. *Mary*, (1980) ALJ 43; *Venkatasubramanian* v. *Arthanariswari Chettiar*, 1980 TNLJ 417.
3. *Bhairon Prasad* v. *Tara Devi*, AIR 1980 All. 36 : 1979 All.LJ. 1324 : 1979 All.WC. 730.
4. *Smt. Durga Devi Bhagat* v. *J.B. Advani & Co. Ltd.*, 76 Cal. WN 528; *Kunjukrishnan* v. *State*, AIR 1983 Kerala 73.

Happening of uncertain event. – Contracts contingent on an uncertain event happening can be enforced only on the happening of the event,[1] and if the event becomes impossible, the contract itself becomes void. In *Narain Pattro* v. *Aukhoy Narain,*[2] there was a contract for sale of certain property contingent on the Court sanctioning it; when the Court refused to sanction the sale, the contract was held to have become void.

Where there was an agreement for sale of 'A' Schedule property provided that if sale deed could not be executed then 'B' Schedule Property to be sold, purchaser shall have option to decide the contingency and on the purchaser opting to purchase 'A' Scheduled property contingency cannot take place and specific performance ought to be made.[3]

Where the appellant and the respondent have agreed for their joint participation in a tender to be submitted by the appellant, the agreement which depends upon the acceptance of the tender is a contingent contract under Sec. 32 of the Contract Act and it cannot be enforced in the absence of tender being accepted.[4]

The principle of the section would appear to have been the ground of decision in what are called the "coronation cases" of which *Krell* v. *Henry* is the type.[5]

33. Enforcement of contracts contingent on an event not happening.—Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

Illustration

A agrees to pay *B* a sum of money, if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

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1. *Ma. E. Tin* v. *Ma Byaw,* (1928) Ran. 286 : 117 IC 242 (Ante-nuptial promise to convey property after marriage—Enforceable on marriage taking place). **See also** *Municipality Markapur* v. *Dodda Ramireddi,* AIR 1972 AP 299 : 1972 (1) ALT 239; *Balwant Singh* v. *Rajaram,* AIR 1973 Raj. 73; *Abdul Satar* v. *Shah Manilal,* AIR 1970 Guj. 12.
2. (1885) 12 Cal. 152; **see also** *Ismail* v. *Official Receiver,* (1928) Sind 63 : 105 IC 735 (Contract for sale contingent on sanction of authorities—Refusal of sanction—Contract void).
3. *R. Velammal* v. *R. Daivasigamani,* AIR 1993 Mad. 100 : 1993 (1) APLJ 63.
4. *U.P. Rajkiya Nirman Nigam Ltd.* v. *Indure Pvt. Ltd.,* AIR 1996 SC 1373, 1377 : (1996) 2 SCC 667 : 1996 (1) Arb. LR 236 : 1996 (1) CLT 501 (SC) : 1996 (2) Supreme 276 : 1996 (2) UJ 48.
5. See under Contingent Contracts, Vol. I.

34. When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.—If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

Illustrations

A agrees to pay *B* a sum of money if *B* marries *C*.

C marries *D*. The marriage of *B* to *C* must now be considered impossible, although it is possible that *D* may die and that *C* may afterwards marry *B*.

This section was applied in the case of *Jaunpur Sugar Factory, (In the matter of)*.[1] One R had agreed to take shares in the company if the company would appoint him its sole agent at a certain place. The company went into liquidation before appointing him as agent and R was entered on the list of contributories. It was held that R was not liable, as the contract to take shares was contingent on the company appointing him as agent. **[435-436]**

35. When contracts become void which are contingent on happening of specified event within fixed time.—Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced which are contingent on specified event not happening within fixed time.—Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

IIlustrations

(a) *A* promises to pay *B* a sum of money if a certain ship returns within a year. The contract may be enforced if the

1. (1925) 23 ALJ 608 : 89 IC 438 : (1925) All. 658.

ship returns within the year, and becomes void if the ship is burnt within the year.

(b) *A* promises to pay *B* a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

Scope.– With regard to the first clause of this section, it may be observed that, in such cases, there is no agreement that a specified event shall happen. As a rule the event itself is independent of the will of either-party and the contract itself partakes more of the nature of insurance.[1]

Where a deed relating to land recited that a certain sum would be paid within a certain time at a specified rate of interest, and wound up with a recital that on default of payment, the land would be deemed to have been sold to the other party for the amount, the Bombay High Court construed the document as a contingent sale as contemplated in this chapter.[2]

Where the petitioner incurred liability by purchasing three buses for hiring them to the respondent for a period of three years, refusal of extending the contract for a further period of three years as promised by the respondent is not proper.[3]

36. Agreements contingent on impossible events, void.—Contingent agreements to do or not to do anything, if an impossible event happens, are void whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Illustration

(a) *A* agrees to pay *B* 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b) *A* agrees to pay *B* 1,000 rupees if *B* will marry *A's* daughter *C*. *C* was dead at the time of the agreement. The agreement is void.

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1. *Maung Kywe* v. *Maung San Tin*, (1923) Ran. 26 : 70 IC 870.
2. *Aswath* v. *Chimabai*, (1926) 27 Bom. LR 1246 : 91 IC 330 : (1925) Bom. 107.
3. *Benathung Odyuo* v. *Union of India*, 2006 (1) CTLJ 44 (Gau).

CHAPTER IV

OF THE PERFORMANCE OF CONTRACT

CONTRACTS, WHICH MUST BE PERFORMED

37. Obligation of parties to contracts.—The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations

(a) *A* promises to deliver goods to *B* on a certain day on payment of Rs. 1,000. *A* dies before that day. *A's* representatives are bound to deliver the goods to *B*, and *B* is bound to pay the Rs. 1,000 to *A's* representatives.

(b) *A* promises to paint a picture for *B* by a certain day, at a certain price. *A* dies before the day. The contract cannot be enforced either by *A's* representatives or by *B*.

Performance of Contracts. – This chapter deals with the performance of contracts in general, the time, mode, and order of performance and also as to who is bound to perform and who can demand performance. **[432]** This section enacts that performance or offer of performance must be made by the promisor under a contract. Where goods were supplied to the defendant firm by the plaintiff and the receipt of the same had been admitted by the former, a presumption arises that an order was placed for the supply of such goods, with the plaintiff by the defendant-firm and it is immaterial whether the person actually placing the order was a partner of the firm or the person authorised by it. The firm will be bound by the obligation arising thereunder.[1] If the promisor happens to die before performance, his legal representatives must perform it unless there is a clear indication to the contrary in the contract. The latter part of the section merely affirms the rule of Common Law. If personal

1. *Kushalbhai Mahijibhai Patel* v. *Firm of Mohamudhussain Rahimbux*, AIR 1981 SC 977 : 1980 UJ SC 446 : 1980 (3) SCR 22 : 1980 Suppl. SCC 1.

considerations are of the foundation of the contract, if, for example, it is a contract involving the exercise of special skill, like painting a picture, the death of the promisor operates as a discharge of the contract. In the case of other contracts of a common kind *(e.g.,)* delivery of goods, the legal representatives will be bound to complete the contracts. [1]

Where the defendant company having agreed to pay a commission in connection with a contract relating to the supply of machinery with the plaintiff an agent of a foreign company, cannot avoid the payment of commission on the ground that the plaintiff as an agent is having an independent contract with the foreign company to receive the commission.[2]

When the relationship of the creditor and debtor having come to an end by virtue of repayment of the whole debt by the debtor and nothing is due towards the same, the lender cannot retain the documents received as security on the ground that some litigation is between the parties. [3]

In some other cases, the Act itself provides that the contract shall end with the promisor's death (*e.g.,*) indemnity, gratuitous bailment, and agency. Though the Act does not specifically deal with the devolution of the benefit of a contract, the principle would appear to be the same. Except where the contract is of a personal nature, (*e.g.,*) contract to marry; the representatives of a promisee may enforce the contract, subject to the provisions of any other enactments relating to the matter. **[457]**

It may be mentioned in passing that it will not be open to a promisor by a mere personal covenant made by himself to bind his representatives also to the performance of the obligation, after his death. Thus where a Zamindar by a registered agreement bound himself and his successors in title to pay an annual contribution to a Taluk Board in consideration of the latter constructing and maintaining a dispensary at the Zamindar's headquarters, it was held that as the obligation rested solely on covenant it could not be enforced against the Zamindari in the hands of persons who had succeeded to the Zamindari by survivorship.[4] The position may however be different if a charge had been created on the Zamindari. Where the lease deed shows that a person is a lessee

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1. *Vaman* v. *Changi,* (1926) 49 Bom. 862 : 27 Bom. LR 1261 : 91 IC 360 : (1926) Bom. 97; *U. Dun Htaw* v. *Maung Aw,* (1929) 7 Ran. 423 : 120 IC 240 : (1929) Ran. 274 (Specific performance of contract for purchase of property decreed against representative of deceased buyer); *Bishun Dayal* v. *Gaya Prasad,* (1928) Oudh 148 : 106 IC 831.
2. *Continental & Eastern Agencies* v. *Coal India Ltd.,* AIR 2003 Delhi 387 : 2003 (106) DLT 340.
3. *Eco Ceramics* v. *Karnataka State Financial Corpn.,* AIR 2001 Karn 167.
4. *Taluk Board, Koilpatti* v. *Chinnathambiar,* (1936) Mad. 709 : (1936) MWN 569 : 44 LW 353 : 164 IC 697.

it is not open to him to contend that he is not the lessee and that he is a benamidar for his father.[1]

Where the terms of contract provides that in the event of termination of contract if defendants fail to refund the outstanding advance the plaintiff can sell the securities without going to the court, it is only an option and not a condition precedent.[2] Where the tender relating to the purchase of salai / cheed gum was accepted by the respondent and the respondent made available excess quantity of material than the estimated quantity in several godowns, the respondent cannot stop the appellant tenderer from lifting such additional quantity of material.[3] Where the petitioners husband has met with an accident after taking six insurance policies for total sum of Rs. 2,20,000/- and these policies were to mature on different dates during the years 2004 to 2015 her prayer for the payment of the money for the full value of the policies cannot be accepted.[4]

Once a settlement having been made between the appellant and the State Government authorizing the former to collect rents on behalf of the State and also deposit money having been paid, the State cannot walk out of the contractual obligation.[5]

For the purpose of repudiation of a contract by a party, an intention must be manifested refusing to perform the contract and thereby setting the other party free from performance of his part.[6]

"Of any other law." – For instance, the Insolvency Acts provide for discharge of contracts in particular circumstances. Similarly, if the circumstances of the contract bring it within the provisions of the Usurious Loans Act, the court may excuse strict performance.[7]

Assignment of Contracts.– The Act does not deal specifically with assignment of contracts.

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1. *Ranivijaya Shani* v. *Prasad Motani,* AIR 1978 Pat. 91 : 1978 Pat.LJR 232 : 1978 BLJR 259; *Kashinath Bhaskar* v. *B. Vishveshwar,* AIR 1952 SC 153 : 1952 SCJ 150 : 1952 SCR 491.
2. *State of Orissa* v. *Hare Krishna Mahatab,* AIR 1992 Orissa 284.
3. *State of M.P.* v. *Ramswaroop Vaishya,* AIR 2003 SC 1067 : (2003) 2 SCC 254 : 2003 (1) Supreme 726 : ILD 2003 SC 232 : 2003 (1) Arbi. LR 344 (SC).
4. *Jameela C.K.* v. *L.I.C. of India,* AIR 2003 Ker 298 : (2003) 3 ILD 670 (Ker) : 2003 (3) Ker.LT 215.
5. *Mandar Madhusudan Bahudhandhi Swablambi Sahkari Sammittee Ltd.* v. *State of Bihar,* AIR 2007 Pat 94 : 2007 (2) Pat LJ 27 : 2007 (3) AIR JharR 476.
6. *Claude-Lila Parulekar* v. *Sakal Papers Pvt. Ltd.,* (2005) 11 SCC 73 : 2005 (3) Supreme 46 : (2005) 124 Comp.Cas 685 : 2005 (2) BankCas 542 : 2006 (1) CTLJ 465 (SC).
7. *Sadanand* v. *Aman Khan,* (1938) PWN 913 (FB).

The general rule may be said to be that the burden of a contract may not be assigned without the consent of the promisee; but the benefit of a contract is assignable if there is no obligation annexed to it, and if no personal qualifications or considerations were the foundation of the contract. **[461]**

The benefits of a contract are no doubt assignable but the assignee does not get a right to sue the other contracting party for breach of the contract itself except where he is claiming through a party to the contract by operation of law.[1]

If the intention of the parties is clear that the promise must be performed personally by the promisor, it must be performed by the promisor, it must be performed by the promisor himself, and no other. It is a question of facts in each case whether a particular contract has a real relation to the personal conduct of the party. In *Toomey* v. *Rama Sahi,*[2] the defendant Ram Sahi agreed with the proprietors of an indigo concern to sow indigo bought from them, on his land, and to weed and re-weed the indigo under the company's directions and when the harvest was ready, reap and load it according to instructions to be given by the company. The company assigned the benefit of the agreement to the plaintiff, who sued for damages for breach of the agreement. The court held that the contract must be construed as one which had been entered into with reference to the personal position, circumstances and qualifications of the assignor, and that the contract cannot be assigned.

On the other hand, in *Jaffer Meher* v. *Budge Budge Jute Mills Co.,*[3] where the contract was for instalmental delivery by the defendant company of certain gunny bags, and contained some buyer's options as to quality and packing and the purchaser assigned his rights to the plaintiff, the court held that no circumstance of a special or personal character existed in the case, so as to render the assignment in operative. Sale, J. said:

> "The rule as regards the assignability of contracts in this country is that the benefit of a contract for the purchase of goods as distinguished from the liability thereunder, may be assigned, understanding by the term benefit, the beneficial right or interest of a party under the contract and the right to sue to recover the

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1. *Ibrahim Isaphai* v. *Union of India,* ILR (1964) Guj. 928 : AIR 1966 Guj. 6.
2. (1890) 17 Cal. 115. **See also** *Namasivaya* v. *Kadir, Ammal,* (1893) 17 Mad. 168 : 4 MLJ 31; (Cf.) *Robson & Sharpe* v. *Drummond,* (1831) 109 ER 1156 : 36 RR 569 **see** *Hindustan Steel Works Construction* v. *Bharat Spun Pipe Co.,* AIR 1975 Cal. 8; *Khardah Co. Ltd.* v. *Raymon & Co.,* AIR 1962 SC 1810 : 1963 (3) SCR 183; *Delhi Cloth and General Mills* v. *Harnam Singh,* AIR 1955 SC 590 : 1955 SCJ 645 : 1955 (2) SCR 402; *Chhotalal* v. *Dilip Kumar,* AIR 1976 Cal. 337 : 1976 (1) Cal.LJ. 522 : 80 Cal.WN. 1052; *Bombay Housing Board* v. *Karbhase Naik & Co.,* (1975) SC 763; *Ram Baran* v. *Rammohit,* AIR 1967 SC 744 : 1967 (1) SCR 293.
3. (1906) 33 Cal. 702 : 10 CWN 755.

benefits created thereby. This rule is however subject to two qualifications: first that the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to fulfil, and next, that the contract is not one which has been induced by personal qualifications or considerations as regards the parties to it."

The question of assignability of executory contracts is intimately connected with the assignment of an actionable claim under the Transfer of Property Act. There would appear to be no doubt that the buyer's interest in an executory contract for sale and purchase of goods is within the definition of an actionable claim.[1] In *Sakalaguna Nayudu* v. *Chinna Munuswami Nayakar,*[2] where a counterpart to a sale deed provided that the vendee should reconvey the property to the vendor after 30 years, in case the vendor desired to get back the property, the Judicial Committee held that the right of the vendee was assignable to third parties. Their Lordships observed that the transaction was not a mere standing offer by the vendee which could ripen into contract only on the acceptance by the vendor by tender of the purchase money. This assignability of the vendor's interest has not been the subject of judicial decision so far, but there is no special circumstance militating against the applicability of the reasoning in regard to the vendee's interest. The distinction, which is important, is that between an actionable claim and a mere right to sue. Thus the benefit of a contract will come under the category of an actionable claim. But the right to damages on breach is nothing more than a bare right to sue, and such a right cannot therefore be assigned.[3] On the other hand, in an Allahabad ruling, the benefit of a contract for the supply of goods has been held assignable.[4]

The assignee of a party to a contract will be bound by an arbitration clause therein, if the subject matter of the reference is capable of assignment.[5]

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1. *Jaffer Meher* v. *Budge Budge Jute Mills Co.,* (1906) 33 Cal. 702 : 10 CWN 755; *Hansraj* v. *Nathoo,* (1907) 9 Bom. LR 838.
2. (1928) 51 Mad. 553 : 55 MLJ 198 followed on the point as to standing offer or contract in *Venkatachalam* v. *Sethuram Rao,* (1933) 56 Mad. 433 : 64 MLJ 354 : 37 LW 340 : 142 IC 315 : (1933) MWN 315 : (1933) Mad. 322 (FB); **see also** *Hansraj* v. *Nathoo,* (1907) 9 Bom. LR 838. **see also** *Fazilka Electric Supply Co.* v. *I.T. Commr.,* AIR 1963 SC 464 : 1963 (1) SCJ 627.
3. *Yadavendra* v. *Shrinivasa,* (1926) 47 Mad. 698 : 80 IC 5 : 20 LW 548 : (1925) Mad. 62 : 47 MLJ 435; *Varahaswami* v. *Ramachandra,* (1915) 38 Mad. 138; *Hirachand* v. *Nemchand,* (1923) 47 Bom. 719 : 73 IC 465 : 25 Bom. LR 445 : (1923) Bom. 403; **see also** *Abu* v. *Chander,* (1909) 36 Cal. 345.
4. *Rameshwar* v. *Jainarain,* (1934) All. 960 : 153 IC 224, **see** *Damodaran, Abkari* v. *State of Kerala,* (1969) 2 Ker. 95 : 1969 Ker. LT 686 (Party cannot avoid contract retaining benefit under it); *Rangiah* v. *Partha,* AIR 1947 Mad. 258 (Difference not over assignment of a right to sale and right to sue pointed out).
5. *Mc. Kenzies Ltd.* v. *Sulleman & Co.,* (1933) Sind 75 : 140 IC 626.

38. Effect of refusal to accept offer of performance.— Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions:

(1) it must be unconditional;

(2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;

(3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing, which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration

A contracts to deliver to *B* at his warehouse, on the 1st March 1873, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, *A* must bring the cotton to *B's* warehouse, on the appointed day, under such circumstances that *B* may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

Tender. – This section deals with the subject of tender or attempted performance. As we saw, a valid tender has all the features of performance and falls short of actual performance only because of wrongful refusal by the other party. **[468]**

The requisites of a valid tender are:

(1) **IT MUST BE UNCONDITIONAL** [1]—A tender of money is not vitiated by merely asking for a receipt,[2] but a demand for a receipt and a full discharge is not unconditional tender. The debtor may, if so minded, pay the full amount demanded under protest and thus reserve the right to plead that a lesser sum is due. A tender does not become conditional by the mere fact that the debtor specifies the account on which the money is paid.[3]

(2) **TENDER MUST BE OF THE PROPER QUANTITY, OR OF THE WHOLE DEBT, AS THE CASE MAY BE.**—Thus a tender of goods priced higher than at the contract price is improper.[4] Tender of a part of a debt or in small instalments (unless provided for in the contract) is also invalid.[5] So is a tender based on a reduced rent,[6] or of a sum not ascertained.[7]

The sending of a cheque for a smaller amount along with a letter to the effect that it was in full satisfaction does not amount to payment or tender of the amount on any condition that acceptance of the amount is in full and complete discharge of the entire debt.[8]

(3) **TENDER MUST BE MADE AT THE PROPER TIME.**—Thus a tender before the due date is ineffective.[9]

A tender accepted beyond time is not valid. Where the train by which the representative who came to submit the tender ran unusually late on the way and the delay being beyond the control of the representative the tender was accepted by the authority beyond the time fixed by the tender notice, it was held that the acceptance of the tender was not valid.[10]

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1. *Sabapathy* v. *Vanmahalinga,* (1915) 38 Mad. 959; *Naraindas* v. *Abinash,* (1922) 44 MLJ 728 : 16 LW 780 : (1922) MWN 791 : 27 CWN 299 : 21 ALJ 201 : (1921) PC 347 : 69 IC 273; *Sitaram* v. *Ram Rao,* (1931) Nag. 91 : 130 IC 817; *Nanu* v. *Manchu,* (1890) 14 Mad. 49; *Sham Sunder* v. *Munshi Mushaheblal,* (1923) 2 Pat. 534 : 72 IC 907 : (1923) Pat. 418. **See also** *Abdul Hamid* v. *Manilal,* 1968 MPLJ 451 : 1968 Jab. LJ 556.
2. *Jagat* v. *Nabagopal,* (1907) 34 Cal. 305 : 5 CLJ 270.
3. *Sati Prasad* v. *Manmatha Nath,* (1913) 18 CWN 84 : 18 IC 442; *International Contractors Ltd.* v. *Prasanta Kumar,* AIR 1962 SC 77 : (1961) 2 SCR 579; (In an agreement to repurchase no question of formal tender arises).
4. *Sivaramier* v. *Subbier,* (1922) Mad. 28 : 15 LW 9 : 70 IC 346.
5. *Biharilal* v. *Nasimannessa,* (1923) 1 37 CLJ 222 : 73 IC 482 : (1923) Cal. 527; *Haji Abdul Rahiman* v. *Haji Noor,* (1891) 16 Bom. 141; *Behari Lal* v. *Ram Ghulam,* (1902) 24 All. 461: (1902) AWN 135; *Simson* v. *Gora Chand,* (1883) 9 Cal. 473 ; *Abdul Ghani* v. *Ali Begum,* (1930) Oudh 208 : 123 IC 58; *Watson* v. *Dhonendra,* (1877) 3 Cal. 6.
6. *Durga Prasad* v. *Rajendra,* (1914) 41 Cal. 493 : 40 IA 223 : 18 CWN 66 : (1914) MWN 1 : 19 CLJ 95 : 26 MLJ 25 : 21 IC 73 : 16 Bom. LR 42.
7. *Lal Batcha* v. *Narainaswamy,* (1910) 34 Mad. 320 : 12 IC 502.
8. *Shyamnagar Tin Factory (P) Ltd.* v. *Snow White Food Products Co. Ltd.,* AIR 1965 Cal. 541.
9. *Eshahuq* v. *Abdul Bari,* (1904) 31 Cal. 183.
10. *Rajkumar Patra* v. *Union of India,* AIR 1981 Orissa 143 : (1981) 51 Cut. LT 81.

(4) **TENDER MUST BE IN PROPER FORM.**—(*a*) A tender by means of a cheque is not proper unless the other party accepts it or has asked for payment by cheque.[1] Where a cheque was tendered but returned only on the ground of insufficiency, and subsequently it was found that the amount of the cheque was the correct sum due, it was held that the tender was good.[2]

(*b*) A mere offer by post to pay the amount due or execute a document does not amount to a valid tender of performance.[3] Similarly, a mere offer through a solicitor to pay a debt due will be ineffective.[4]

(*c*) The money tendered must be current coin of the realm.[5]

(5) **TENDER MUST BE BY A PERSON READY, ABLE AND WILLING TO PERFORM.**—In a case of money payment, the tender must be accompanied with actual production of the cash. Thus, in ordinary money claims, a tender before suit must be followed up by payment into Court.[6] In case of goods to be delivered, it is the duty of the tenderer to go to the other party's place of business and inform him of his readiness to deliver.[7] Where a place is mentioned in the contract, the vendor must bring them to the place and give the buyer an opportunity to satisfy himself that they are the goods he had bargained for. A mere intimation that the goods are at the vendor's place and will be forwarded to the place named after examination and approval is not a proper offer of performance.[8] In order to be considered ready and willing, a person need not be in actual physical possession of the goods. It is enough if he has control over them.[9]

(6) **THE TENDER MUST GIVE REASONABLE OPPORTUNITY FOR INSPECTION.**—A tender made late in the day so that the other party

1. V.R. *Venkataramier* v. *Gopalakrishna,* (1929) 52 Mad. 322 : 116 IC 844 : 29 LW 220 : 56 MLJ 255 : (1929) Mad. 230; *Bolye Chund* v. *Moulard,* (1878) 4 Cal. 572. **See** *Periasami Thevar* v. *Nanasivayam Pillai,* 92 LW 32. (If cheque is accepted, later on it cannot be objected), 1976 Ren. CJ 388 (Delhi); *Mohanlal Sah* v. *Sabitri Debi,* AIR 1980 Pat. 182.
2. *Ismail* v. *Abdulla,* (1931) 55 Bom. 525 : 129 IC 748 : 32 Bom. LR 1660 : (1931) Bom. 118.
3. *Sabapathy* v. *Vanmahalinga,* (1915) 38 Mad. 959 (offer to execute document); *Veerayya* v. *Sivayya,* (1914) 27 MLJ 482 : 26 IC 121 (Offer by post to pay); *Kamayya* v. *Devapa,* (1896) 22 Bom. 440.
4. *Ismailbhai* v. *Adam Osman,* ILR (1938) 2 Cal. 337 : 42 CWN 1023.
5. (Cf.) *Trimbak* v. *Sakharam,* (1891) 16 Bom. 599.
6. *Arunachala* v. *Govindaswami,* (1931) 55 Mad. 458 : 135 IC 907 : 62 MLJ 266 : (1932) Mad. 109 : (1931) MWN 1226 : 34 LW 843; *Sabapathy* v. *Vanmahalinga,* (1915) 38 Mad. 959; *Behari Lal* v. *Ram Ghulam,* (1902) 24 All. 461; *Bakhalchandra* v. *Baikuntanath,* (1928) Cal. 874 : 32 CWN 1082 : 117 IC 687; *Haji Abdul Rahman* v. *Haji Noor,* (1891) 16 Bom. 141.
7. *Juggernath* v. *Ram Dayal,* (1883) 9 Cal. 791.
8. *Janoo & Co.* v. *Joseph Heath & Sons,* (1918) 46 IC 497.
9. *Arunachalam* v. *Krishna Iyer,* (1925) 49 MLJ 530 : (1925) Mad. 1168 : 22 LW 265 : (1925) MWN 324 : 90 IC 481; *Chengravelu* v. *Venkanna,* (1925) 49 MLJ 300 : (1925) Mad. 571 : 86 IC 299; *Lakshmana* v. *Ramalinga,* (1925) 48 MLJ 522 : (1925) Mad. 888 : 90 IC 206.

could not make inspection of the goods is ineffective.[1] But this duty of giving reasonable inspection does not extend to proving to the promisee's satisfaction the identity of the goods.[2] As pointed out in *Andrew Yule & Co. In re*[3] the normal place of inspection is the place to delivery.

In a Calcutta ruling, it has been held that an offer through a solicitor to pay a debt due, does not of itself afford a reasonable opportunity to the promisee of ascertaining that the promisor is able to perform his promise and that therefore such an offer will not constitute a valid tender.[4]

(7) **TENDER MUST BE MADE TO THE PROPER PERSON.**— In *Pandurang* v. *Dadabhoy,*[5] where the debtor was ready with the full amount, but the executors of the deceased creditor did not take steps for obtaining probate, so as to give a valid acquittance, it was held that there had been a proper tender. In *Adm. General, Madras* v. *Jagirdar of Arni,*[6] a notice of readiness and willingness to pay, given to one interested in the estate of deceased creditor was held to be a proper tender. In case of joint promisees; tender to one is valid.[7] (*e.g.,*) tender to one joint lessor or co-mortagagee.

The heirs of single promisee are for the purpose of an unaccepted tender in the same position as joint promisees and so tender to one of them is valid.[8] Where a tender of performance is to be made to such heirs, it should be on the same conditions as those required in the case of the original promisee.[9]

Tender when unnecessary.—"The practice of the Court is not to require a party to make a formal tender if, from the facts stated in the bill or from the evidence it appears that the tender would have been a mere form and the party to whom it was made would have refused to accept the money."[10]

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1. *Muthukaru Alagappa* v. *Krishna Iyer,* (1927) Mad. 65 : 97 IC 866; *Ruttonsey* v. *Jamnadas,* (1882) 6 Bom. 692; *Sati Prasad* v. *Manmatha Nath,* (1913) 18 CWN 84 : 18 IC 442; (Cf.) *Isherwood* v. *Whitmore,* (1843) 152 ER 837.
2. *Arunachalam* v. *Krishnier,* (1925) 22 LW 265 : 90 IC 481 : (1925) MWN 324 : (1925) Mad. 1168 : 49 MLJ 530.
3. (1932) 59 Cal. 928 : (1932) Cal. 879.
4. *Ismailbhai* v. *Adam Osman,* ILR (1938) 2 Cal. 337 : 42 CWN 1023.
5. (1902) 26 Bom. 643 : 4 Bom. LR 453.
6. (1908) 4 MLT 335.
7. *Krishna Rao* v. *Manaji,* (1874) 11 BHCR 106; *Barber Maran* v. *Raman,* (1897) 20 Mad. 461 : 7 MLJ 269.
8. *Bejoy Gopal* v. *Nabin Bala,* (1939) 44 CWN 423.
9. *Ismailbhai* v. *Adam Osman,* ILR (1938) 2 Cal. 337 : 42 CWN 1023.
10. *Hunter* v. *Daniel,* (1845) 67 ER 712 (717), cited in *Venkatarayanim* v. *Zamindar of Tuni,* (1923) 46 Mad. 108 : 17 LW 383 : 50 IA 41 : 71 IC 1035 : 44 MLJ 631 : 25 Bom. LR 541 : 38 CLJ 34 : 28 CWN 25 : (1923) PC 26; *Ramaswami* v. *Palaniappa,* (1930) 30 LW 898 : 122 IC 37 : (1930) Mad. 364.

Effect of Tender.—The effect of a valid tender is to stop the running of interest on the amount payable. A valid tender on a contract of debt is as much a performance and discharge of a debtor's duty as actual payment. [1]

Discharge by one joint promisee.—In connection with the last clause of the section, the question has arisen whether a release by one of several joint promisees would discharge the promisor as against all the promisees. On this point, there is a sharp cleavage of judicial opinion among the different High Courts. The Madras High Court in *Barber Maran* v. *Ramana,* [2] held that a release by one co-mortgagee discharges the mortgagor against the other mortgagees also. This case was followed by a Full Bench in *Annapurnamma* v. *Akkayya,* [3] where it was held that one of several payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other payees, and in *Ramaswami* v. *Chandra Kotayya* [4] with the qualification, that the promisor must have made actual payment. But in *Ahinsa Bibi* v. *Abdul Kader,* [5] the Court declined to extend the principle of *Barber Maran's case* to cases of co-heirs of a single promisee, and expressed doubts as to the correctness of the decision. In *Sheikh Ibrahim* v. *Rama Iyer,* [6] another Bench of the Madras High Court held that a payment in collusion with one co-promisee will not discharge the promisor. And in *Ankalamma* v. *Bellam Chenchayya,* [7] where a bond was executed in favour of the manager of a joint Hindu family, it was held that a payment to a junior member in the manager's lifetime would not constitute an effective discharge of the bond. The Bombay, Calcutta, Patna, Allahabad and Lahore High Courts, [8] have differed from the principle of the decision in *Barber Maran's case.*

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1. *Dasherathy* v. *Khondkar,* (1928) 55 Cal. 624 : 32 CWN 359 : (1928) Cal. 68; *Gajendra* v. *Sita,* (1926) Cal. 310 : 90 IC 637.
2. (1897) 20 Mad. 461 : 7 MLJ 269; *Appavu* v. *Nanjappa,* (1913) 25 MLJ 329; **but see** *Arunachalam* v. *Ramasamy,* (1928) MWN 518 : 30 LW 723 : 112 IC 501 : (1928) Mad. 933.
3. (1913) 36 Mad. 544 : 24 MLJ 333 : (1913) MWN 328 : 19 IC 12 : 13 MLT 268; *Karishengamma* v. *Jattikrishnamma,* (1909) 1 IC 219 : (1924) 48 Mad. 693 : 47 MLJ 840 : 1925 Madras 261 : 87 IC 297. **See** *Ananda Prakash Dey* v. *Lokendranath Maulik,* AIR 1972 Orissa 269 : 38 Cut.LT 402 : (1972) 1 Cut.WR. 530. (Payment of rent to a co-lessor only does not discharge the lessee to pay. What is due to new co-lessor).
4. (1924) 48 Mad. 693 : 47 MLJ 840 : (1925) Mad. 261 : 85 IC 297.
5. (1901) 25 Mad. 26; **see also** *Ramaswami* v. *Muniandi,* (1910) 20 MLJ 709 : 5 IC 343 : 7 MLT 253 : (1911) MWN 550; *Sitaram* v. *Shridar,* (1903) 27 Bom. 292 : 5 Bom. LR 91.
6. (1911) 35 Mad. 685 : 21 MLJ 508 : 10 IC 874 : (1911) 1 MWN 442. **See also** *Arunachalam* v. *Ramasami,* (1928) MWN 518 : 30 LW 723 : 112 IC 501 (Payment to one co-mortgagee does not discharge).
7. (1918) 41 Mad. 637 : 34 MLJ 315 : 7 LW 221 : 45 IC 419.
8. *Gendal Raju* v. *Maganlal,* (1928) 30 Bom. LR 1111 : 113 IC 618 : (1928) Bom. 420 (Collusive payment to one joint landlord no release); **see** *Sitaram* v. *Shridhar,* (1903) 27 Bom. 292 : 5 Bom. LR 91 (Payment to a co-heir); *Gulzar* v. *Trailokyanath,* (1928) Cal. 125 : 105 IC 751; *Husseinara* v. *Rahimannessa,* (1911) 38 Cal. 342 : 13 CLJ 3 : 8 IC 837; *Sheikh Abdul Hakim* v. *Adwaitachindra,* (1918) 22 CWN 1021 : 49 IC 63; *Syed Abbas* v. *Misri Lal,* (1921) Pat. 27 : 5 PLJ 376 : 56 IC 403 (Payment to co-mortgagee); *Shyam Lal* v. *Jagannath,* (1937) All. 527 : (1937) ALJ 395 : 168 IC 178; *Sukh Lal* v. *Kanjman,* (1930) 28 ALJ 290 : (1930) All. 98; *Jauhari* v. *Ganga Sahia,* (1919) 41 All. 631 : 17 ALJ 731 : 51 IC 107; *Mt. Malan* v. *Tara Singh,* (1922) Lah. 64 : 4 LLJ 23 : 63 IC 744; *Mathura Das* v. *Nizam Din,* (1917) 41 IC 921 : 68 PR 1917 (FB).

In a Full Bench decision of the Rangoon High Court,[1] the question arose whether a joint payee of a promissory note could effectively discharge the maker, so as to bar a claim by the other payees. The leading judgment of Leach, J., made an exhaustive review of the authorities and showed that the view of the majority in the Madras Full Bench case in *Annapurnamma* v. *Akkayya* above, has not found acceptance in other High Courts. With reference to the concluding portion of Sec. 38, it was pointed out that it has reference only to the consequence of refusal and not the consequence of acceptance. The Full Bench accordingly held that a co-promisee under a bond could not give a valid discharge so as to bind the other payees.

In the case of an agent of two joint principals the Patna High Court has held that, as the liability of an agent does not arise out of contract, but is annexed by law to his office, the agent is not exonerated by accounting to one principal, and that Sec. 38 has no bearing at all on the question.[2]

Subsequently call for tender after more than about a year later does not vest a tenderer right for accepting the lowest tender by him for certain items pursuant to earlier notice.[3]

As the section deals only with legal consequences of the *refusal of a tender of performance,* it may be doubted whether by mere implication, *the acceptance of a proffered performance* by one of several promisees may be said to discharge the claims of the rest. It is not possible to read the section to mean that where a promisor makes to a joint promisee an offer of performance of a promise which the joint promisees are entitled to enforce the acceptance of the offer by one of the joint promisees will have the effect of treating the promise as having been performed in respect of all the joint promisees.[4]

Court cannot sit in judgment over the assessment of experience by the authorities while awarding of work to a tenderer, as per tender notification.[5]

39. Effect of refusal of party to perform promise wholly.—When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

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1. (1937) Ran. 227 : (1937) Ran. LR 1 : 170 IC 95.
2. *Jagdip* v. *Rajo Kuer,* (1923) 2 Pat. 585 : 75 IC 1022 : (1923) Pat. 464.
3. *Red Rose Co-operative Labour & Construction (LOC) Ltd.* v. *State of Punjab,* AIR 1999 P & H 244 (DB).
4. *Govindlal* v. *Firm Thakurdas,* AIR 1974 Bom. 164 : 1974 Mah.LJ. 106. (Case law on the point discussed).
5. *Avula Construction (P) Ltd.* v. *Senior Divisional Electrical Engineer, Traction Distribution, Eluru,* AIR 1999 AP 318 : 1999 (3) ALT 236.

Illustrations

(a) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract.

(b) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her at the rate of 100 rupees for each night. On the sixth night *A* wilfully absents herself. With the assent of *B*, *A* sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract, and cannot now put an end to it but is entitled to compensation for the damage sustained by him through *A's* failure to sing on the sixth night.

Anticipatory Breach – English Law.– A breach of contract may be of two kinds. It may be an actual, present breach, or it may be a constructive breach, or as it is called in English Law, 'anticipatory breach.' An actual breach is possible only when the time for performance arrives; but in certain circumstances, a party is constructively deemed to have broken the contract, though the time for its performance may not have arrived. For instance, he may expressly repudiate his obligations under the contract, (*i.e.*), communicate to the promisee his intention not to perform the contract. Or, he may so conduct himself as to preclude absolutely the possibility of performance at the due time. In such a case, the other party is entitled to take the party repudiating at his word, rescind the contract, absolve himself from all obligations under it, and have recourse to the remedial rights arising upon a breach of contract. The law casts no duty on him to wait till the time for performance arrives for enforcing his remedial rights. This is equally so even in cases of repudiation of contingent contracts before the time for performance has arrived. This is what is called in English Law "anticipatory breach." **[520]**

The person making a breach of the contract cannot himself rescind it. The right to rescind or continue the contract lies with the other party.[1]

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1. *S.V. Harihara Iyer* v. *Mathew George*, AIR 1965 Ker. 187 : 1964 Ker.LJ. 638 : 1964 Ker.LJ. 546.

But the injured party need not take any notice of the anticipatory breach. He may elect, if so minded, to treat the contract as subsisting, and wait to enforce his rights until the due date for performance. In such a case, the contract is kept alive for the benefit of both parties, and it would therefore be open to the party in default to perform it before the due date or to take advantage of any supervening circumstance which may have the result of discharging the contract.

This is a brief is the English Law, on the subject as laid down in the leading cases of *Hochster* v. *De La Tour* [1], *Frost* v. *Knight* [2] and *Avery* v. *Bowden* [3] and the section merely formulate the English rule. **[463]** The principles deducible from the English authorities have been set out in detail in *Nannier* v. *Rayulu Iyer & Co.*[4]

"Refused to Perform".–A refusal to perform must relate to an essential part of the contract. It must be such that an intention to repudiate the contract in its entirety may be inferred from it. The breach must be substantial so as to go to the root of the contract. Therefore, a mere refusal to perform at some time before the due date will not prevent a person from performing at the appointed time, provided the other party has not accepted the refusal as repudiation.[5] Where the plaintiff has given time to the defendant for vacating the premises and delivering the possession before expiry of 24-06-1984 and the defendant has refused in view of his request through his earlier letter, and when a suit is filed by the plaintiff before the expiry of the date fixed by him no cause of action arises as there was no step to put an end to the contract and thus Sec. 39 is not attracted.[6]

If an employer suspends an employee and prevents him from reporting for duty in the absence of any term of the contract of service between the parties, it is open to the employee to treat it as a breach of contract on the part of the employer and seek his remedies on that footing.[7]

The question as to what amounts to a refusal of performance has been material mostly in cases of contracts for sale and purchase of goods in

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1. (1853) 118 ER 922.
2. (1872) 7 Ex. 111.
3. (1856) 119 ER 1119.
4. (1926) 49 Mad. 781 : 93 IC 673 : 2481 W 535 : (1926) Mad. 778. **See** *Motilal Srinivasa Sarda* v. *Netha Co-operative Spinning Mills Ltd.*, AIR 1975 AP 169.
5. *Phulchand* v. *Jugal Kishore,* (1927) 8 Lah. 591 : 106 IC 100 : (1927) Lah. 623; *Satna Central C& L.M. Bank Ltd.* v. *Agarwal,* 1969 MPWR 807 : 1969 MPLJ 879 : 1969 Jabl. LJ 888. **See also** 1978 Tax LR 242. (Auction of foreign liquor shops—Highest bidder withdrawing-Shops held by forfeiting grant—Contract gets discharged).
6. *Union Bank of India* v. *Vithalbhai Pvt. Ltd.,* 2002 (2) Civil LJ 85 (Cal) (DB).
7. *Rockweld Electrodes India Ltd.* v. *K.C. Vijeegan,* (1979) 2 MLJ 494 : (1980) 1 Lab. LJ 54.

instalments. On this point the original English rule as laid down in *Withers* v. *Reynolds,*[1] has been modified by later cases to this extent, that a mere failure to pay for one instalment will not discharge the seller from his obligations, unless it reasonably leads to the inference that similar breaches will be committed in relation to subsequent deliveries.[2] In cases of this kind, it is a question of construction of the terms of the particular contract whether the breach of contract alleged is a virtual repudiation of the contract *in toto* or a breach merely of a part such as to give only to a claim for compensation.

Thus in *Subbier* v. *Venkatachalapathy Iyer,*[3] a mere omission to take delivery of a portion of the goods deliverable under the contract was held not to be a repudiation or refusal. In an early Calcutta case, *Sooltan Chand* v. *Schiller*[4] the contract was for sale of linseed, in the course of two months, the terms being cash on delivery. Some deliveries were made and when a large sum remained due from plaintiffs, the defendants declined to continue deliveries. The plaintiffs promised to pay the dues on adjustment of certain allowances for empty bags. The defendants persisted in their refusal. The plaintiffs sued for damages for non-delivery, and the Court held there had been no refusal to perform on the plaintiff's part such as to justify the defendants in putting an end to the contract.

Similarly, in *Rash Behary Saha* v. *Nrittya Gopal,*[5] a case of contract for sale of sugar in four shipments, cash being payable before delivery, the plaintiff on receiving intimation of the arrival of the first shipment asked for time to pay. The defendant declined to give time, cancelled the contract, and refused to deliver the second shipment even though the plaintiff offered to pay for it. In a suit for damage for non-delivery, it was held that there had been no such refusal to perform, on the part of the plaintiff, as would entitle the defendant to put an end to the contract. But, in *Khetra Mohan* v. *Benode Behary,*[6] where the buyer failed to take delivery of the first of two instalmental deliveries, and the

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1. 2 B & Ad. 882.
2. *Simpson* v. *Crippin,* (1872) 8 QB 14; *Freeth* v. *Burr,* (1874) 9 CP 208; *Mersey Steat Co.*v. *Naylor* (1884) 9 AC 434; *Maple Flock & Co.* v. *Universal Furniture Products,* (1934) 1 KB 148.
3. (1925) Mad. 1290 : (1925) MWN 592 : 91 IC 580. **See** *Kumarasami* v. *Karuppusami,* AIR 1953 Mad. 380; *Soundraraj Nair* v. *Annamalai,* AIR 1960 Mad. 480; *West Bengal Financial Corporation* v. *Gluco Series (P) Ltd.,* AIR 1973 Cal. 268.
4. (1878) 4 Cal. 252. **See also** *Simson* v. *Veerayya,* (1886) 9 Mad. 359; *Volkart Bros.* v. *Rutnavelu,* (1895) 18 Mad. 63; *Aryavbatt Oversees (P) Ltd.* v. *Kay Bar Biscuits (P) Ltd.,* AIR 1983 NOC 14 (Delhi).
5. (1906) 33 Cal. 477. **But see** *Raghunath* v. *Mohammad Ali,* (1928) All. 117 : 106 IC 268; *Md. Mumtaz Ali* v. *Altaf-ul-Rahman,* (1922) Oudh 259 : 69 IC 789.
6. (1930) 34 CWN 33 : 126 IC 545 : (1930) Cal. 382 ; AIR 1957 Orissa 8; *State of Maharashtra* v. *Digambar,* AIR 1979 SC 1339 (Case of Works contract—Time was the essence of the transaction).

seller thereupon put an end to the contract and thereafter the buyer demanded delivery, the Court held that the buyer had broken a substantial part of the contract and therefore, he was not entitled to damages.

Repudiation must be total, absolute and clear as laid down in *Steel Bros. & Co.* v. *Dayal Khatav.*[1] So mere complaints about delay in carrying out a contract or weak protests against the other party's right to put an end to it will not amount to a refusal to perform.[2] Nor will a conditional refusal amount to repudiation.[3] But in *Lakhmidas* v. *Dorab Tata,*[4] a refusal to perform was implied from a failure to make out a marketable title even after notice. The promisee cannot rescind the contract on mere suspicion that the promisor may refuse performance. There must be clear tangible evidence of refusal.[5]

MORTGAGES.—In the case of mortgages of immovable property, containing covenants by the mortagagee to pay off subsisting encumbrances, the principle of the section has been applied so as to preclude the party in default from claiming the benefit of particular covenants. Thus a usufructuary mortgagee who failed to pay off creditors, according to the terms of the deed, was denied the right to possession,[6] and a mortgagee who did not pay off a portion of prior encumbrances was penalised by redemption being allowed before the term.[7]

SALE OF IMMOVABLE PROPERTY.—The principle of the section has been applied to cases of sale of immovable property. Where a contract for sale contained a clause for immediate delivery of possession by the vendor and the evidence showed he was unable to deliver such possession, the buyer was held justified in rescinding the contract.[8]

"Disabled himself"—Where a party by his own act makes it impossible for him to perform his contract at the due date, there is a constructive breach of contract, and the other party is entitled forth with to

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1. (1924) 47 Bom. 924 : 87 IC 67 : (1924) Bom. 247 : 25 Bom. LR 1063; *Master* v. *Garret & Taylor,* (1931) Ran. 126 : 131 IC 220.
2. *Burn & Co.* v. *Thakur Saheb,* (1924) 28 CWN 104 : 83 IC 260 : (1924) Cal. 427; *Sivaramier* v. *Subbier,* (1922) 15 LW 9 : 70 IC 346 : (1922) Mad. 28; *Rockweld Electrodes* v. *K.C. Vijayan,* 92 LW 332-338; *Mishra Bandhakaryalaya India Ltd.* v. *Koshal,* AIR 1970 MP 261: 1969 MP WR 829 : 1970 MPLJ 475 : 1970 JLJ 723 (Breach of contract in respect of payment and royalties to author).
3. *Phulchand* v. *Jugal Kishore,* (1927) 8 Lah. 501 : 106 IC 10 : (1927) Lah. 693; *Rajaram* v. *Abdul Rahim,* (1915) 31 IC 450.
4. (1927) 51 Bom. 247 : 29 Bom. LR 19 : (1927) Bom. 195.
5. *Panchapagesa* v. *Arunachala,* (1933) MWN 122. **See** *Ranchhoddas* v. *Devaji,* AIR 1977 SC 1517 : (1977) 2 SCR 621 : (1977) 3 SCC 584.
6. *Avantika Prasad* v. *Gur Baksh,* (1924) Oudh 425 : 85 IC 9 : 270 C 60.
7. *Sanwaley Prasad* v. *Sheo Sarup,* (1927) 2 Luck. 279 : 98 IC 770 : (1927) Oudh 12.
8. *Punchapagesa* v. *Arunachala,* (1932) MWN 122; **see** *Mihura Prasad* v. *Ram Sarup,* (1934) A. 617 : 149 IC 304.

enforce his rights as on a breach.[1] The commonest instance is an agreement to sell a chattel by a specified date and sale of the same to a third party before that date. In *Sanwaley* v. *Sheo Sarup,*[2] the failure by a mortgagee to pay off a prior charge according to the terms of the document was considered sufficient to entitle the mortgagor to redeem before the term. In *Subba Rao* v. *Devu Shetti,*[3] where the facts were *in pari materia,* the Court held that the mortgagee could not sue for interest alone on part of the sum advanced on the ground that the mortgagor who did not receive the consideration of the mortgage in full, may rescind it. But the correctness of this view has been, questioned in some later cases.[4]

Rights of Promisee.—As already said, renunciation by the promisor vests an option in the promisee to treat the contract as broken and sue for damages as on a breach. Where a contract for the sale of immovable property is cancelled by the vendor himself before the agreed date fixed for the performance of the contract the vendee can immediately sue for refund of the amount deposited by him and no question of readiness and willingness to perform the contract on the part of the vendee arises in such a case.[5] The case of *Purushothamdas Thribuvandas* v. *Purushothamdas Mangalas*[6] also illustrates the position. Where parties had been betrothed to each other, and it only remained to fix a day for the marriage ceremony, a definite expression of unwillingness to marry by one party was held to entitle the other to sue for damages as if a breach had occurred just then. If, however, the party entitled does not exercise he option, as will be seen from the latter part of the section, the contract will be kept alive for the benefit of both parties. Thus, where a person had committed default in payment in accordance with the contract, but the other party instead of accepting it as a repudiation and refusal to perform, chose to treat the contract as subsisting and partially performed it, the Judicial Committee held that payment could not be insisted on till complete delivery was made.[7] In one Madras case *Ramier* v. *Ramudu Iyer,*[8] where the seller had elected to treat the contract as subsisting in spite of a refusal by the buyer to take delivery of one

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1. *Synge* v. *Synge,* (1894) 1 QB 466; *Saranpet* v. *Punno,* (1931) 134 IC 779 : 32 PLR 593.
2. (1927) 2 Luck. 279 : 98 IC 770 : (1927) Oudh 12.
3. (1894) 13 Mad. 126.
4. *Kandaswami* v. *Ramaswami,* (1919) 42 Mad. 203; *Subbaraya* v. *Manikka,* (1911) 1 MWN 265 : 10 IC 258; *Rasik Lal* v. *Ram Narain,* (1912) 34 All. 273.
5. *Gurdial Singh* v. *Pearey Lal,* (1981) 20 DLT 318 : AIR 1982 Delhi 120.
6. (1897) 21 Bom. 23.
7. *Burn & Co.* v. *Lukhdirji,* (1925) 30 CWN 145 : 23 ALJ 806 : 90 IC 52 : (1925) PC 188. **See also** *Fazal* v. *Mangaldas,* (1922) 46 Bom. 489 : 23 Bom. LR 1144 : 66 IC 726 : (1922) Bom. 303.
8. (1933) 56 Mad. 304 : 37 LW 210 : (1933) MWN 39 : (1933) Mad. 176 : 64 MLJ 199. **See also** *M.S. Sarda* v. *Netha Co-op. Spg. Mills,* AIR 1975 AP 169; *State of Kerala* v. *C.C. Refineries,* AIR 1968 SC 1361 : 1968 (3) SCR 556.

instalment, it was held that it was open to the buyer to justify his declining to complete the contract on the ground that the seller had subsequently failed to make a tender of the goods according to the terms of the contract.

But if he does accept the repudiation the contract is at an end, and thereafter neither party could treat the contract as subsisting. The Lahore High Court has held in *Jandoo Mal* v. *Phul Chand* [1] that after an acceptance of repudiation, the promisor cannot treat the contract as subsisting; and in *Narasimha* v. *Narayana,* [2] the Madras High Court ruled that an election to rescind is irrevocable. The promisee under a joint contract may in the absence of an express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise or contract. [3]

Waiver of condition precedent.—The much discussed English case, *Braithwaite* v. *Foreign Hardwood Co.,* [4] raised the question whether a buyer who repudiated the contract on one ground could afterwards change his ground and plead that the seller had not performed a condition precedent. It was held that the repudiation itself amounted to a waiver of the performance of the condition precedent, and that the buyer could not raise a different ground of objection, unknown at the date of repudiation. In later cases, it has however been pointed out that a person who repudiates a contract for a given reason which fails him is not totally debarred from setting up any other defence available in the circumstances.[5] In *Sivayya* v. *Ranganayakulu,* [6] the Judicial Committee have put the matter beyond doubt by observing that any *dicta* in *Braithwaite's* case, contrary to *British and Benington's Ltd.* v. *N.W. Cachar Tea Co.,* are incorrect. It would therefore be open to a party to justify the repudiation on any ground, which existed at the date of such repudiation. **[525]**

Acquiescence.—The latter part of the section dealing with acquiescence is exemplified in a Bombay case, *Bakaralli* v. *Alliance Silk Mills Co.*[7] There, the contract between certain mill owners and their employees provided that the former could close the mills for a definite period for reasons of trade depression and for an unlimited period for strikes, etc. The owners closed the

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1. (1925) 5 Lah. 497 : 85 IC 118 : (1925) Lah. 217.
2. (1925) 49 MLJ 720 : 92 IC 333.
3. *Kabiraj Dina Bandu Acharya* v. *Prasanna Chanda Samantrai,* 1973 (1) CWL 509.
4. (1905) 2 KB 543. **See** *Nannier* v. *Rayulu Iyer,* (1925) 49 Mad. 781.
5. *British & Benington's* v. *N.W. Cachar Tea Co.,* (1923) AC 48.
6. (1935) 58 Mad. 670 : 62 IA 89 : 37 Bom. LR 538 : 41 LW 775 : 68 MLJ 635 : 39 CWN 632: 154 IC 1097 : (1935) MWN 390 : (1935) PC 67. **But see** *Ramayya* v. *Shaik Saib,* AIR 1958 AP 576.
7. (1934) 36 Bom. LR 190 : (1934) Bom. 126; *Union of India* v. *Kesar Singh,* AIR 1978 J&K 102; *New India Assurance Co. Ltd.* v. *Food Corporation of India,* (1983) 96 LW 116 (SN).

mills on the former ground for more than the prescribed period. An employee attended the mill on the re-opening day, and then the mill was closed indefinitely (in accordance with the terms of the agreement) because of a strike. In a suit by the employee for breach of contract, it was held that by attending on the re-opening day after the closing, it was held that by agreement, he had acquiescenced in the breach, and treated the contract as continuing, and could not therefore complain when the mills exercised their legal right of closing for strikes under the agreement.

Date of Breach.—Where the breach of contract is made by letter it is deemed to take place not on the date on which the letter of repudiation is written but on the day on which the other party receives the letter and makes his election to accept the repudiation or stand by the contract.[1]

Damages.—In *Ramgopal* v. *Dhanji,*[2] the Privy Council ruled that in a case of anticipatory breach, the plaintiff is entitled to measure his damages as they stand at the date of repudiation. But, where the plaintiff has elected to rescind the contract only at a date subsequent to the repudiation by the other party, the damages will have to assessed as at the date of rescission.[3]

BY WHOM CONTRACTS MUST BE PERFORMED

40. Person by whom promise is to be performed.—If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Illustrations

(a) *A* promises to pay *B a* sum of money. *A* may perform this promise, either by personally paying the money to *B or* by causing it to be paid to *B* by another, and, if *A* dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

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1. *Gaekwar, Baroda State Railway* v. *Habibullah,* (1934) ALJ 1093 : (1934) All. 740 : 153 IC 824; **see** *Morgan* v. *Bain,* (1874) 44 LJ CP 47.
2. (1928) 55 Cal. 1048 : (1928) PC 200 : 28 LW 55 : 32 CWN 1117 : 55 MLJ 248 : 30 Bom. LR 1389 : (1928) MWN 924 : 111 IC 480.
3. *Imamali* v. *Rani Priyawati Devi,* ILR (1938) Nag. 31 : (1937) Nag. 289 : 171 IC 553; *Balram* v. *Mahadeo,* AIR 1949 Nag. 389.

(b) *A promises* to paint a picture for *B*. *A* must perform this promise personally.

Performance.–Normally, a contract in the absence of a contrary intention, express or implied is enforceable by and against parties thereto and their legal heirs and legal representatives including assignees and transferees.[1] Contract may be performed by the promisor himself or by his agent. He who does anything through another is deemed to have done it himself. *Qui facit per alium facit per se.* Thus specific performance can be claimed against a legal representative in respect of a contract for purchase of immovable property.[2] The only exception to the application of the maxim is where the personality of the person contracted with is for any reason, material (*e.g.,*) a work requiring some special skill or where there are certain claims (*e.g.,*) by way of set off, etc., in relation to the particular party contracted with.[3] **[457,463]** A person who is not a party to the agreement cannot be made liable.[4]

Under, Section 40, except in very special circumstances, a person agreeing to purchase a property is not bound to purchase it himself and he may arrange for its purchase by some other person as his nominee on the terms of the agreement entered into by the parties.[5]

41. Effect of accepting performance from third person.—When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Performance by third party.– Under the English law, a payment or performance by a third party must have been previously authorised. The section says nothing about the promisor authorising performance. The section applies only to executory contracts.[6] It can be invoked only where the contract is performed by a stranger. It is not enough that it is performed in part; what is necessary is that it should be performed in full.[7] The section has no application where the payment is not unconditional.[8] Where A owed a large

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1. *Ram Buran Prasad* v. *Ram Mohit, Hazra,* AIR 1967 SC 744 : (1967) 1 SCR 293.
2. *U. Dun Htaw* v. *Maung Aw,* (1929) 7 Ran. 423 : 120 IC 240 : (1929) Ran. 274.
3. *Robson* v. *Drummond,* (1831) 109 ER 1156 : 36 RR 569.
4. *Nand Kishore* v. *State of Bihar,* AIR 1974 SC 1988 : (1973) 2 SCC 770 : 1973 UJ 587.
5. *Umar Noor Mohammad* v. *Dayal Saran Darbari,* AIR 1967 All. 253.
6. *Sri Sarda Mills Ltd.* v. *Union of India,* AIR 1966 Mad : (1966) 2 MLJ 16 : 79 MLW 237. 381 and **see also** *Nand Kishore* v. *State of Bihar,* AIR 1974 SC 1988 : (1973) 2 SCC 770 : 1973 UJ 587.
7. *Chandrasekhara Hebbar* v. *Vittala Bhandare,* AIR 1966 Mys : (1965) 2 Mys. LJ 338. 84 and **see also** *Umar Noor Mohammad* v. *Dayal Saran Darbari,* AIR 1967 All. 253.
8. *Union of India* v. *Hindustan Aeronautics,* (1968) 2 Mys. LJ 240.

sum of money to B and C offered to pay B a lesser sum in full satisfaction of B's claim against A and B accepted the offer, he cannot recover the balance from A[1] after recovering payment from C in full satisfaction. Actual performance is necessary before this section can be invoked.[2] A mere substituted promise falling short of a novation, does not absolve the promisor.[3]

42. Devolution of joint liabilities.— When two or more persons have made a joint promise, then unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death of any of them, his representative jointly with the survivor, or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

Joint Liability.–This section marks a departure from the corresponding rule in English law. Under English law, upon the death of one of several joint contractors, the liability under the contract devolves on the survivors; and no action will lie against the representative of the deceased either alone or with the survivors. **[461]**

Under the Indian law, generally speaking, all joint liability is joint and several. Therefore, the rule of survivorship among joint tenant that obtains in English law is modified by this section and Section 45, which put the representative of the deceased joint tenant in his place.[4] On failure of such a representative, the rule of survivorship among joint tenants, applies.[5] The rule enunciated in the section applies only in the absence of a contract to the contrary.

Where a usufructuary mortgage was executed by all the respondents jointly and the debt borrowed under it was a joint debt, each one of the mortgagors was held jointly, liable for the entire debt.[6]

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1. *Lala Kapurchand Godha* v. *Mir Nawab Himayatalikhan Azamjah,* AIR 1963 SC 250 : (1963) 2 SCJ 397 : (1963) 2 An. WR (SC) 94 : (1963) 2 MLJ (SC) 94.
2. **See** *Harchandi Lal* v. *Sheoraj,* (1917) 39 All. 178 : 15 ALJ 223 : 5 LW 502 : (1917) MWN 290 : 21 CWN 765 : 19 Bom. LR 444 : 39 IC 343 : 32 MLJ 241; *Chegamull* v. *Govindasami,* (1928) 112 IC 491 : (1928) Mad. 972; *Dhanpat Mal* v. *Niamat Rai,* (1933) Lah. 335 : 34 PLR 440. **See** *Union of India* v. *Orissa Textile Mills,* AIR 1979 Orissa 165 : (1979) 48 Cut.LJ. 245 (on facts it was held that this section would not apply).
3. *Dhanpat Mal* v. *Niamat Rai,* (1933) Lah. 335 : 34 PLR 440.
4. *Azizur Rahman* v. *Upendranath,* (1937) 42 CWN 18 : 66 CLJ 104 : (1938) Cal. 129; *Sumaru* v. *Puddan,* AIR 1935 All. 975 : 159 IC 352.
5. **See** *Mt. Rasulam* v. *Babu,* (1930) ALJ 811 : 122 IC 404 : (1930) All. 350.
6. *Dhanki Mahajan* v. *Ram Chanduba Vakhasting,* AIR 1969 SC 69 : (1969) 1 SCJ 157 : (1968) 3 SCR 759.

43. Any one of joint promisors may be compelled to perform.—When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any [one or more][1] of such joint promisors to perform the whole of the promise.

Each promisor may compel contribution.—Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution.—If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation:—Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations

(a) *A*, *B* and *C* jointly promise to pay *D* 3,000 rupees. *D* may compel either *A* or *B* or *C* to pay him 3,000 rupees.

(b) *A*, *B* and *C* jointly promise to pay *D* the sum of 3,000 rupees. *C* is compelled to pay the whole. *A* is insolvent, but his assets are sufficient to pay one-half of his debts. *C* is entitled to receive 500 rupees from *A's* estate, and 1,250 rupees from *B*.

(c) *A*, *B* and *C* are under a joint promise to pay *D* 3,000 rupees. *C* is unable to pay anything and *A* is compelled to pay the whole. *A* is entitled to receive 1,500 rupees from *B*.

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1. These words were substituted for the word "one" by S. 2 and Sch. 2 of the Amending Act, 1891 (XII of 1891).

(d) *A*, *B* and *C* are under a joint promise to pay *D* 3,000 rupees, *A* and *B* being only sureties for *C*. *C* fails to pay. *A* and *B* are compelled to pay the whole sum. They are entitled to recover it from *C*.

Joint and several liability.—This section again constitutes a material variation from the rules of English law. The English rule is that all joint contractors must be sued jointly for a breach of contract, and if only one joint promisor is sued, it is open to him to plead that the co-promisors should also be made parties to the action. The present section, however, makes all joint liability, joint and several. It is therefore, open to the promisee to sue anyone or all, of the joint promisors, and failure to implead all of them is no defence to a suit against one or some only.[1] **[458]**

Therefore the fact that a contract is not enforceable against one co-promisor does not bar a suit against the others. Thus a joint promise made by a major and minor has been enforced against the former, though void against the latter.[2] So too, a claim barred against one promisor may be enforced against another, if, as against him, it is not barred.[3]

As the section applies only in the absence of a contract to the contrary, it may be open to a co-promisor who is sued alone to show that there was a definite contract against separate and individual liability for the whole.[4]

Who are joint promisors? – Partners are joint promisors so far as third parties are concerned, and each partner is liable for the whole debt of the

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1. *Manbodh Bhagat* v. *Jaswant*, (1938) 17 Pat. 662; *Raghunath* v. *Baleshwar*, (1927) 7 Pat. 353 : 105 IC 484 : (1927) Pat. 426 (Presumption is that liability is joint and several); *Balakrishan Patro* v. *Balasubudhi*, AIR 1949 Pat. 184; *J.F.M. R.S.B. & Sons* v. *State Bank of Hyd.*, AIR 1971 SC 449 : (1971) 2 SCR 136 : (1970) 2 SCC 766 : (1971) 1 SCJ 680 : (1971) 1 An. WR 117 : (1971) 1 MLJ 116; *Motilal* v. *Ghella Bhai*, (1892) 17 Bom. 6; *Muhammad Askari* v. *Radhe Ram*, (1900) 22 All. 307 : (1900) AWN 73 (No right in a joint promisor to be sued only with the others); *Chandmal* v. *Ban Behari*, (1924) 50 Cal. 718 : 74 IC 1021 : (1924) Cal. 209 (Release of one debtor does not extinguish liability of the rest); *Nathusa Prasad* v. *Mahadev*, (1933) Nag. 324 : 144 IC 117 (Pronote by three members of joint family—One insolvent—Others liable); *Hirday* v. *Jugal Prasad*, (1927) Pat. 2 : 97 IC 373; *Devi Dayal* v. *Bhupinder Kumar*, AIR 1973 Delhi 290 : 1973 Rajdhani LR 41; *Kabiraj Dinabandhu* v. *Samantrai*, 1973 (1) CWR 509.
2. *Jamna Bai* v. *Vasanta Rao*, (1916) 39 Mad. 409 : (1916) PC 2 : 43 IA 99 : 14 ALJ 534 : 18 Bom. LR 432 : 24 CLJ 74 : 20 CWN 840 : 31 MLJ 18 : 34 IC 213; *Sain Das* v. *Ramchand*, (1924) 4 Lah. 334 : 5 LLJ 469 : 85 IC 701 : (1924) Lah. 146; *Dasarath* v. *Satyanarayan*, AIR 1963 Cal. 325; *Rama Shankar* v. *Shyamalata*, AIR 1970 SC 716 : (1970) 2 SCR 360.
3. *Abraham* v. *Ranphial*, (1963) 27 MLJ 746 : 39 Mad. 228 : 27 IC 337.
4. *Raghunath* v. *Baleshwar*, (1927) 7 Pat. 353 : 1927 Pat. 426 : 105 IC 484.

firm.[1] Co-heirs of a deceased promisor are not joint promisors.[2] Joint agents are in the position of joint promisors and the death of one does not terminate the agency of the other,[3] as the liability is joint and several.

Decree against some of several joint promisors.–The section leaves open the question whether the promisee can bring only one suit against all the promisors or he can bring a separate suit against each joint promisor. There is considerable diversity of opinion among the several High Courts as to the effect of a decree obtained against some only of several joint promisors. In English Law, the rule on this subject was laid down in *King* v. *Hoare,*[4] that judgment recovered against one of two or more joint debtors is a bar to an action against the other. The Allahabad [5] and Madras High Courts,[6] and latter, Patna High Court [7] Punjab and Haryana High Court [8] have held that the rule of *King* v. *Hoare* is not applicable in India in view of the underlying principle of the section that all joint liability is joint and several. The Calcutta[9] and Bombay [10] High Courts are of the view that the principle of *King* v. *Hoare* is applicable because the section only deprives a co-contractor of the plea in abatement available to the joint contractor under English law, and cannot be construed as enabling the promisee to virtually split up his cause of action into as many causes of action as there are promisors. It may, however, be mentioned that, in

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1. *Appa Dada* v. *Ramkrishna,* (1930) 53 Bom. 652 : 121 IC 581 : 31 Bom. LR 1187 : (1930) Bom. 5 (Suit competent against some of the members of a company); *Shaik Sahed* v. *Krishna Mohan,* (1916) 24 CLJ 371 : 35 IC 563 (Parties becoming jointly interested in a contract by one person are not joint promisors); *Lukmidas* v. *Purushotam,* (1882) 6 Bom. 700; *Narayana* v. *Lakshmana,* (1879) 21 Mad. 256; *Veerappa* v. *Arunachalam,* (1924) 47 MLJ 168; *Mahomed Ismail* v. *Saiduddin,* (1927) Lah. 819 : 104 IC 700; *Lakhmichand* v. *Gokuldas,* (1926) Sind 75 : 90 IC 242. **See** *Finance Centre* v. *Ram Parkash,* AIR 1977 NOC 269 (J&K); *Bakshi Hardatt* v. *State of Jammu and Kashmir,* AIR 1977 NOC 270 (J&K); *Jainarain* v. *Surajmall,* AIR 1949 FC 211; *Chettiar* v. *Chettiar,* AIR 1949 Mad. 109.
2. *Hozara* v. *Naranjan Singh,* (1929) Lah. 783 : 119 IC 419; *Abinash Chandra* v. *Fulchand,* (1924) Cal. 165; *Devi Dayal* v. *Bhupinder Kumar,* AIR 1973 Delhi 290.
3. *Bhagirath* v. *Prem Chand,* (1913) 17 CLJ 201 : 16 IC 852.
4. (1844) 153 ER 206 : 67 RR 694.
5. *Muhammad Askari* v. *Radhe Ram,* (1909) 22 All. 307 : (1977) All. WR 373.
6. *Ramanjulu* v. *Aravamadu,* (1910) 33 Mad. 317 : (1910) MWN 35 : 5 IC 735; *Moolchand* v. *Alwar,* (1916) 39 Mad. 548 : 29 IC 303 (Case of release of one debtor); *Radhakrishna* v. *Mutinkrishna,* AIR 1970 Mad. 337 : (1970) 2 MLJ 566 : 83 MLJ 181.
7. *Traders Co-operative Bank* v. *Mallick,* (1934) Pat. 52 (2) : 147 IC 702.
8. In *re. Northern India Finance Corporation Ltd.,* (1984) 55 Comp. Cas. 1.
9. *Hemaedro* v. *Rajendrolall,* (1878) 3 Cal. 373 : 1 CLR 488; *Moselle Solomon* v. *Martin & Co.,* (1935) 62 Cal. 612 : 39 CWN 461. **See also** the observations of Pandrang Rao, J. in *Chockalinga* v. *Meyappa,* (1938) 2 MLJ 287 : 48 LW 383 : (1938) MWN 104.
10. *Lukmidas* v. *Purushotam,* (1882) 6 Bom. 700; *Markandrai* v. *Virendrarai,* (1917) 19 Bom. LR 837 : 42 IC 815; *Shivlal* v. *Birdichand,* (1917) 19 Bom. LR 370; 40 IC 194. **See also** *Guruswami* v. *Samurti,* (1881) 5 Mad. 37 (Old Madras view).

a Bombay case, one of the learned Judges of the Division Bench expressed himself in favour of the majority view.[1]

Right of Contribution.—Where one joint promisor performs the entire promise himself, he can call upon the others to contribute. As the right to contribution springs from equality of burden and benefit, where a joint decree against co-sharers is satisfied by one, he is entitled in conscience, if not by contract, to contribution from the other. The right to contribution arises from the equity existing in favour of a person jointly bound with others, who, however, has had to perform or pay more than his just share.[2] Thus, a claim against co-vendors by a vendor who has been mulcted in damages for breach of a covenant in the sale deed will fall within the section.[3]

The right arises, as decided in *Abraham* v. *Raphial,*[4] only on actual payment. The payment must have had the effect of exonerating the co-debtors, wholly or *pro tanto.*[5] As was said in *Ram Pershad* v. *Neerbhoy,*[6] "Until he has discharged that which he says ought to be treated as a common burden or at any rate done something towards the discharge of it, he cannot say that there is anything of which he has relieved his co-debtors, and which he can call upon them to share with him." So, the mere fact that a decree is outstanding against one joint promisor is no ground for contribution. As a rule, co-promisors are liable to contribute equally. But it is open to one to show that the plaintiff is solely liable or that he is not equally liable with the plaintiff.[7]

Partners in a firm occupy the same position as any other co-promisors regarding application of Section 43. The section affords full guarantee to the right of a partner to claim contribution from other partners.[8] Where a firm becomes a tenant of premises and subsequently on its dissolution the premises is allotted to one of the partners, this fact will not absolve their liability for

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1. *National Petroleum Co.* v. *Popatlal,* (1936) Bom. 344 : 165 IC 338 : 38 Bom. LR 610; *Patna* v. *Ramkripal,* AIR 1955 Pat. 442; *Union of India* v. *Vulcan Insurance Co.,* AIR 1972 Guj. 255.
2. *Bhagwati* v. *Miyan Murat,* (1931) 10 Pat. 528 : (1931) Pat. 394 : 134 IC 139; *Nityanand* v. *Radhacharan,* (1934) Pat. 411 (2) : 148 IC 434; *Kedarlal* v. *Harilal,* AIR 1952 SC 47 : 1952 SCR 179 : 1952 MWN 104 : 65 LW 179 : 1952 SCJ 37 : (1952) MLJ 431.
3. *Sadasiva* v. *Rajalingam,* (1932) MWN 1111.
4. (1916) 39 Mad. 288 : 97 IC 337 : 27 MLJ 746. **See also** *Mangarao* v. *Krishna Rao,* ILR (1963) AP 931.
5. *Abboy* v. *Ramachandra,* 1924 19 LW 686 : (1923) MWN 925 : 76 IC 905 : (1924) Mad. 279; *Darbari* v. *Damodar,* 1929 All. 792.
6. (1872) 11 Ben. LR 76; *Narendra* v. *Pashupati,* AIR 1949 Cal. 242; *Padmanabha* v. *Keshava,* AIR 1951 Mad. 239.
7. *Siva Panda* v. *Jujusti Panda,* (1902) 25 Mad. 599; *Golla Kondamma* v. *Golla Chinna Subba Reddi,* (1927) Mad. 160 : 98 IC 675.
8. *Bakshi Hardatt* v. *State of Jammu & Kashmir,* 1977 Kash. LJ 272.

rent vis-a-vis the landlords when there was nothing to show that the landlords had given their assent to the arrangement by which the premises was allotted to one partner.[1]

Joint Tortfeasors.—The English rule as laid down in *Merry Weather* v. *Nixon*,[2] is that there is no contribution between wrongdoers. But the decision has been taken exception to, in later cases, as not being founded on any principle of justice or equity.[3] And the Law Reforms (Married Woman and Tortfeasors) Act, 1935 has specifically provided that there shall be a right of contribution as between joint tortfeasors, with liberty to the Court to apportion the amount as between the wrong-doers as it may think just and equitable. In India the rule in *Merryweather* v. *Nixon* has not been applied in all its strictness.[4] In *Siva Panda* v. *Jujusti Panda*,[5] the Court doubted whether the rule was at all applicable in India. In a case, *Parbhoo Daya* v. *Dwarka Prasad*,[6] a Bench of the Allahabad High Court pointed out that in order to entitle a party to claim contribution, there must be either a contract express or implied, by which it may be said that the defendant agreed to compensate the plaintiff in certain events, or that there should be an equity between the parties which would induce the courts to grant the plaintiff a relief from the burden he has shouldered, by discharging the decree or a debt payable by the others. In *Narayanamurthy* v. *Komali Chandrayya*,[7] where a decree for money against two joint wrong-doers had been realised from one, the Court held that the other was liable to contribute. The general rule would appear thus to be that contribution can be claimed except where the parties have been guilty of conscious wrongdoing.[8]

Contribution re: Cost. — If the plaintiff and the defendant had been arraigned as co-plaintiffs in the prior action, there may be an implied contract for and a right to contribution,[9] but in the case of co-defendants, the plaintiff

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1. *Kanhaiya Lal Balkrishan Dass* v. *Labhu Ram*, AIR 1971 Delhi 219 : (1971) Ren. CJ 250.
2. (1799) 101 ER 1337 : 16 RR 810.
3. *Palmer* v. *Wick & Co.*, (1894) AC 318.
4. *Kamala Prasad* v. *Kishore*, (1928) 55 Cal. 666 : 106 IC 300 : 48 CLJ 350 : (1928) Cal. 180. **See** *Palghat Coimbatore Transportation Co.* v. *Narayanan*, (1938) MWN 1241 (1243).
5. (1902) 25 Mad. 599. **See also** *Nihal Singh* v. *Collector of Bulandshar*, (1916) 38 All. 237.
6. (1932) 54 All. 371 : (1932) ALJ 215 : 135 IC 837 : (1932) All. 334.
7. (1927) 53 MLJ 174 : (1927) MWN 888 : 26 LW 67 : 102 IC 835 : (1927) Mad. 790; *Shahul Hameed* v. *Ibrahim*, (1903) 26 Mad. 373. **See also** *Sheo Ratan* v. *Karan*, (1924) 46 All. 860 : 22 ALJ 788 : 84 IC 269 : (1924) All. 857.
8. *Suput* v. *Imrit*, (1880) 5 Cal. 720; *Vayangara* v. *Pariyangot*, (1883) 7 Mad. 89 (False defence); *Parbu Dayal* v. *Dwarka Prasad*, (1932) 54 All. 371 : 135 IC 317 : (1932) All. 334.
9. *Ram Sarup* v. *Baij Nath*, (1921) 43 All. 77 : 58 IC 324 : (1921) All. 372; *Parshotam* v. *Lachmi*, (1922) 45 All. 99 : 69 IC 688 : (1923) All. 67.

must according to some Madras decisions, show an equity entitling him to contribution.[1] The Calcutta High Court has however held that in such circumstances, the plaintiff is *prima facie* entitled to contribution and that the defendant must show grounds of exemption.[2] Where parties prosecute a case *bona fide* and are mulcted in costs, and such costs are paid by one of them, he can claim contribution from the rest, and the rule of non-contribution among tortfeasors will not apply.[3] It will be an *fortiori,* where there is no legal link joining the co-defendants and they are entirely unconnected except for the fact of their having been impleaded as such (*e.g.*) several alienees from a limited owner under the Hindu law, impleaded in a reversioner's suit to set aside the alienations.[4]

The right to contribution has been recognised even in a case in which the plaintiff and defendant had, as co-defandant in the prior action, put up false defences or fabricated false documents,[5] *but* the decision was rested on the fact of equal delinquency, which prevented the defendant from pleading equitable exemption. But, among co-defendants, those who did not defend the suit or took no interest therein are equitably entitled to exemption.[6] Again, where the defendants in the prior action had set up mutually antagonistic defences, the right to contribution has been negatived on the principle that it will not be possible to predicate that one was paying on behalf of the rest.[7] So

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1. *Muthuswamy Iyer* v. *Subramania Iyer,* (1931) 61 MLJ 638 : 34 LW 712 : 135 IC 16 : (1932) Mad. 146; *Chelamiah* v. *Suryanarayana,* (1920) 53 IC 77; **see also** *Mulla* v. *Jagannath,* (1910) 32 All. 585.
2. *Kulada Prasad* v. *Giribala,* (1936) 40 CWN 1089. **See also** *Kishanlal* v. *Karim Buksh,* (1930) Lah. 49 : 120 IC 677; *Babu Ram* v. *Badri Das,* (1926) 25 ALJ 720 : 95 IC 689.
3. *Shahul Hameed* v. *Ibrahim Syed,* (1903) 26 Mad. 378; *Shiam Lal* v. *Nawal Kishore,* (1938) All. 631 : (1938) ALJ 990; *Gurulingappa* v. *Samanna Saidappa,* (1930) 55 Bom. 94 : (1930) Bom. 506 : 32 Bom. LR 1246; *Ramdeo Ram* v. *Rai Baijnath,* 1920 58 IC 31; (Cf.) *Kalinath* v. *Jadunandan,* (1920) 58 IC 28 (Co-plaintiffs instituting false case—Costs decreed to be paid by them—No contribution).
4. *Venkayya* v. *Basivireddi,* (1936) 59 Mad. 250 : (1935) MWN 1309 : 42 LW 951 : 160 IC 420 : 71 MLJ 238 : (1936) Mad. 167. (In this case the Court held there was an implied contract for contribution from the fact of all the alienees joining in an appeal against the joint decree).
5. *Veera Reddi* v. *Angayya,* (1935) Mad. 347 : 41 LW 361 : (1935) MWN 238 : 159 IC 507; *Saran Dayal* v. *Dalchand,* (1938) Lah. 579 : 177 IC 847; *Sheo Ratan* v. *Karan Singh,* (1924) All. 857 : (1924) 46 All. 860 : 22 ALJ 788 (Joint tort feasors).
6. *Bal Krishnan* v. *Chiddha,* (1929) All. 654; *Bisambhardeo Narayan* v. *Hitnarayan,* (1936) 15 Pat. 219 : 160 IC 976 : (1936) Pat. 49 (No contest in prior suit by defendant in the suit for contribution); *Vayangara* v. *Pariyangot,* (1883) 7 Mad. 89 (Plaintiff in contribution suit was the real defendant in prior action); *Muthuswamy* v. *Subramania,* (1932) Mad. 146 : 34 LW 712 : 135 IC 16 : 61 MLJ 638 (Plaintiff was owner of land and defendants lessees in prior action—Prior suit was for recovery of property from plaintiff); *Bhawani Prasad* v. *Ram Prasad,* (1937) All. 227 : 167 IC 913 : (1937) ALJ 1 (Defendant in contribution suit had admitted the claim in prior suit-contest only by the plaintiff—No contribution); *Nand Lal* v. *Beni Madho,* (1918) 40 All. 672.
7. *Fakira* v. *Tasadduq Hussain,* (1897) 19 All. 462.

too, where the defendants in the prior action had been conscious tortfeasors (e.g.) joint trespass upon land,[1] wrongful removal of materials of a building by persons acting in concert,[2] no right to contribution will be recognised.

In one Lahore case, it has been suggested that where a suit for contribution for costs is laid against more than one person, the liability of the defendants should be apportioned and that they should not be made jointly and severally liable for the suit claim.[3]

44. Effect of release of one joint promisor.—Where two or more persons have made a joint promise a release of one of such joint promisors by the promisee, does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

Release of joint promisor.—The section from English Law under which, in the absence of express reservations, a release of one joint debtor operates as a release of all of them. Under the section, where a promisee chooses to release one joint promisor from liability, such a release does not affect the liability of the others; nor does it make any difference to the responsibilities *inter se* of the several promisors.[4] **[460]**

The principle of the section was applied in *Moolchand* v. *Alwar* [5] to a judgment debt, and in *Krishna Charan* v. *Sanat Kumar* [6] to a case of co-mortgagors. In *Jamuna Prasad* v. *Ram Sakhi* [7] in the case of a joint decree for costs, the failure of the decree-holders to bring the legal representatives of one of the debtors on record for purpose of execution was construed as a release of one joint promisor, and execution was directed against the others.

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1. *Chelamiah* v. *Suryanarayana,* (1929) 53 IC 77; *Bismbardeo* v. *Hatnarayan,* (1936) 15 Pat. 219 : (1936) Pat. 49.
2. *Parbhoo Dayal* v. *Dwarka Prasad,* (1932) 54 All. 371 : 135 IC 837 : (1932) All. 334.
3. *Chanan Mal* v. *Salig Ram,* (1933) Lah. 690 : 144 IC 18 : 14 Lah. 609. (Quaere, whether it will not be opposed to S. 43).
4. *Govindlal* v. *Firm Thakurdas Ballabhdas,* AIR 1974 Bom. 164 : 1974 Mah. LJ 106.
5. (1916) 39 Mad. 548; *Daulat Ram* v. *Punjab National Bank,* (1933) Lah. 505 : 144 IC 981 ; *Amolakchand* v. *Bhagwandas,* (1927) All. 830 : 102 IC 193; *Bhawani* v. *Darson,* (1911) 14 CLJ 354 : 11 IC 450; *In re Industrial Bank,* (1931) Bom. 123 : 32 Bom. LR 1656 : 129 IC 890 (2).
6. (1917) 44 Cal. 162; **see also** *Chand Mall* v. *Ban Behari,* (1923) 50 Cal. 718; *Gangaram* v. *Jaiballav,* (1903) 30 Cal. 953; *Arjun* v. *Banbehari,* AIR 1944 Cal. 328.
7. (1933) Pat. 24 : 140 IC 874 : (1932) 13 Pat. LT 619.

The section applies to every case of release, whether before or after breach.[1]

45. Devolution of joint rights.—When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them, during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Illustration

A in consideration of 5,000 rupees lent to him by *B* and *C*, promises *B* and *C* jointly to repay them that sum with interest on a day specified. *B* dies. The right to claim performance rests with *B's* representative jointly with *C* during *C's* life, and after the death of *C* with the representatives of *B* and *C* jointly.

Joint promisees—This section deals with how the right to claim performance devolves, where there are a number of promisees. The section differs from the English law by which on the death of a joint promisee, the right to demand performance devolves on the survivors. Under this section, all the promisees during their joint lives will be *jointly* entitled to claim performance. Where one promisee dies, his representative is entitled to demand performance along with the other surviving promisees; and when all the promisees die, the legal representatives of them all, must joint in demanding performance.

It is not, therefore, open to one of the joint promisees to sue alone, either for performance of the promise in entirety or to the extent of his share.[2] Any

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1. *Kirtee Chunder* v. *Struthers*, (1878) 4 Cal. 336 : 3 CLR 546.
2. *Siluvaimuthu* v. *Muhamad Sahul*, (1927) Mad. 84 : 51 MLJ 648 : 98 IC 549; *Ahinsa Bibi* v. *Abdul Kader*, (1901) 25 Mad. 26. **See also** *Vyankatesh Oil Mill* v. *Vel Mahomed*, (1927) 30 Bom. LR 117 : 109 IC 99 : (1928) Bom. 191; *Balakrishna* v. *Mahad Municipality*, (1885) 10 Bom. 32; *Ramakrishna* v. *Ramabai*, (1892) 17 Bom. 29; *Kalidas* v. *Nathu*, (1883) 7 Bom. 217; *Dular* v. *Balram*, (1871) 1 All. 453; *Meajan* v. *Alimuddin*, (1917) 44 Cal. 130 : 20 CWN 1217 : 25 CLJ 42 : 34 IC 571; *Ram Narain* v. *Ram Chanáer*, (1890) 18 Cal. 86; *Munshi Sahu* v. *Bhupal Mahton*, (1936) Pat. 274 : 163 IC 405 : (1936) PWN 239. Promissory note in favour of two—Suit by one alone); *Govindram* v. *Chetumal*, AIR 1970 Bom. 251; *Ananda Prasad Dey* v. *Lokendranath Mallik*, AIR 1972 Orissa 269 : 1972 (1) CWR 530 : 30 Cut. LT 402.

joint promisee who declines to join as plaintiff or colludes with the defendant must be made a co-defendant.[1] Where a co-promisee who is a necessary party is added as a co-plaintiff after the period of limitation, the suit will fail *in toto*.[2]

Where a patta executed between the co-sharers and the tenant of the land contained a term providing that half of the rent will be paid to one co-sharer and the remaining half to the other co-sharer and acting on the stipulation the tenant had actually paid half the rent to each co-sharer, in such circumstances each of such co-sharers has a right to maintain a suit for recovering rent separately and in such suits the other co-sharer is not a necessary party.[3]

In a case of joint vendees, a suit by one alone for damages against the vendor for fraudulent representations at the time of sale is not maintainable.[4] Similarly with co-mortgagees, as a rule, one cannot sue alone for the whole of the mortgage amount or even his share.[5] Again, brokers jointly employed must sue together for commission due.[6] Similarly, in a suit for specific performance of a promise in favour of more than one person, all the promisees must join.[7]

Partners—The English rule that joint promises are on the death of open promise enforceable only by the previous survivors was relaxed in the case of partners. But, while the *right* of the deceased partner devolved on his representative, the *remedy* by way of suit could be availed of only by the survivors, who were accountable to the legal representative, on recovery of the amount. This exception in English Law seems to have been made the rule in Indian Law. Where one partner dies, it would appear from the terms of the section that the surviving partners alone couldn't sue to enforce obligations

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1. *Shitalchandra* v. *Manickchandra,* (1909) 13 CWN 509; *Pyari Mohan* v. *Kedar Nath,* (1897) 26 Cal. 409; *Muhammad Ali* v. *Muhammad Shah,* (1911) 57 PR; *Kandhiya Lal* v. *Chandar,* (1884) 7 All. 313; *Monghibi* v. *Cooverji Umersey,* AIR 1939 PC 170; *Kandaswami* v. *Venkatachala Kandar,* 85 MLW 616; *Ponnusami* v. *Rama Boyan,* AIR 1979 Mad. 130 : (1979) 92 MLW 71; *Nirmala Bala Dasi* v. *Sudarsan Jana,* AIR 1980 Cal. 258 : (1980) 2 Cal.LJ. 11; *Jahar Ray* v. *Premji Bhimji,* AIR 1977 SC 2349 : 1978 UJ (SC) 19.
2. *Ramsebuk* v. *Ramlall,* (1881) 6 Cal. 815 : **see also** *South India Industrial Ltd.* v. *Mothey Narsimha Rao,* (1927) 50 Mad. 372 : (1927) Mad. 468; *Munshi Sahu* v. *Bhupal Mahton,* (1936) Pat. 274 : 163 IC 405 : (1936) PWN 239.
3. *Dhanbhaghvati* v. *Mandsaur Electric Supply Co. Ltd.,* AIR 1981 MP 259.
4. *Sri Raja Sobhanadri* v. *Sri Raja Parthasarthy,* (1932) MWN 494 : 35 LW 279 : 62 MLJ 154 : 137 IC 274 : (1932) Mad. 583 : **see also** *Pir Baksh* v. *Kedar Nath,* (1935) Lah. 478 : 155 IC 610.
5. *Satindranath* v. *Jatindranath,* (1927) 31 CWN 374 : (1927) Cal. 425; *Jwalanath* v. *Rupa,* (1882) 175 PR.
6. *Mangammal* v. *Pahlajrai,* (1928) Sind 16 : 105 IC 544.
7. *Korilpalli Ramayya* v. *Sajja Subbayya,* (1912) MWN 415 : 13 IC 315.

due to the partnership. But, Order 30, Rule 4 of the Civil Procedure Code has modified this section, in cases where a firm is *eo nomine*, a party to the suit, by allowing the surviving joint partners to sue, without the necessity of adding as co-plaintiffs the legal representatives of the deceased partner. It is open, however, to the legal representatives to be made parties in such a suit.[1] As to the interpretation of this rule, there is a difference of opinion among the several High Courts.[2]

It has been held in Bombay that it is open to the representative of the deceased partner to sue for recovery of a partnership debt, and join the surviving co-partners as defendants in case of their refusal to join as plaintiffs.[3]

Where a sum of money is due to a partnership such a sum can be recovered either in a suit brought by all the partners of the firm or in a suit filed in accordance with Or. 30, R. 1, Code of Civil Procedure in the name of the firm. Suit by one partner alone is not maintainable. And such a partner cannot assert to claim performance of the contract under this section.[4]

Hindu joint family—The case of a joint family under the Hindu Law is not affected by the section. Here though there may be a number of promisees, it is not necessary that all the members must join as plaintiffs. The manager is quite competent to represent the joint family.[5]

TIME AND PLACE FOR PERFORMANCE

46. Time for performance of promise, where no application is to be made and no time is specified.—Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question "what is a reasonable time" is, in each particular case, a question of fact.

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1. **See** *Hari Singh* v. *Karam Chand,* (1926) 8 Lah. 1 : 100 IC 721 : (1927) Lah. 115; *Devshi* v. *Bhikamchand,* (1927) 29 Bom. LR 147 : 100 IC 993 : (1927) Bom. 125.
2. **See** *Motilal* v. *Ghellabai,* (1893) 17 Bom. 6 ; *Ugar Sen* v. *Lakhmichand,* (1910) 32 All. 638; *Debi Das* v. *Nirpat,* (1898) 20 All. 365; *Mool Chand* v. *Mul Chand,* (1923) 4 Lah. 142; *Vaidyanatha* v. *Chinnasami,* (1893) 17 Mad. 108; per contra, *Ram Narain* v. *Ram Chunder,* (1890) 18 Cal. 86; *Hari Singh* v. *Karam Chand,* (1926) 8 Lah. 1 : 100 IC 721 : (1927) Lah. 115.
3. *Aga Gulam* v. *A.D. Sassoon,* (1897) 21 Bom. 412. **See** *G.P. Co-op. P&S Union* v. *Krishna Rao,* AIR 1974 Bom. 52.
4. *Tarachand* v. *Hulkar Mal,* AIR 1979 Delhi 160.
5. **See** *Kishen Prasad* v. *Har Narain,* (1912) 33 All. 272 (PC) : 38 IA 45 : 15 CWN 321 : 8 ALJ 56 : 21 MLJ 378 : (1911) 2 MWN 395 : 9 IC 739.

Where time not fixed.—Where the contract is to be performed without any application for performance, and where no time for performance is fixed, then the contract must be carried out within a reasonable time. What is a reasonable time depends on the facts and circumstances of each particular case. In one case, where a promise to pay the plaintiff's debt to a third party was not fulfilled for three years it was held that the failure amounted to a breach of the contract,[1] as a period of three years was a reasonable time for performance.

When a decree for specific performance was passed by consent of parties without specifying any time for conveyance the same could be obtained within the period of limitation.[2] When time for performance was not specified and there was unreasonable delay, prior notice by the other party before treating the contract as revoked or rescinded is not necessary.[3]

Where a decree is passed by the court for specific performance of the contract without abrogating or modifying the express terms of such contract but does not fix time for performance of the contract it must be presumed that the parties to the decree had the obligation within a reasonable time.[4]

Where the defendant has agreed to execute a sale deed in respect of immovable property within a period of one month of receiving the permission from the Urban Land Ceiling Authority, Ludhiana, the purpose of stipulation is not to defeat the plaintiff's right for demanding specific performance but the intention is to get the sale deed registered soon after the permission is obtained by the defendant from the said authority so as to avoid to keep the transaction pending for an indefinite time.[5]

In a suit for specific performance, the proceeding of the court directing the registration of property became final on 18-12-1990 but the balance was deposited only on 23-4-1992, it cannot be said that performance is within reasonable time even though no time limit is prescribed.[6]

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1. *Doraisinga* v. *Arunachalam,* (1899) 23 Mad. 441; *Mahomed Ibrahim* v. *Nalam Lakshmikantham,* (1919) 53 IC 125; *Gopala* v. *Ramasamy,* (1919) 10 MLT 496. **See also** *Rustomji* v. *Dhairyawan,* (1930) 32 Bom. LR 798 : 34 CWN 681 : 123 IC 712 : (1930) PC 165; *Bengal Coal Co.* v. *Homee,* (1899) 24 Bom. 97 (Agreement to supply goods on reasonable notice—39 days held not reasonable); *Chathurgan* v. *Shahzaday,* (1930) Oudh 395 : 126 IC 682 (Jewels borrowed for wedding occasion—Detaining them after wedding is over is not performance of contract within reasonable time).
2. *Jnanada Debi* v. *Nath Bank Ltd.,* AIR 1979 Cal. 246.
3. *Official Receiver* v. *Baneshwar Prasad Singh,* AIR 1962 Pat. 152 : 1962 BLJR 225.
4. *Hungerford Investment Trust* v. *Haridas Mundhra,* AIR 1972 SC 1826, 1833 : 1972 (3) SCR 690 : (1972) 3 SCC 684.
5. *Rakha Singh* v. *Babu Singh,* AIR 2002 P&H 270 : 2003 Arbi. LR 22 : 2002 (3) Civil LJ 417 : 2002 (4) Cur. CC 262 : 2002 (2) Pun. LR 122.
6. *Raju Naidu* v. *M. Kolandai Samy,* 2000 (3) CCC 149, 154 (Mad).

47. Time and place for performance of promise, where time is specified and no application to be made.—When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day, and at the place at which the promise ought to be performed.

Illustration

A promises to deliver goods at *B's* warehouse on the 1st January. On that day *A* brings the goods to *B's* warehouse, but after the usual hour for closing it, and they are not received. *A* has not performed his promise.

Where time fixed—Where the promisor has to perform the contract on a date fixed, without application by the promisee, the promisor must perform it at the place mentioned during the usual hours of business. A mere tender on the due date, of a railway receipt for the goods will not be a proper offer of performance, unless the goods covered by the receipts have arrived.[1] **[442]**

As the Lord's Day Act does not apply in India, the fact that the last day for performance falls on a Sunday, is no excuse for non-performance.[2]

48. Application for performance on certain day to be at proper time and place.—When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation—The question "what is a proper time and place" is, in each particular case, a question of fact.

49. Place of performance of promise, where no application to be made and no place fixed for performance.—When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the

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1. *Mukunchand* v. *Nihalchand,* (1916) 40 Bom. 517 : 18 Bom. LR 96 : 32 IC 948.
2. *Lalchand* v. *John L. Kersten,* (1890) 15 Bom. 338.

duty of the promisor to apply to the promisee to appoint a reasonable place, for the performance of the promise, and to perform it at such place.

Illustration

A undertakes to deliver a thousand maunds of jute to *B* on a fixed day. *A* must apply to *B* to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Place for performance—If the contract provides for performance without a demand therefor, but does not fix the place of performance, the party bound must apply to the promisee to appoint a place for performance, and perform the contract at the appointed place. In *Grenon* v. *Lachmi,* [1] where the contract was to deliver goods at any place in Bengal, the Court held that it fell within this section rather than Sec. 94 (now Sec. 36 of the Sale of Goods Act) and that it was the duty of the promisor to apply for fixing the place of performance.

The section lays down a general rule that covers both money payments as well as delivery of goods.[2] The rule at Common Law in England was that with regard to money payments, it is the debtor's duty to find the creditor, subject to his being within the realm,[3] and that in regard to delivery of heavy goods; he must apply to the creditor to appoint a place. The Common Law rule that the debtor should find the creditor and pay the debt where the creditor resides applies in India in fit cases.[4] The observations of Sir Lawrence Jenkins in an early Bombay case,[5] tended to show that the section is exhaustive and has modified the Common Law rule, but in *Soni Ram* v. *Tata,*[6] the Privy Council observed:

In the case before the Privy Council, the contract by the defendants was to pay the plaintiffs who carried on business at Rangoon certain sums but no

1. (1897) 24 Cal. 8 (PC) : 23 IA 119.
2. *Soniram* v. *Tata,* (1927) 5 Ran. 451 : 102 IC 610 : 25 ALJ 690 : 29 Bom. LR 1027 : 45 CLJ 633 : (1927) MWN 520 : 31 CWN 998 : 26 LW 720 : 54 IA 265 : 53 MLJ 25 : (1927) PC 156; *Bhagauti Shukul* v. *Chandrika,* (1933) All. 147 : 150 IC 289. *State of Punjab* v. *A.K. Rana (Engineer) Ltd.,* AIR 1964 Cal. 418; *S.P.C. Engineering Co.* v. *Union of India,* AIR 1966 Cal. 259 (Dissenting from *Firm Hiralal Girdharilal* v. *Baijnath Hardia Khotri,* AIR 1960 Punj. 450).
3. The Indian Law is the same. **See** *Bansilal Abirchand* v. *Gulam Mahtab,* (1925) 53 Cal. 88 : 53 IA 58 : (1925) PC 290.
4. *H.S. Shobasingh & Sons* v. *Sourashtra Iron Foundry & Steel Works (P) Ltd,* AIR 1968 Guj. 276 : 1968 (9) Guj.LR. 1060.
5. *Puttappa* v. *Virabhadrappa,* (1906) 7 Bom. LR 993.
6. **See** *Nathubai* v. *Chhabildas,* (1935) 59 Bom. 365 : (1935) Bom. 283 : 37 Bom. LR 357 : 157 IC 248.

place for payment was mentioned. The argument pressed upon their Lordships was that as no place was fixed and as the promisor had not applied for appointing a reasonable place for performance, the plaintiffs could not sue at Rangoon. Their Lordships observed that such a construction would enable the promisor to better his position under the contract by neglecting to perform a statutory duty imposed on him with regard to its performance.

The observations of their Lordships quoted above have been understood as signifying that the rule of the English Common Law as to the duty of the debtor to seek out the creditor has not been wholly displaced by the present section and can be applied where the necessities of the case require. Accordingly, in a suit for dower by a Mahommedan wife, the suit was held to have bee properly laid at the place where the wife resided.[1] So where the agent at *A* entered into a contract of agency with the principal at *B*, an implied obligation was held to arise from the necessities of the case to account to the principal at his place.[2] But where the principal wrongfully cancelled an agency agreement after having taken a deposit from the plaintiff (agent) it was held that the advance was converted into a debt and that in accordance with the general principle which Section 49 has not displaced the money became payable at the agent's place of residence.[3] In an analogous case of a suit for return of advance made for goods ordered from the defendant, it was held on the same line of reasoning that the defendant acting in breach of the contract had become a debtor to the plaintiff and that the filing of the suit at the plaintiff's place was proper.[4]

Where a lessee had not applied to the lessor to appoint a reasonable place for payment of the premium, the Court held that there was an implied promise in the circumstances, to pay at the lessor's place.[5] It may be mentioned that in some cases between debtor and creditor, the general principle has been applied without referring to Section 49.[6]

In a Madras ruling, where neither the lease executed at Madras of lands in the moffussil, nor its counterpart by the lessee specified the place where

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1. *Tulsiman* v. *Abdul Latif,* (1936) 63 Cal. 726 : (1936) Cal. 97 : 161 IC 427 : 40 CWN 392. *Piyara Singh* v. *Bhagwan Das,* AIR 1958 Punjab 33; *Balloram* v. *Uttamchand,* AIR 1965 Raj. 93; *Maria Munnisa Begum* v. *Noore Mohd.,* AIR 1965 AP 231 : 1965 (1) An.WR 450 : 1965 (2) ALT 16.
2. *Annamalai* v. *Daw Hnin,* (1936) Ran. 251 : 163 IC 397 (2).
3. *Champaklal* v. *Nectar Tea Co.,* (1933) 57 Bom. 306 : 35 Bom. LR 168 : 143 IC 335 : (1933) Bom. 179.
4. *Muhammad Esuff Rowther* v. *Hathem & Co.,* (1934) 67 MLJ 296 : 40 LW 498 : (1934) MWN 1011.
5. *Bhagauti Shukul* v. *Chandrika Prasad,* (1933) All. 147 : 150 IC 289; **see also** *Motilal* v. *Surajmal,* (1906) 30 Bom. 167; *Puttappa* v. *Veerabadrappa,* (1906) 7 Bom. LR 993; *Ramachandra* v. *Mohanlal,* (1930) 121 IC 688 : (1930) Nag. 207.
6. *Gokul Das* v. *Nathu,* (1926) 48 All. 310 : 24 ALJ 291 : 92 IC 492 : (1926) All. 477.

payment of rent was to be made, the Court held applying the principle of the Privy Council ruling that the suit could be laid at Madras.[1]

In *Nathubai* v. *Chhabildas,*[2] the Court had to consider the effect of the two Privy Council decisions mentioned above. There the defendant resided in a Native State. The plaintiff was a resident of Surat and he sued in Surat for return of a loan made there. The contract was silent as to place of payment, and the defendant had not applied to the plaintiff to name a place for payment. The Court held that it was reasonable to suppose that if the defendant had applied to the plaintiff he would have appointed Surat and that the institution of the suit there was itself corroboration of his intention.

If by an agreement, express or implied, by the creditor, the debtor is authorised to pay the debt by a cheque and to send the cheque to the creditor by post, the post office is the agent of the creditor to receive the cheque and the creditor receives payment as soon as the cheque is posted to him.[3]

The section does not apply where the money is payable on demand.[4] In *Ramasubramaniam* v. *Ranganathan,*[5] the Kerala High Court has taken a somewhat different view holding that where a maker of a pronote is sought to be charged on a pronote payable on demand and not payable at a particular place there should be no objection to take notice of the rule of obligation of the debtor to seek out the creditor for payment. Thus a suit against the maker falling within the exception to Section 64 of the Negotiable Instruments Act, the rule of the debtor seeking out the creditor for payment may have application in the same manner and to the same extent as in the simple case of a debtor and creditor.

50. Performance in manner or at time prescribed or sanctioned by promisee.—The performance of any promise may be made in any manner or at any time, which the promisee prescribed, or sanctions.

Illustrations

(a) *B* owes *A* 2,000 rupees. *A* desires *B* to pay the amount to *A's* account with *C*, a banker. *B*, who also banks with *C*, orders the amount to be transferred from his account

1. *S.P.G. Mission* v. *Sama Rao Naidu,* (1938) MWN 979 : 48 LW 438 : (1938) Mad. 977.
2. (1935) 59 Bom. 365 : 157 IC 248 : 37 Bom. LR 357 : (1935) Bom. 283.
3. *Indore-Malwa United Ltd.* v. *Commissioner of Income Tax,* AIR 1966 SC 1466 : (1966) 1 SCJ 630 : 1966 (2) SCR 651.
4. *Sailendra* v. *Ramsunder,* (1912) 10 CLJ 279 : 15 IC 885; *Raman Chettiar* v. *Gopalachari,* (1908) 31 Mad. 223.
5. 1978 Ker. LT 906.

to *A's* credit, and this is done by *C*. Afterwards, and before *A* knows of the transfer, *C* fails. There has been a good payment by *B*.

(b) *A* and *B* are mutually indebted. *A* and *B* settle an account by setting off one item against another, and *B* pays *A* the balance found to be due from him upon such settlement. This amounts to a payment by *A* and *B*, respectively, of the sums, which they owed to each other.

(c) *A* owes *B* 2,000 rupees. *B* accepts some of *A's* goods in deduction of the debt. The delivery of the goods operates as a part payment.

(d) *A* desires *B*, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as *B* puts into the post a letter containing the note duly addressed to *A*.

Performance in prescribed manner—A promise has to be performed at the time and in the manner prescribed or sanctioned by the promisee.[1] For example, the promisee may be willing to accept goods instead of money. In such case, the delivery of the goods is a proper performance. Or it may be by acceptance of something else. See Illustration (c). Or it may be a case of set-off. See Illustration (b). Again, it may be by the execution of a promissory note. See Illustration (d).[2] Or again, it may consist of mere book adjustments without actual transfer of cash.[3]

In the absence of any agreement with regard to the time of performance the contract has to be performed within a reasonable time and what is reasonable time depends upon the particular circumstances of each case.[4]

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1. *Union of India* v. *Radha Kissen*, AIR 1969 SC 762 : 1969 LIC 1146.
2. *I.T. Commr.* v. *Ongole Glass Works Ltd.*, AIR 1954 SC 429 : 1954 SCJ 522 : 1955 (1) SCR 185 : 1954 (24) CC 520; *Indore Malwa United Mills Ltd.* v. *Commr. of Income Tax*, AIR 1966 SC 1466 : 1966 (2) SCR 651 : 1966 (59) ITR 738; *Hanuman Prasad* v. *Hiralal*, AIR 1971 SC 206 : 40 Com. Cas. 1058 : (1970) 1 SCWR 890 : 1970 SCC 484 : (1970) 1 Com. LJ 195 : 1970 MLW (Civil) 252 : (1971) 1 SCJ 104 : 1971 Cal. LJ 262.
3. *Kishindas* v. *Meghraj*, (1925) Sind 144 : 81 IC 834. **See also** *Narayan Das* v. *Sangli Bank*, AIR 1966 SC 170 : 1965 (3) SCR 770 : 1965 (35) Com.Cas 780.
4. *Firm Bachraj Amlokchand* v. *Firm Nandlal Sitaram*, AIR 1966 MP 145:1966 MPLJ 120.

PERFORMANCE OF RECIPROCAL PROMISES

51. Promisor not bound to perform unless reciprocal promisee ready and willing to perform.—When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations

(a) *A* and *B* contract that *A* shall deliver goods to *B* to be paid for by *B* on delivery.

A need not deliver the goods, unless *B* is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless *A* is ready and willing to deliver them on payment.

(b) *A* and *B* contract that *A* shall deliver goods to *B* at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver, unless *B* is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless *A* is ready and willing to deliver the goods on payment of the first instalment.

Applicability—A contract to reconvey the property by the vendee on payment of the consideration money by the vendor within a stipulated time falls within the category of reciprocal promises and as such the contract is governed by Section 51.[1]

Order of performance—This and the succeeding sections deal with the order of performance in the case of reciprocal promises. Where the contract is unilateral or, where, in the case of a bilateral contract, one party has performed his part there is no question of *order* of performance. But in the case of an executory contract, in which reciprocal promises are the mutual consideration for each other, the question will arise in what order the promises

1. *Benode Behari Das Gupta* v. *Benoy Bhusuan Choudhury,* AIR 1973 Gau. 66.

are to be performed. From this point of view, promises may be of three kinds— **[430]**

1. MUTUAL AND INDEPENDENT—Here one promise is enforceable without the necessity of showing that the plaintiff was willing to perform the other promise.

2. CONDITION PRECEDENT—Here it is only on performance of one promise that the liability to perform the other arises.

3. CONCURRENT AND DEPENDENT—Here the two promises have to be performed simultaneously, (*e.g.*) goods sold for cash.

But these classifications apart, it is a question of the intention of the parties to be gathered from a construction of the terms of the contract, whether one promise is to be performed, before the other party can be called upon to perform his part or whether each is to be in readiness to perform at the same time as the other. The trend of modern opinion is to regard reciprocal promises, especially in contracts for sale of goods, as concurrent and dependent.[1]

The section says that in case of reciprocal promises to be simultaneously performed, the promisor is not bound to perform unless the promisee is ready and willing to perform, and one party cannot sue the other for damages for breach of contract without alleging and proving that he was ready and willing to perform his part. If the plaintiff happens to be the buyer, he must allege and prove that he was ready to pay if the plaintiff happens to be the seller, he must aver and prove readiness to deliver.[2] However, in *Kanwar Bhan Sukha* v. *Ganpat Rai* [3] it has been suggested that in a suit for damages for breach of contract an averment of plaintiff's readiness and willingness is implied and it is for the other side to deny it expressly, and thus throw back on the plaintiff the burden of proving deny it expressly, and thus throw back on the plaintiff the burden of proving affirmatively his willingness and readiness. Readiness and willingness do not mean that the purchaser should produce the money or vouch a concluded scheme for financing the transaction.[4]

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1. *Vairavan Chettiar* v. *Kannappa,* (1925) Mad. 1029 : 86 IC 436; *Chengravelu* v. *Venkanna,* (1925) 49 MLJ 300 : 86 IC 299 : (1925) Mad. 971; *Begraj* v. *Alisher,* (1923) Sind 50 : 77 IC 897; *Verman* v. *Gopal Das,* (1923) Lah. 363 : 76 IC 733. (Presumption that they are concurrent) **see** *Ramamoorty* v. *Satyanarayana,* AIR 1958 AP 550.
2. *Morton* v. *Lamb,* (1797) 101 ER 890; *Chengravelu* v. *Venkanna,* (1925) 49 MLJ 300 : (1925) Mad. 571 : 86 IC 299; *Mahomed Ismail* v. *Hasan Ali,* (1923) All. 220 : 79 IC 473; *Firm Birdhi Chand* v. *Ramdeo,* ILR (1969) 19 Raj. 481 : 1970 Raj. LW 148.
3. (1926) 7 Lah. 442 : 94 IC 304 : (1926) Lah. 318.
4. *Nathulal* v. *Phoolchand,* AIR 1970 SC 546; *Narayanaswami* v. *Dhanakote Ammal,* AIR 1967 Mad. 220 ILR (1966) 1 Mad. 68.

The Nagpur High Court has held that in view of the provisions of Or. 6, R. 6 of the C.P.C. a claim on a contract falling within Sec. 51 of the Contract Act will not fail merely by reason of the absence of an averment in the pleading as to readiness and willingness.[1]

Ready and willing—AVERMENT—Readiness and willingness as a concept in a contract for sale of goods is a limited doctrine. The reciprocity when applied to a contract for supply of goods within a fixed time cannot mean that while the buyer was willing to accept delivery even for some time beyond the agreed or specified time he should be obliged to do so indefinitely and that the seller need not perform his part of any reciprocal promise or his obligation.[2]

PROOF—Readiness and willingness will be sufficiently proved, if it is shown that the seller had, on the due date, control of the requisite goods.[3] Actual custody or possession of the goods is not necessary.[4] In a case where the vendor repudiated the contract for delivery of goods, the Privy Council held that the purchaser need not have made an actual tender of the money and that the proof that he had arranged to get money in it was enough to entitle him to decree.[5] Similarly, where it was in evidence that the seller had no goods on hand nor had control over the goods contracted for, it was held to be an act of supererogation on the buyer's part to take the money to the seller and tender it.[6] Conversely the seller need not prove an actual tender where the buyer has absconded from his place of business, leaving no one to represent him.[7] In case of sale of shares, readiness and willingness are sufficiently proved if the vendor tenders to the buyer the share allotment and receipt papers and transfer form.[8]

Reciprocal arrangement for sale and repurchase—An agreement simpliciter providing a reciprocal arrangement for sale and repurchase of property by the original vendor imposing obligations and

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1. *Arjunsa* v. *Mohanlal,* (1937) Nag. 345 : 172 IC 812.
2. *Colles Cranes of India Ltd.* v. *Speedeo Spares Corporation,* AIR 1970 Cal. 321.
3. *Rattan Lal Sultan* v. *Bishen Sahai,* (1928) 10 Lah. 143 : 110 IC 241 : (1928) Lah. 834.
4. *Kanwar Bhan Sukha* v. *Ganpat Rai,* (1926) 7 Lah. 442 : 94 IC 304 : (1926) Lah. 318.
5. *Shriram* v. *Madangopal,* (1903) 30 Cal. 865; *Kidar Nath* v. *Shimbu,* (1927) 8 Lah. 198 : 99 IC 812 : (1927) Lah. 176; *Ganesh Das* v. *Ram Nath,* (1928) 9 Lah. 148 : 111 IC 498 : (1928) Lah. 20; *Dutt* v. *Gupta,* AIR 1958 Punjab 289; (Cf.) *Dayabhai* v. *Maniklal,* (1871) 8 BHCR (AC) 123; *Brijmohan* v. *Chandrabhagibai,* (1939) Nag. 173.
6. *Ganesh Datt* v. *Gopal Singh,* (1930) 32 PLR 828; *Shriram* v. *Madangopal,* (1903) 30 Cal. 865.
7. *Zippel* v. *Kapur & Co.,* (1932) Sind 9 : 139 IC 114.
8. *Imperial Banking Co.* v. *Atmaram,* (1865) 2 BHCR 246.

conferring benefits on both parties enforceable at the instance of either of the parties to the agreement and whether such an agreement is of such a nature or not is governed by interpretation of its provisions.[1]

52. Order of performance of reciprocal promises.— Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations

(a) *A* and *B* contract that *A* shall build a house for *B* at a fixed price. *A's* promise to build the house must be performed before B's promise to pay for it.

(b) *A* and *B* contract that *A* shall make over his stock-in-trade to *B* at a fixed price, and *B* promises to give security for the payment of the money. *A's* promise need not be performed until the security is given, for the nature of the transaction requires that *A* should have security before he delivers up his stock.

Order of performance.—This section repeats that if the order of performance is fixed in the contract itself, such order has to be followed [2] if not, such order as the reason of the thing or the nature of the transaction calls for. In a Privy Council ruling, *Florrie Edridge* v. *Rustomji*,[3] where during the pendency of legal proceedings against a company in which defendant was interested, the latter had agreed to make certain payments in satisfaction of the claim, on the performance of certain conditions by the plaintiff the Judicial Committee held that in the circumstances, it was a contract under Sec. 52 rather than Sec. 51, and that the reciprocal promises emerging out of the transaction were not inherently capable of simultaneous performance within the terms of Sec. 51.

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1. V. *Pechimuthu* v. *Gowrammal*, AIR 2001 SC 2446 : (2001) 7 SCC 617 : 2001 (5) Supreme 576 : 2001 (6) JT 162 : 2001 (5) SLT 521.
2. *Manavalam* v. *Mary*, (1980) 1 MLJ 413, **see** ILR (1980) 1 Kant. 305; *Lazarus* v. *Rev Johnson Edward*, AIR 1976 AP 243 : 1976 (1) APLJ 97; **see** for Illus. (b) ILR (1977) 2 Kerala 67.
3. (1930) 65 MLJ 113 : 38 CWN 145 : (1930) MWN 1452 : 38 LW 972 : (1933) PC 233 : 148 IC 739.

Where the party seeks to enforce an arbitration clause in a contract, he must in the first place, perform his own part of the contract for the initiation and speedy disposal of arbitration proceedings by naming his suit for and giving notice to the other party.[1]

Again, work is not usually paid for in advance, and so a party refusing to work because payment has not been made for work done in part, will be guilty of a breach.[2]

53. Liability of party preventing event on which the contract is to take effect.—When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration

A and *B* contract that *B* shall execute certain work for *A* for a thousand rupees. *B* is ready and willing to execute the work accordingly, but *A* prevents him from doing so. The contract is voidable at the option of *B*; and, if he elects to rescind it, he is entitled to recover from *A* compensation for any loss, which he has incurred, by its non-performance.

Preventing performance.—Under Section 53 a contract becomes voidable at the option of one party who is prevented by the other party from performing his promise and he is entitled to compensation for any loss, which he may sustain in consequence of the non-performance of the contract.[3] Where, in the case of an executory contract, one party prevents the other from performing his part, the other party is entitled to avoid the contract, and claim compensation for the non-performance by the party in default. For instance, where a person agrees to purchase a particular machine only after trial, but subsequently fails to give facilities for a trial, he will be liable to pay for the machine as no test had been made.[4] Or where a principal prevents the

1. *Shaw Wallace* v. *Gurbux*, (1929) Sind, 58 : 109 IC 262.
2. *Hashman* v. *Lucknow Improvement Trust*, (1927) Oudh 616 : 101 IC 847; (Cf.) *Anant* v. *Sarup*, (1928) 26 ALJ 492 : 115 IC 793 : (1928) All. 360.
3. *State of Bihar* v. *P.K. Jain*, AIR 1981 Pat. 260; 1981 Pat. LJR 290.
4. *Mackay* v. *Dick*, (1881) 6 AC 251.

agent from completing negotiations started, the agency is voidable and the agent can recover the commission.[1]

54. Effect of default as to that promise which should be first performed in contract consisting of reciprocal promises.—When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Illustrations

(a) *A* hires *B's* ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by *A*, *B* receiving a certain freight for its conveyance. *A* does not provide any cargo for the ship. *A* cannot claim the performance of *B's* promise, and must make compensation to *B* for the loss which *B* sustains by the non-performance of the contract.

(b) *A* contracts with *B* to execute certain builder's work for a fixed price. *B* supplying the scaffolding and timber necessary for the work. *B* refuses to furnish any scaffolding or timber, and the work cannot be executed. *A* need not execute the work, and *B* is bound to make compensation to *A* for any loss caused to him by the non-performance of the contract.

(c) *A* contracts with *B* to deliver to him, at a specified price, certain merchandise on board a ship, which cannot arrive for a month, and *B* engages to pay for the merchandise within a week from the date of the contract. *B* does not pay within the week. *A's* promise to deliver need not be performed, and *B* must make compensation.

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1. *Elias* v. *Govind*, (1903) 30 Cal. 202; *Corporation of Bombay* v. *Cuverji*, (1895) 20 Bom. 124.

(d) *A* promises *B* to sell him one hundred bales of merchandise, to be delivered next day, and *B* promises *A* to pay for them within a month. *A* does not deliver according to his promise. *B's* promise to pay need not be performed and *A* must make compensation.

Breach of Conditions Precedent. —The only point to be noted is the nature of the condition, and its relative importance in relation to the contract. If it goes to the root of it, the party in default cannot sue. If, on the other hand, the condition is not vital to the contract, the other party will be only entitled to damages for breach, but will not be absolved from performance of his promise.[1] Thus a description of the tonnage of a ship [2] or the number of voyages it has made [3] may be a substantive part of the contract. Similarly, where a mortgagee who covenants to pay off a prior encumbrance within a certain time fails to do so, the mortgagor may redeem before the term.[4] Again where under a contract the defendant had to give a "delivery telegram" as a condition precedent to payment by the plaintiff, and omitted to do so, the plaintiff was held entitled to rescind the contract.[5] Similarly, where under a contract for sale of goods the defendants were to make deliveries to third parties to be named by plaintiffs and the plaintiffs were to send to the defendants what were called "transfer forms", intimating the names of persons to whom deliveries were to be made, and the plaintiffs failed to send the forms, it was held they were the parties in breach and therefore disentitled to damages.[6]

But, where a vendee has contracted to pay the purchase money in full before delivery, and the vendor wrongfully sells to third parties part of the contract goods, and the vendee without accepting such act as a repudiation, chooses to stand by the original contract, he must pay the money in full before claiming delivery, and cannot claim to deduct a proportionate part of the price of the goods wrongfully sold.[7]

The rule enunciated in this section is also illustrated in a Patna case where a party to an ekrarnama who brought a suit in violation of its terms

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1. *Manokji* v. *Maniklal,* (1924) Sind 105 : 76 IC 90; *Nonjibhai Karianji* v. *Ramkishan,* 1976 MPLJ 650.
2. *Oceanic Steam Navigation Co.* v. *Soonderdas,* (1890) 14 Bom. 241.
3. *Fleming* v. *Koegler,* (1879) 4 Cal. 237 : 3 CLR 297.
4. *Sanwaley Prasad* v. *Sheo Sarup,* (1926) 2 Luck 279 : 98 IC 770 : (1927) Oudh 12.
5. *Adam Haji* v. *Sakavath,* (1922) MWN 434 : 70 IC 736 : (1923) Mad. 103 : 43 MLJ 199.
6. *Seshayya* v. *Venkataswami,* (1935) MWN 882 : 42 LW 35 : 157 IC 751 : (1935) Mad. 619.
7. *Mathra Das* v. *Secretary of State,* (1930) Lah. 779; (Cf.) *Sharfdin* v. *Allah Bux,* (1925) Sind 220 : 889 IC 569.

was held to be precluded from enforcing the beneficent provisions of the document.[1]

55. Effect of failure to perform at fixed time, in contract in which time is essential.—When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential.—If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon.—If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

Time, if of the essence.—Time is not always of the essence of the contract in the absence of any stipulation in the deed of agreement of sale for performance.[2] Whether time is really essence of contract to be ascertained from real intention of parties.[3] If parties agree that a particular promise must be performed at or before a particular time, the question may arise as to what will be their rights if performance is not made within the time limited. This section provides that if the intention of the parties is clear that time is of the

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1. *Ram Charan* v. *Ram Lakhan*, (1925) Pat. 496 : 88 IC 697.
2. *D.S. Thimmappa* v. *Siddaramakka*, AIR 1996 SC 1960 : (1996) 8 SCC 366 : 1996 (2) CCC 280 (SC) : 1996 (2) CLT 298 (SC) : 1996 (4) Supreme 245.
3. *Rabindra Kumar Paul* v. *Satyendra Kumar Mookherjee*, 2005 (2) CTLJ 499 (Cal) (DB).

essence of the contract, (*i.e.,*) that it is only performance within the time fixed that will give efficacy to the transaction, then, failure to perform within such period vests in the other party a right to avoid the contract. Where the contract specifically provides for the performance to take place within the stipulated time and that time is the essence of the contract and contract is rescinded on account of non compliance of the terms, the courts in the absence of conduct amounting to a waiver or estoppel would not interfere to order specific performance.[1] But, if the parties do not attach much importance to performance within a particular time, then, default in performance at the due date only entails a liability to compensate the other party. In such a case, it is incumbent on the party accepting performance beyond time, to give notice to the defaulter that he intends to claim compensation for non-performance at the agreed time.[2] **[508]**

Time is not the essence of the contract unless it is stipulated so by express terms or by necessary implication.[3]

For the purpose of determining whether time is essence of the contract the expressions "as soon as possible" or forthwith or others similar expressions will be construed by reference to what is reasonable in the circumstances and the words such as "immediately" or directly convey more stringent requisition than is ordinarily implied by reasonable time.[4]

The intention to make time the essence of the contract must be absolutely clear.[5] Incorporation in the written agreement of a clause imposing a penalty in case of default does not by itself evidence an intention to treat time as essence of the contract.[6] Time may be made the essence of the contract by subsequent notice,[7] though the section does not expressly provide for such notice.[8] As a general rule, in contracts for sale of immovable property, time is

1. *Union Eagle Ltd.* v. *Golden Achievements Ltd.,* (1997) 2 All. ER 215 (PC).
2. *Mahadeo Parshad* v. *Kanhaiya Lal,* (1912) 14 IC 129.
3. *E. Bhagwan Das* v. *Dilip Kumar,* AIR 1998 AP 374 : 1998 (2) ALD 816 : 1998 (3) ALT 803 : 1998 (1) LS 499 (DB).
4. *Dr. Thokarla Patel* v. *Lt.Col Syed Badruddin,* 1993 (2) Civil LJ 953, 958 (Guj).
5. *Ragubir* v. *Sundar Lal,* (1931) 11 Lah. 699 : (1931) Lah. 205 : 131 IC 371; *Suryanarayanamurti* v. *Satyanarayanamurti,* (1925) 48 MLJ 150; *Kishen Prasad* v. *Kunj Behari,* (1925) 24 ALJ 210 : 91 IC 790 : (1926) All. 278; *Sankar* v. *Ratanji,* (1923) 47 Bom. 607 : 25 Bom. LR 328 : 79 IC 226 : (1923) Bom. 441; *Mahan Lal* v. *Gyaniram,* (1935) Nag. 111 : 155 IC 778; *American Pipe Co.* v. *State of U.P.,* AIR 1983 Cal. 186; *K. Abdulkhadar* v. *Plantation Corporation of Kerala Ltd,* AIR 1983 Kerala 1.
6. *Mangalram* v. *Premananda,* AIR 1972 A&N 8.
7. *Karsandas* v. *Chotalal,* (1924) 48 Bom. 259 : 25 Bom. LR 1144 : 85 IC 491 : (1924) Bom. 282; *Dhanrajgirji Narsingirji* v. *Tata Sons Ltd.,* (1925) 49 Bom. 1 : 26 Bom. LR 858 : 92 IC 225; *Shamsudin* v.*Dahyabhai,* (1924) 48 Bom. 368 : 26 Bom. LR 105 : 84 IC 947 : (1924) Bom. 357; *Fazle Ahamad* v. *Rajendra Nath,* (1926) Cal. 339 : 90 IC 795; *Krishna Chandra* v. *Khan Mamud,* (1936) 63 Cal. 804 : 161 IC 166 : 40 CWN 659 : (1936) Cal. 51; *Sheikh Shahabuddin* v. *Vilayat Ali,* (1926) Nag. 435 : 95 IC 614.
8. *Burn & Co.* v. *Thakur Sahib,* (1924) 28 CWN 104 : 83 IC 260 : (1924) Cal. 427; *Shanti Bai* v. *James Edward,* 1972 Jab. LJ 70 : 1972 MPLJ 122. (Time can be made the essence of the contract by a specific term embodied in the deed itself. Such a term would be a contract to the contrary.)

not deemed to be the contract.[1] In regard to contracts of reconveyance relating to immovable property, if the option to repurchase the property is not made within the stipulated period, the option is deemed to have lapsed.[2] Time is not of the essence of the contract in case of an agreement for reconveyance of the property sold in the absence of any specific stipulation to that effect and special circumstances in support thereof.[3] It is well recognised principle of law that time cannot be considered as essence of the contract in the matter of agreement of sale relating to immovable property unless the parties have specifically provided so. But even where the agreement is silent as to the time of performance, the parties are required to perform their part within a reasonable time and what is reasonable time will be determined by having regard to the surrounding circumstances including the express terms and nature of the property.[4] Although the general rule that time is essence of contract is not applicable to immoveable properties but in exceptional cases the parties may make time as the essence of contract. Although it is presumed that time is essence of contract, but merely because the date for execution of sale deed is fixed in the agreement, it cannot be said as indicative that time is the essence of contract, particularly when the said date was extended from time to time.[5] The test would be to look to the intention of the parties.[6] Equity in such a case looks not at the letter, but at the substance of the agreement in order to ascertain

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1. *Krishna Chandra* v. *Khan Mamud,* (1936) 63 Cal. 804 : 161 IC 164 : 40 CWN 659 : (1936) Cal. 51; *Teju Kaya* v. *Gangji Nensey,* (1933) 57 Bom. 292 : 142 IC 381 : 34 Bom. LR 1629 : (1933) 71 (Sale of property—Price and possession given—Sale deed to be executed in six months—Time not of the essence); *Kalu Dalpat* v. *Narayan,* (1927) 29 Bom. LR 56 : 100 IC 578 : (1927) Bom. 111; *Jamshedji* v. *Burjorji,* (1916) 40 Bom. 289; *Sadiq Hussain* v. *Anup Singh,* (1923) 4 Lah. 327 : 76 IC 91 : (1924) Lah. 151; *Mahadeo* v. *Narayan,* (1919) 24 CWN 330 : 3 IC 121; *Kanshi Ram* v. *Brij Nath,* (1926) 98 IC 890; *Suri Chetty* v. *Parthasarathy,* (1921) 40 MLJ 13 : 13 LW 77 : 61 IC 457 : (1921) MWN 94 : (1921) Mad. 141 (But unreasonable delay by vendee may entitle the vendor to terminate the contract); *Natesa* v. *Appavu,* (1913) 38 Mad. 178 : (1913) MWN 341 : 24 MLJ 488 : 19 IC 462; *Sriram* v. *Kidari,* (1925) 6 Lah. 308; 88 IC 743 : (1925) Lah. 481; *Abdul Ali* v. *Gokuldas,* (1927) Sind 49 : 97 IC 269; *Surajbai* v. *Nabab Mohammed,* 1969 Raj. LW 597 : ILR (1969) 14 Raj. 508; *A.P.S.E.B.* v. *Patel & Patel etc.,* AIR 1977 AP 172; *Govind Lal Chawla* v. *C.K. Sharma,* AIR 1978 All. 446; *Pudi Lazarus* v. *Johnson Edward,* AIR 1976 AP 243; *Benode Behari* v. *Benoy Bhusan,* AIR 1973 Gau. 66; *Lal* v. *Lal,* AIR 1973 All. 16 : 1972 All. LJ 865; *Kandasani Mudaliar* v. *Munusamy Odayar,* (1974) 2 MLJ 162 : 87 LW 384; *Gomathinayagam Pillai* v. *Palaniswami Nadar,* AIR 1967 SC 868 and (1967) 1 SCR 227 : (1967) 2 SCWR 147; *Govindprasad* v. *Hari Dutt,* AIR 1977 SC 1005 : 1977 (2) SCR 877 : (1977) 2 SCC 668.
2. *Bismillah Begum* v. *Rahmatullah Khan,* (1998) 2 SCC 26 : 1998 (1) JT 262 : 1998 (1) Scale 178 : 1998 (1) Supreme 310 : 1998 (2) SLJ 462 : AIR 1998 SC 970, 971.
3. *Bibi Jaibunisha* v. *Jagdish Pandit,* (1997) 4 SCC 480, 482.
4. *K.S. Vaidyanathan* v. *Vairavan,* (1997) 3 SCC 7.
5. *Shakuntala Devi* v. *Mohanlal Amrit Jain Market,* AIR 1994 Raj. 259, 263 : 1994 (3) Cur. CC 608.
6. *Nanak Builders and Investors Pvt. Ltd.* v. *Vinod Kumar Alag,* AIR 1991 Delhi 315, 321.

whether the parties, not withstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time.[1] In the case of a reversion or a business it is established that, in the absence of anything to the contrary in the contract, time is deemed to be of the essence. But that rule may not apply to the sale of leaseholds.[2] Similarly, in the case of sale of goods, a stipulation as to time of payment is not deemed to be of the essence.

Where a sale agreement of immovable property contained a stipulation that performance must be made within six months failing which the advance paid would be forfeited it cannot be construed that the time is essence of the contract, unless an express stipulation that time is the essence of contract is provided in such agreement.[3] Although the parties have fixed the period of delivery, time cannot said to be the essence of the contract and for the purpose of construing otherwise, their agreement has to be considered in its entirety for the purpose of appreciation of the intent of the parties.[4]

Although it is well settled that time is not an essence of an agreement relating to immovable property and the specific performance of the contract cannot be refused on the ground of delay, this application will not apply in respect of suit for specific performance relating to agreement to repurchase.[5]

When the agreement relating to the sale of property allows three months time for payment of balance of sale consideration it cannot be said that the time is essence of the contract when there is no express stipulation in the agreement to that effect.[6]

In connection with the family partition of the property although the appellants asserted that the time for payments under the agreements was a matter of essence, the fact that the payment due in 1993 were asked in the application made by them in 1995 shows that they did not mean that time was of essence.[7]

Although the contract by which cables were agreed to be supplied by the appellant to the respondent Department of Telecom clearly shows that the

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1. *Kandarpa Nag.* v. *Banwari Lal,* (1921) 33 CLJ 244 : 60 IC 864 : (1921) Hal. 356; *Sadiq Hussain* v. *Anup Singh,* (1923) 4 Lah. 327 : 76 IC 91 : (1924) Lah. 151; *Raghbir* v. *Sundar Lal,* (1931) Lah. 205 : 11 Lah. 699.
2. *Teju Kaya* v. *Gangji Nensey,* (1933) 57 Bom. 292 : 142 IC 381 : 34 Bom. LR 1629 : (1933) Bom. 71.
3. *Vairavan* v. *K.S. Vidyananda,* AIR 1996 Mad. 353, 358.
4. *Arosan Enterprises Ltd.* v. *Union of India,* AIR 1999 SC 3804, 3815 (DB) : 1999 (9) Supreme 427 : (1999) 9 SCC 449 : 1999 (3) R.A.J. 297 : 1999 (6) Scale 46.
5. *Ramu Ammal* v. *Nathamuni Naidu,* 1999 (3) CCC 384 (388) (Mad).
6. *Amalorpava Mary Ammal* v. *S. Gopala Rathinam,* 2001 (1) MLJ 282.
7. *Amteshwar Anand* v. *Virender Mohan Singh,* AIR 2006 SC 151 : (2006) 1 SCC 148 : 2005 (8) Supreme 219 : 2005 (4) CurCC 225 (SC)

time is essence of the contract, but the provision in one of the clauses for payment of liquidated damages by the appellant for delayed delivery establishes that time is not essence of the contract.[1]

Where the buyer agreeing to buy the immovable property from the seller has promised to pay the balance consideration within a specified time and in the event of default the advance paid by him to be forfeited and the agreement to be cancelled and subsequently part payment being accepted by the seller on the assurance of the buyer to make full payment soon, indicates that time was the essence of the contract.[2]

Where the defendant sellars have agreed to evict the tenant and handover possession of the flat to the plaintiff purchaser before execution and registration of the sale deed and the defendants having failed to perform their obligation under the contract, the plaintiff purchaser cannot be compelled to pay the balance of consideration on the ground that the time is essence of the contract.[3]

Although the words used in the contract indicate that time is the essence of the contract, it is not of much significance when there is specific provision in the contract regarding the extension of time.[4]

Where a purchase order was placed for the supply of shutters within 15 days, the time of supply must strictly be adhered to failing which the contract is liable to be rescinded on the ground of time being the essence of contract.[5]

When the construction of a shed in the premises of the defendant could not be completed by the defendant construction company within the specified time for want of submission of drawings by the defendant, time cannot said to be essence of the contract as the plaintiff construction company cannot be blamed for the delay.[6] Where an agreement has been entered into relating to the sale of immovable property subject to the condition that the sellers were required to secure permission for the sale within a specified time under Land Ceiling Act and mutually agreed the agreement to be not enforceable if the

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1. *Haryana Telecom Ltd.* v. *Union of India,* AIR 2006 Del 339.
2. *Datta Seeta Mahalakshmamma* v. *Yanamadala Balaramaiah,* AIR 2003 AP 430, 436 (DB) : 2003 (4) ALD 381 : 2003 (6) ALT 151 : 2004 (1) Cur CC 238 : 2004 (13) AIC 353 (AP).
3. *Kuldip Gandotra* v. *Shailendra Nath Endlay,* AIR 2007 Del 1 : 2006 (2) CTLJ 183 (Del) : 2007 AIHC 41 (NOC).
4. *Tonkos Engineer and Contractors* v. *Union of India,* 2001 (1) KLT 666.
5. *State of Orissa* v. *Durga Enterprises Jagatsingpur,* AIR 1995 Ori. 207, 210.
6. *Multi Metals Ltd.* v. *K.L. Jolly,* AIR 2003 Raj. 8, 10 : 2002 (49) Arbi. LR 212 : 2002 (2) Raj LR 330 : 2003 (2) Raj LW 1111.

sellers failed to secure the necessary permission, under the circumstances time is said to have been intended by the parties to be the essence of the contract.[1] Where the performance of the contract was agreed to be made within six months and the earnest money paid was agreed to be forfeited in the event of non performance, the reasonableness and proximity expressed by specific and clear terms to six months on the expiry thereof not only the agreement was to stand cancelled but also the earnest money was to stand forfeited indicates that the time is essence of the contract.[2]

Merely because time was extended on several occasion for the completion of the construction work of warehouses entrusted to the plaintiff, it doesn't lead to the conclusion that the other party has to be kept in waiting endlessly and the affected party on account of non-performance of the contract is entitled to rescind the contract even if the time is not the essence of the contract.[3]

But the tendency is to regard time of delivery as of the essence in all mercantile contracts. Especially in the case of goods subject to great fluctuations in price, the time of delivery is deemed to be of the essence of the contract.[4] In the case of a Malabar Kuri transaction, the time for furnishing security before drawing the money has been held to be of the essence of the transaction.[5] Again, even in the case of immovable property, an option of repurchase has to be exercised within the time limited,[6] the reason being that in such a case there is no mutuality.[7] The fact that property in goods has already passed

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1. *P. Purushotham Reddy* v. *M/s. Pratap Steels Ltd.*, AIR 2003 AP 141 : 2003 (6) ALD (NOC) 145 : 2002 (5) ALT 438 : 2002 (6) ALD 29.
2. *Continental & Eastern Agencies* v. *Coal India Ltd.*, AIR 2003 Delhi 387 : 2003 (106) DLT 340.
3. *Food Corporation of India* v. *Anupama Warehousing Establishment*, AIR 2004 Ker 137 : 2004 (2) CTLJ 388 (Ker) (DB).
4. *Balaram* v. *Govinda*, (1925) 49 MLJ 200 : 91 IC 257 : (1925) Mad. 1232; *Mohanlal* v. *Gyaniram*, (1935) Nag. 111 : 155 IC 778. **See** *Kesavan* v. *Antony*, 1971 Ker. LT 220 (On prinicple that is no reason why the rule that stipulation about time is an essential term of the contract should not be applied to contracts legally entered into by agricultural cultivators land); *Natarajan* v. *Loganathan*, (1976) 1 MLJ 368; but see *American Pipe Co.* v. *State of U.P.*, AIR 1983 Cal. 186.
5. *Ayya Pattar* v. *Attu Purath*, (1919) MWN 805 : 52 IC 938.
6. *Samarapuri* v. *Sudarsana*, (1919) 42 Mad. 802; *Maung Wala* v. *Maung Shwe Gon*, (1923) 1 Ran. 472 : 82 IC 610; (1924) Ran. 57; *Mathura* v. *Jagdeo*, (1927) 49 All. 405 : 25 ALJ 261 : 104 IC 504 : (1927) All. 321; *Malak* v. *Mohan Singh*, AIR 1974 Bom. 136; *Ramachandrayya* v. *Narayana*, (1979) 1 APLJ 463; *Sambhunath* v. *Sushama*, AIR 1980 Cal. 5; *Kallaian* v. *Ningesouda*, AIR 1982 Kant. 93. **See also** *Smt. Kamal Rani* v. *Smt. Chand Rani*, AIR 1980 Delhi 188; *Varadayammal* v. *Balasubramania Gounder*, (1979) 1 MLJ 294 : ILR (1979) 2 Mad. 68 : 92 LW 92; *Kandaswami Mudaliar* v. *Munuswamy Odayar*, (1974) 2 MLJ 62 : 87 LW 384; Cf. however, *Ram Prasad* v. *Urmila Dei*, 1979 All. LJ 987.
7. *Maung Po* v. *Maung Shwe*, (1923) Ran. 42 : 70 IC 126.

does not prevent the buyer from rescinding the contract under this section.[1] In an Allahabad case,[2] the vendor committed default in a contract for sale of in which time was expressly made the essence of the contract. However, he subsequently sent the goods but the vendee intimated that the contract had been cancelled owing to the default and that the goods despatched would be in his custody only on behalf of that the goods vendee sold the goods after due notice, and remitted the proceeds to the vendor after deducting his charges. It was held in an action by the vendor for the price that the purchaser's action quite justified.

At Common Law stipulations as to time in a contract giving an option for renewal of a lease of land were considered to be of the essence of the contract even if they were not expressed to be so and were considered as conditions precedent. Equity followed the Common Law rule and did not regard stipulations as to time as not of the essence of the bargain, the reason being that a renewal of a lease in a privilege and if the tenant wishes to claim the privilege he must do so strictly within the time limited for the purpose. A lessee not having exercised the option of renewal within the time limited by the clause is not, therefore, entitled to a renewal.[3]

The rule that stipulation about time is an essential term in the contract is applicable to contracts entered into by cultivators of land relating to the raising of agricultural crops on the land (such as baling water from paddy fields).[4]

Consent decrees.—The question has arisen whether in case of consent decrees fixing certain sums as payable by a certain date, this section is applicable. It has been held that, the section applies, and that if on a construction of the language of the decree, it is possible to infer that the stipulation as to time was an essential part of the compromise, such stipulation will be enforced.[5]

Extension of time.—Where a promisee extends the time for performance, it does not necessarily follow that time has ceased to be of the essence of the contract.[6] Where under a contract fixing a time for performance,

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1. *Baldeo Doss* v. *Howe,* (1880) 6 Cal. 64.
2. *Baij Nath* v. *Johar Chand,* (1933) ALJ 1000 : 144 IC 82 : (1933) All. 404.
3. *Caltex (India) Ltd.* v. *Bhagwan Devi Masodia,* AIR 1969 SC 605 : (1969) 1 SCJ 783.
4. *Kesavan* v. *Antony,* 1971 Ker. LT 220.
5. **See** *Jwala Ram* v. *Mathura Das,* (1931) Lah. 696 : 132 IC 580; *Bhagvant* v. *Appaji,* (1916) 18 Bom. LR 803; *Sasadhar* v. *Raghab,* (1930) Pat. 234 : 125 IC 123; *Hans Raj* v. *Jogeshar,* (1925) 88 IC 1020 : (1925) Pat. 691; *Parbhu Ram* v. *Jhalo Koer,* (1917) 42 IC 408; *Kishen Prasad* v. *Kunj Behari,* (1926) 24 ALJ 210 : 91 IC 790 : (1926) All. 278.
6. *Haji Fakir* v. *Abdulla,* (1887) 12 Bom. 658; *Mt. Hafizunnissa* v. *Moulvi Imamuddin,* (1924) Pat. 825 : 75 IC 123; *Kamal Krishna* v. *Chatoorbhuj,* (1925) Cal. 324 : 78 IC 962; **but see** *Manni Lal* v. *Nihal Chand,* (1930) Oudh 417 (Inference of waiver); *Mohinder Singh* v. *Executive Engineer,* AIR 1971 J&K 130.

the promisor has made a deposit forfeitable on default of timous performance, and the promisee accepts without demur performance at a later date, the deposit will be recoverable by the promisor, the stipulation for forfeiture being regarded as a penalty.[1]

Where the Delhi Development Authority selling plots in an auction granted extension of time to the auction buyer for payment of sale money, subject to payment of interest, it cannot cancel allotment of plots when the auction buyer has deposited the sale money together with interest although after the expiry of the extension of time since the payment and the interest was accepted by the Authority.[2]

Where penalty has been provided in the general conditions of the contract for delayed execution of work and also a provision has been made for grant of extension of time in the special conditions of the contract in case of physical obstructions, the intention of the parties to the contract is that the time is not the essence of the contract.[3]

The question whether time is the essence of the contract or not has to be determined from the intent of parties but not on the basis of any presumption or presumed extension or presumed acceptance of a renewed date as any such extension of date of performance ought to be categorical in nature rather than being vague or in the anvil of presumptions.[4]

Where an agreement for sale of shares deposited with a bank treated time as of essence and the vendee was required to get them released by the fixed date and to make payment by instalments and despite default by vendee to get the shares release within time the vendors accepted payments, such acceptance would preclude a rescission of the contract.[5]

Where a vendor agreeing to sell house property undertook to hand over the vacant possession by evicting the tenants and effect registration within six months, the facts that he received certain sum from the vendee even after the expiry of six months and intimated that the tenants did not vacate and agreed to intimate within one month of their vacation show that the time is not essence of contract.[6]

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1. *Pallonjee & Sons* v. *Lonavala Municipality,* (1937) Bom. 417 : 39 Bom. LR 835 : 171 IC 660 : ILR (1937) Bom. 782.
2. *R.K. Saxena* v. *Delhi Development Authority,* AIR 2002 SC 2340 : (2001) 4 SCC 137 : 2001 (3) Supreme 57 : 2001 (3) Civil LJ 22 : 2001 (90) DLT 752 (SC).
3. *U.P. State Bridge Corporation Ltd. Lucknow* v. *Bangalore Development Authority, Bangalore,* AIR 2005 Kant 166.
4. *Arosan Enterprises Ltd.* v. *Union of India,* AIR 1999 SC 3804, 3809 (DB) : 1999 (9) Supreme 427 : (1999) 9 SCC 449 : 1999 (3) RAJ 297 : 1999 (6) Scale 46.
5. *Anil Gupta* v. *Atul Kumar Gupta,* (1981) 20 DLT 497.
6. *S.V.S. Sarma* v. *Meesala Kotha Muvallayya,* AIR 1996 AP 441, 446 : 1996 (2) ALT 982 : 1996 (2) APLJ 460 : 1996 (4) ALD 524 : 1996 (2) LS 155 : 1996 (4) ICC 764.

Where it is stated in the agreement that the sale deed shall be executed before the date stipulated it cannot be said that time is the essence of contract, when it was provided in the agreement to sell that sale shall be completed after the vendor obtains the sale certificate from the Government.[1]

Where the plaintiff purchaser agreed to pay the balance of sale consideration within a week of the date of agreement subject to the condition of the defendant seller obtaining the Income Tax Clearance Certificate which is necessary for the registration, the conduct of the seller demanding the balance of consideration after obtaining the requisite certificate is indicative of the fact that the parties never intended time is to be the essence of the contract.[2]

Where in a contract between a State Government and a contractor for construction of an aqueduct across a river within the stipulated period of twelve months, power was conferred upon the Executive Engineer to grant extension of time for completion of work on reasonable grounds and further provision was made for levying and recovering penalty compensation from the contractor at specified rates for the unfinished work after the expiry of the fixed date, such provisions would exclude the inference that time was intended to be of the essence of the contract. The rescission of such a contract on the part of the State Government without fixing any further period making time the essence and directing the contractor to complete the work within such period, was clearly illegal and wrongful and, thereby, the State Government committed a breach of the contract with the result that the security deposit of the contractor could not be forfeited.[3]

Where in a works contract time was mentioned as of essence of the contract but the contract was enforceable till completion of the work or its abandonment, rescission of the contract and consequent forfeiture of the security deposit was held to be proper and within the terms of the contract.[4]

Merely because the conditions of the contract provide for granting extension of time to complete the contract work, time cannot be said to be the essence of the contract.[5]

Again, where a breach occurs after the extended date, damages will be assessed in relation to such date and not the date originally agreed upon.[6]

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1. *Bhagwan Singh* v. *Teja Singh*, AIR 1995 P&H 64, 68.
2. *Arjun Pradeepak* v. *G. Vani*, 2003 (6) ALD 350 (DB) : 2003 (5) ALT 755 (DB).
3. *Hind Construction Contractors* v. *State of Maharashtra*, AIR 1979 SC 720 : 1979 (2) SCR 1147 : (1979) 2 SCC 70; *Anand Construction* v. *State of Bihar*, AIR 1973 Cal. 550.
4. *State of Maharashtra* v. *Kulkarni*, AIR 1979 SC 1339 : 1979 SCC 217 : (1979) 3 SCR 188.
5. *Food Corporation of India* v. *Ratanlal N. Gwalani*, AIR 2004 MP 215 : 2004 (2) Cur.CC 393 : 2004 (1) MPHT 56 : 2004 (1) MPLJ 552.
6. *Muhammad Habibullah* v. *Bird & Co.*, (1921) 43 All. 257 : (1922) PC 178 : 24 Bom. LR 687: 4 LW 350 (PC); *Mohanlal* v. *Gyaniram*, (1935) Nag. 111 : 155 IC 778.

Clause 3 of the section means that the promisee cannot claim damages for non-performance at the original agreed time, not that he cannot claim non-performance at the extended time. It has been said that the section does for not enable a promisee to keep alive a broken contract in the hope of being able to recover heavier damages for its breach."[1]

56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations

(a) *A* agrees with *B* to discover treasure by magic. The agreement is void.

(b) *A* and *B* contract to marry each other. Before the time fixed for the marriage, *A* goes mad. The contract becomes void.

(c) *A* contracts to marry *B*, being already married to *C*, and being forbidden by the law to which he is subject to practise polygamy. *A* must make compensation to *B* for the loss caused to her by the non-performance of his promise.

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1. *Muthayya* v. *Lekku*, (1914) 37 Mad. 412; *Mohanlal* v. *Gyaniram*, (1935) Nag. 111 : 155 IC 778; *Hitkari Motors* v. *Attar Singh*, AIR 1962 J&K 10.

(d) *A* contracts to take in cargo for *B* at a foreign port. *A's* Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) *A* contracts to act at a theatre for six months in consideration of a sum paid in advance by *B*. On several occasions, *A* is too ill to act. The contract to act on those occasions becomes void.

Applicability—In *Satyabrata* v. *Mugneeram,*[1] the Supreme Court observed *'inter alia'*. "In deciding cases in India, the only doctrine we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act taking the word 'impossible' in its practical and not literal sense". Section 56 applies only to a contract. It does not apply to leases.[2] Once a valid lease comes into existence the agreement to lease disappears and its place is taken by the lease. It becomes a completed conveyance. Events, which discharge a contract, do not invalidate a completed transfer. An agreement to lease is however within the scope of Section 56. Thus where an agreement providing that the property concerned should be leased to the plaintiff for three years and that the lease deed should be registered within 15 days of the acceptance of the tender called for and submitted and for one reason or other the contemplated lease deed was neither executed nor registered it was held that it was only an agreement to lease and would come within the scope of Section 56.[3]

Impossibility.—Impossibility of performance is one of the modes of discharge of contract. When a contract to perform a certain thing becomes impossible of fulfilment owing to some supervening circumstance or circumstances, the party liable is discharged from performance. A contract is said to be frustrated when a certain set of circumstances arise subsequent to the formation of a contract rendering the performance of the contract by one or both parties physically and commercially impossible which is not due to fault of either parties and as such by virtue of the altered circumstances the court relieves them of their further obligations.[4] The true, foundation of a

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1. AIR 1954 SC 44; (1954) 1 MLJ (SC) 41; *Ram Sarup Gaur* v. *Ratnam,* AIR 1984 All. 369.
2. *Smt. Sushila Devi* v. *Hari Singh,* (1971) 1 SCWR 487 : AIR 1971 SC 1756; **see also** *H.V. Rajan* v. *C.N. Gopal,* AIR 1975 SC 261 : (1975) 2 SCJ 1 : *Savamalai Estates* v. *Kannayan,* (1978) 1 MLJ 424 : 91 LW 255.
3. (1971) 1 SCWR 487 : AIR 1971 SC 1956.
4. *Central Bank of India Staff Co-op. Building Society Ltd.* v. *D.R. Koteswara Rao,* AIR 2004 AP 18 (DB) : 2004 (2) CTLJ 600 (AP) : 2003 (5) ALD 116 (DB) : 2003 (2) LS 435 : 2003 (6) ALT 121 (DB).

discharge of contract by impossibility is 'consent'. It can hardly be denied that when two normally minded persons make a contract about something, they expect a certain state of things to exist, at the time of performance; they assume a certain state of things as the foundation of the contract; a particular set of circumstances forms the milieu or background as it were, for the performance to come. Now, if for any reason, the state of things at the time for performance is altered by no fault of either party, and consequently, the performance originally stipulated for is not possible then the party obliged, is discharged from his obligation; for the parties are deemed to have contracted only on the certain fundamental assumptions and to have consented that on the failure of those assumptions, there shall be no obligation to perform the contract. Take a common instance of B promising to paint a portrait for A, before or by a certain date. Suppose before the date, B dies or is struck with paralysis. The contract is paint A's contract that B should continue to be alive and to have good health till the time of performance. **[484]**

Now this is one kind of impossibility. But it is possible that the impossibility could have existed unknown to the parties even at the time of making the contract, *e.g.*, non-existence of the subject-matter. This, properly speaking, comes under the category of mutual mistake.

Supervening Impossibility.—What the present section is concerned with mainly is what may be called subsequent or supervening impossibility. Of this there may be various types:—(1) Performance may become impossible through the destruction of anything essential to the performance of the contract.[1] Or (2) performance may become impossible through a change of law, so that what was lawful at the formation of the contract, becomes prohibited at the time of performance.[2] (3) Again, performance may become impossible because a state of things, the existence of which was the basis of the contract has ceased to exist.[3] (4) Again because of some circumstances, performance within the time, in the way contemplated, may become

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1. *Taylor* v. *Caldwell*, (1863) 122 ER 309 : 129 RR 573; *D's, A's Gulnes* v. *Imperial Chemical Industries*, (1938) 1 AER 24; *Tatem Ltd.* v. *Gamboo*, (1938) 3 AER 135.
2. *Baily* v. *De Crespigny*, (1869) 4 QB 180; *Reilly* v. *The King*, (1934) AC 176; *Esposito* v. *Bowden*, (1857) 119 ER 1430 : 110 RR 822; *Hirji Mulji* v. *Cheong*, (1926) AC 497; *Kawasaki* v. *Bantham S.S. Co.*, (1939) 1 AER 819; *Union of India* v. *Damani & Co.*, AIR 1980 SC 1149 : 1980 Supp. SCC 707 : 1980 UJ 706.
3. *Krell* v. *Henry*, (1903) 2 KB 740. **See also** *Aerial Advertising Co.* v. *Batchelor's Peas Ltd.*, (1938) 2 AER 788; *Minnevitch* v. *Cafe de Paris (Londres)*, (1936) 1 AER 884; *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.*, (1935) AC 524 : 156 IC 1046 : (1935) PC 128 (Self induced frustration will not discharge the contract). **See also** *Gambhirmull Mahabirprasad* v. *Indian Bank Ltd.*, AIR 1963 Cal. 163.

impossible.[1] Lastly in case of contracts of service, they may be rendered impossible by death or illness of the party.[2]

"Becomes Impossible".—Impossibility as conceived in Section 56 must be taken in a practical and not a literal sense.[3] It is not a physical impossibility but a situation in which performance if made would be useless to achieve the object for which the agreement was entered into.[4] In *Purshotamdas* v. *Purshotamdas,*[5] in a suit for damages for breach of contract against a Hindu father who had agreed to give his daughter in marriage to the plaintiff, it was held that a mere declaration by the girl of her unwillingness to marry the plaintiff was insufficient to make performance "impossible". In *Karl Ettlinger* v. *Chagan Das,*[6] the court held that a contract to supply freight did not become impossible, simply because the freight could not be got except at prohibitive prices. Similarly, in *Hari Lakshman* v. *Secretary of State,*[7] where owing to a strike of the workmen employed on a contract, it could not be performed, the court held there was no impossibility within the meaning of the section. Even the sinking of goods at sea has been held to be no defence to a buyer's claim for damages, where there is no condition in the contract providing for such a contingency.[8] In *Sinnappa* v. *Ramaswami,* [9] where leased lands got silted up by floods it was held that the tenant could not invoke the present section to escape liability for rent. In *Fulchand* v. *Pragdas,*[10] where the defendant firm had agreed to sell goods to the plaintiff as and when they got the same from the

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1. *Metropolitan Water Board* v. *Dick Kerr,* (1918) AC 119; *Horlock* v. *Beal,* (1916) 1 AC 486.
2. *Robinson* v. *Davison,* (1871) 6 Ex. 269; *Bombay Dyeing and Mfg. Co.* v. *State of Bombay,* AIR 1958 SC 32 8 : 1958 SCJ 620 : 1958 SCR 1122 : 1958 (1) LLJ 778; *Katras Jherriah Coal Co. Ltd.* v. *Mercantile Bank,* AIR 1981 Cal. 418 : 1981 (2) Cal. HN 146.
3. *Satyabrata* v. *Mugneeram,* AIR 1954 SC 44 : 1954 SCJ 1 : 1954 SCR 310.
4. *Ayssa* v. *Prabhakaran,* AIR 1971 Ker. 239 : 1971 Ker. LT 331.
5. (1896) 21 Bom. 23; (Cf.) *Rangaswami* v. *Trisa Maistry,* (1907) 17 MLJ 37; *Seth Mohan Lal* v. *Grem,* (1968) 1 SCJ 834; *Shiam Sunder* v. *Durga,* AIR 1966 All 185; *Janki Nath* v. *Ghulam Qadir,* AIR 1964 J&K 26 (Agreement to sell—Property in possession of tenant—Performance did not become impossible).
6. (1916) 40 Bom. 301; A *fortiori* where impossibility is traceable to party's default. **See** *Banaurasi* v. *Mohiuddin,* (1924) 3 Pat. 581 : 78 IC 723 : (1924) Pat. 586; **see also** *Mill Stores Trading Co.* v. *Seth Mathurdas,* (1921) Nag. 42 : 17 NLR 1 : 57 IC 636; *Hukamchand* v. *Mercantile Bank,* (1921) Lah. 100 : 62 IC 815; *Rajaram* v. *Dt. Board, Tanjore,* (1910) 1 MWN 686 : 8 IC 565 (Contract for supply for gravel held not to have become impossible simply because the Railway Company were unable to supply trucks).
7. (1927) 52 Bom. 142 : 108 IC 19 : (1928) Bom. 61.
8. *Chote Lal* v. *Nathu Mal,* (1930) Lah. 193.
9. (1929) Mad. 575 : 181 IC 79.
10. (1923) 47 Bom. 344 : 27 CWN 878 : 18 LW 441 : (1923) MWN 547 : (1923) PC 54 : 44 MLJ 498. **See** *Ranchoddas* v. *Nathmal Hirachand & Co.,* AIR 1949 Bom. 356; *Biswas* v. *Sakina Begum,* AIR 1973 Cal. 135; *Bissesswarlal Jaidayal,* AIR 1949 Cal. 407.

mills with whom they had placed orders, and the mills failed to supply the goods to the defendants, the Privy Council held that the contract had not become impossible within the meaning of Section 56. In a Bombay case, where a decree had been assigned, but the judgment-debtor of the assigned decree was adjudicated insolvent before the actual payment of the consideration, the assignee decree-holder sought to invoke the section but the court held that it was not a case of impossibility within the meaning of the section.[1] Where a contractor deposited the amount with the Govt. and has been given the contract to do sand quarrying operations but was prevented to carry on the work by local people, public and government authorities, the contract is held to have been frustrated.[2] Where there was a contract between the State and the plaintiff's who were the licencees for the sale of arrack, the plea of the plaintiff's that they were prevented from selling arrack due to the threats and interference of naxalites and consequently the contract was frustrated is not tenable.[3]

Where the petitioner entered into a contract agreeing to supply animal beef to the respondent Zoological park failed to do so under the Orissa Prevention of Cow Slaughter Act, 1960, having regard to the nature and circumstances of the transaction and implied terms the performance of the contract by the petitioner contractor became impossible and such impossibility comes within the fold of *"force-majeura"*.[4]

Where the defendants have agreed to sell the leasehold interest in the property to the plaintiffs subject to the condition of receiving the permission from the Cantonment Board for the sale and such permission having been refused by the Cantonment Board no specific performance of the contract can be claimed in view of the performance of the contract having been rendered impossible.[5]

Where the defendant Andhra Pradesh Co-operative Oil Seeds Growers Federation Ltd., failed to supply groundnut oil to the plaintiff under the agreement on the ground that it was under the statutory obligation to supply oil to Civil Supply Corporation to serve the needs under Public Distribution System and pleaded impossibility of Performance, the suit by the plaintiff claiming damages for breach of contract contending that the Doctrine of Frustration did not apply to the case instead of Doctrine of Forseebility cannot

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1. *Vithaldas* v. *Jagjivan,* (1939) 41 Bom. LR 33 : (1939) Bom. 84.
2. *Krishna & Co.* v. *Govt. of A.P.,* AIR 1993 AP 1.
3. *State of A.P.* v. V. *NarenderReddy,* 2003 (4) ALD 345 (DB) : 2003 (5) ALT 51 (DB).
4. *Syed Khurshed Ali* v. *State of Orissa,* AIR 2007 Ori 56 : 2007 AIHC 1592 : 2006 (2) Orrissa LR 557.
5. *N. Satyanarayana* v. *Vedprakash Dusaj,* AIR 2003 AP 385 : 2003 (3) ALD 884 (DB).

be maintained considering the statutory obligation of the defendant federation to supply oil to the Civil Supply Corporation.[1]

On the other hand, in *Inder Pershad* v. *Campbell,*[2] where a person agreed to cultivate indigo for a certain period on land of which he had a sublease and subsequently the lands were lost to him because his landlord, the immediate tenant, had failed to pay rent, the court held that the case fell within the section. On a similar principle, it was held in *Thomas* v. *Hanuman Prasad,*[3] that a contract for sale, subject to the sanction of the cantonment authorities, became impossible, when subsequently sanction was refused and so the contract became void. Self induced frustration is no frustration.[4]

When the petitioner Housing Board at the time of the agreement for providing water proofing of the houses knew that the houses in respect of which work is to be executed were in possession of the allottees, the performance of the contract cannot said to be frustrated on the ground of impossibility, because of the denial on the part of the allottees to permit execution of the work.[5]

Where a party invoking Sec. 56 desires to establish that the contract has become frustrated must establish the following facts:

(1) that the performance of the contract has become impossible;

(2) that the impossibility is not on account of some event which the promisor could not prevent or anticipate; and

(3) that the impossibility is not self induced by the promisor or due to his negligence.

Merely because the building is demolished under municipal notice, the lease does not become impossible of performance as the doctrine of frustration applies only to contractual obligations but not to contracts creating estates or interests in land, which had already accrued. Further there is no question of

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1. *Ramesh Agencies* v. *Andhra Pradesh Co-operative Oil Seeds Growers Federation Limited, Hyderabad,* 2007 (1) ALD (NOC 4).
2. (1881) 7 Cal. 474; **but see** *Venkateshwara* v. *Kesava,* (1879) 2 Mad. 187; For a curious case of application of the section to a marriage contract, **see** *Birendra Kumar* v. *Hemalata,* (1921) Cal. 459 : (1921) 48 Cal. 283 : 60 IC 362; *V.C.K. Bus Service* v. *R.T. Authority,* AIR 1957 SC 489 (a case of condition subsequent).
3. (1929) ALJ 1122 : 1929 All. 837; *Sunnam Sattiah* v. *State of Andhra Pradesh,* AIR 1980 AP 18; *Ramiah* v. *Mohammadunnissa Begum,* AIR 1981 AP 38; *Punj. Sons (P) Ltd.* v. *Union of India,* AIR 1986 Del. 158.
4. *Bhoothalinga Agencies* v. *VTC Perraswami Nadar,* AIR 1969 SC 110; *Ved Prakash* v. *Sishupal Singh,* AIR 1984 All. 288.
5. *Gujarat Housing Board* v. *Vipul Corporation,* AIR 2004 Guj 319 : 2005 (1) GCD Guj 288 : 2004 (3) Guj.LH 350 : 2004 (3) Guj.LR 1937.

impossibility arising since the lessor rights will revive when the building is reconstructed.[1]

The defendant company started a scheme for the development of housing colony. It entered into agreement with different purchasers for sale of plots and accepted consideration money in part from them as earnest money. The company undertook to construct the roads and drains and after completion of the same the purchaser would be called upon to complete the conveyance on payment of balance of consideration money. But before it could proceed with its plan the Government requisitioned substantial portion of land for military purposes. Under these circumstances the company decided to treat the agreement for sale as cancelled and proposed to return the earnest money. The plaintiff filed a suit. The defendant company resisted the suit on the ground that the agreement has become void by way of frustration.

The Supreme Court of India held that the contract cannot be avoided on the ground of frustration.

Mukerjee J, observed:

> "Undoubtedly the commencement of the work was delayed but was the delay going to be so great and of such a character that it would totally upset the basis of the bargain and commercial object which the parties had in view? The requisition orders, it must be remembered were by their very nature, of temporary character and the requisitioning authority could, in law, occupy the position of a licensee in regard to the requisitioned property. The order might continue during the whole period of the war and even for some time after that or it could have been withdrawn before the war terminated.

If there was a definite time limit agreed to by the parties within which the construction work was to be finished, it could be said with perfect propriety that delay for an indefinite period would make the performance of the contract impossible within the specified time and this would seriously affect the object and purpose of the venture. But when there is no time limit whatsoever in the contract nor even an understanding between the parties on that point and when during the war the parties could naturally anticipate restrictions of various kinds which would make the carrying on of these operations more tardy and difficult than in times of peace, we do not think that the order of requisition the fundamental basis upon which the agreement rested or struck at the roots of the adventure."[2]

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1. *Amir Chand* v. *Chunilal,* AIR 1990 P&H 345 : 1990 (2) Ren. LR 137.
2. *Satyabrata* v. *Mugneeram,* AIR 1954 SC 44 : 1954 SCJ 1 : 1954 SCR 310.

The Supreme Court followed the claim case in *Mugneeram & Co.* v. *Gurbachan Singh.*[1]

This appeal like *Satyabrata Ghose* v. *Mugneeram Bangur and Co.*[2], relates to the effect of requisitioning orders made by the Government during the last war under which they took possession of land belonging to the appellant company which had been divided into building plots by them in pursuance of what is known as the Lake Colony Scheme by constructing roads and drains. The plaintiff-respondent was one of the various persons who had entered into contracts with the company for purchase of plots in pursuance of the public offers made by the company. This he did by addressing a letter to the company and paying Rs. 202 by way of earnest money.

The first paragraph of the section lays down the law in the same way as in England. It speaks of something, which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible' has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and unless from the point of view of the object and purpose which the parties had in view, if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain it can very well be said that the promisor found it impossible to do the act which he promised to do.

Although various theories have been propounded by the Judges and jurists in England regarding the judicial basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility".

In the instant case, there is no term or condition in the agreement in question, which stipulates that the agreement would be treated as having become impracticable on the refusal of the Prant Officer to grant the permission under Section 63 of the Act. The parties are, therefore, governed purely by

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1. AIR 1965 SC 1523 : 1965 (2) SCR 630.
2. AIR 1954 SC 44 : 1954 SCR 310.

Section 56 of the Contract Act according to which a contract becomes void only if something supervened after its execution, which renders it impracticable. On the contention advanced on behalf of the respondents, the question that arises is whether the above quoted order of the Prant Officer, Thana Prant dated December 8, 1958, rendered the contract impracticable. The answer to this question is obviously in the negative. The said order, it will be noted, was not of such a catastrophic character as can be said to have struck at the very root of the whole object and purpose for which the parties had entered into the bargain in question or to have rendered the contract impracticable or impossible of performance. A careful perusal of the order would show that it was neither conclusive nor it was passed on the merits of the aforesaid application. The permission was refused by the Prant Officer only on the technical ground that the appellants had not obtained the requisite certificate as contemplated by Rule 36(f) of the Rules. It did not in any way prohibit the appellants from making a fresh application to the Collector, Thana Prant, who in view of the phraseology of Section 63 of the Act read with clause (f) of Rule 36 of the Rules appears to be the only authority competent to grant the requisite certificate. The said order also did not put any fetter on the appellants to apply to the Collector or the Additional Collector for grant of the requisite permission for sale and purchase of the land after obtaining the aforesaid certificate. We are, therefore, clearly of the opinion that no untoward even or change of circumstances supervened to make the agreement factually or legally impossible of performance so as to attract Section 56 of the Contract Act."

Destruction of subject-matter.—**[488]** With regard to impossibility due to destruction of the subject-matter, it is necessary to mention certain statutory provisions outside the Contract Act. Under the Specific Relief Act (Section 12) it is provided that the mere destruction of a portion of the subject-matter of a contract does not render it wholly impossible of performance. Again, the Transfer of Property Act (Section 108) provides that a lease shall be void in case of total or partial destruction of the property by fire, tempest, flood, or violence of an army or mob.

SURETY-BONDS FOR APPEARANCE—The question whether the section is applicable so as to relieve sureties for appearance of a judgment-debtor, where for reasons beyond the control of the surety or the debtor, the appearance of the latter on the day fixed is impossible, has arisen in some cases, and has been answered in the affirmative.[1]

Impossibility caused by subsequent illegality.—Where a contract becomes impossible of fulfilment owing to prohibition by an Act of

1. *Thakar Datt* v. *Ram Singh,* (1928) Lah. 61 : 108 IC 376; *Maung Kywe* v. *Maung San Tin,* (1923) Ran. 26 : 70 IC 870; *Inder Singh* v. *State,* AIR 1960 All. 419.

the Legislature, it need not be performed. The parties are deemed to have contracted only on the footing of the performance of the contract continuing lawful. The law does not impose an obligation to do that which it forbids and the obligation to perform a contract is implied conditional on the continued lawfulness of the performance. In *Sannidhi Gundayya* v. *Illoori Subbayya,*[1] the contract was for delivery of bags of rice by railway wagons. Both the parties knew that the Government had imposed 'wagons restriction' which interfered with easy transport. The defendant was unable to supply according to the contract and pleaded impossibility as a defence. The Court held that he was discharged.

On the other hand, where a contract to carry pilgrims from Bombay to Jeddah was broken by the steamer company on the ground that some of the pilgrims were suffering from an infectious disease and therefore performance of the contract of carriage would be an offence under Section 269 of the Penal Code, it was held that the section did not apply and that impossibility could not be pleaded, because it was quite within the power of the company to have taken the necessary precautions.[2] **[489]**

Where there was an agreement between the plaintiff and the defendant relating to sale and purchase of Thika Tenancy which became impossible of performing on account of subsequently promulgating the Calcutta Thika Tenancy (Acquisition and Regulation) Act 1981, the contention that the agreement in question was valid under the old law prior to the passing of the subsequent Act of 1981 cannot be accepted.[3]

In regard to cases of this kind, it has to be remembered that where only a portion of the contract becomes impossible, the section cannot be invoked. In President, District Board, *South Kanara* v. *Santhappa,*[4] where, owing to a Government ordinance about traffic in food-grains, a contractor of tolls suffered loss, and sued to recover the money paid, it was held that he could not recover on the ground of "impossibility", as there were other kinds of traffic passing the toll-gates.

Similarly, in *Gurdit* v. *Secretary of State,*[5] where Government regulations had cut off a source of supply, and the defendant pleaded impossibility on that ground, the Court held that the contract was not discharged as there were other sources of supply.

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1. (1926) MWN 917 : (1927) Mad. 89 : 99 IC 459 : 51 MLJ 663; *Madhoram* v. *Sett,* (1919) 45 Cal. 28 : 21 CWN 670 : 40 IC 383.
2. *Bombay & Persia Steam Navigation Co.* v. *Rubatino,* (1889) 14 Bom. 147.
3. *Rozan Mian* v. *Tahera Begum,* AIR 2007 SC 2883 : 2007 AIRSCW 5266 : 2006 (6) IAR KarR 99.
4. (1925) Mad. 907 : 86 IC 362, following *Herne Bay Steamboat Co.* v. *Hutton,* (1903) 2 KB 683; see for an analogous case, *Sankaran* v. *Dt. Board, Malabar,* (1933) MWN 1281 : (1934) Mad. 85 : 39 LW 51 : 66 MLJ 108 : 147 IC 964.
5. (1931) Lah. 347 : 130 IC 772; *Ram Swarup Gaur* v. *Ratiram,* AIR 1984 All. 369.

Failure to accept the tender within the stipulated period owing to Courts' injunction to which the tenderer is not party results in frustration of contract and it is not open to the person inviting tenders to accept the tender subsequently.[1]

Impossibility caused by declaration of war :

(i) **CONTRACTS WITH ALIEN ENEMIES**—The general effect of declaration of war is to prohibit trading with the enemy, or even with resident in enemy country. All rights under contracts are suspended till the war comes to a close. But, if the performance of a contract will help the enemy, such a contract becomes void on the declaration of war.[2] Again, where the character of a contract will be revolutionised, by long delay in performance, the contract will be entirely discharged, and not merely suspended.[3] In *Marshal & Co.* v. *Naginchand,*[4] Beaman, J., observed that the suspension of a contract requiring continuous performance of mutual duties will not be expedient inasmuch as, on the cessation of hostilities, the contract will be practically a new one, to be performed under different conditions, and so such a contract must be taken as dissolved by the declaration of war. **[490]**

(ii) **COMMANDEERING**—In E*dmund Bendit* v. *E.R. Prudhomme,*[5] a contract on C.I.F. terms for shipping groundnuts to Europe, contained a 'force majeure' clause about war, revolution, strikes etc., as exonerating from performance. The steamer by which the defendant had booked the necessary tonnage was subsequently commandered by Government. It was held that the inability to get tonnage was *'force majeure'* within the meaning of the contract, and that the defendant was discharged from performance.

Frustration.—Regarding the doctrine of frustration, in *Smt. Sushila Devi* v. *Hari Singh,*[6] the Supreme Court has pointed out that Section 56 embodies the law of frustration. The doctrine of frustration is really an aspect or part of

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1. *M/s. Shyam Biri Works Pvt. Ltd.* v. *U.P. Forest Corpn.*, AIR 1990 All. 205.
2. *Textile Mfg. Co.* v. *Solomon,* (1916) 40 Bom. 570; *Nissim* v. *Haji Sultanali,* (1916) 40 Bom. 11 : 17 Bom. LR 249 : 28 IC 433; *Banghy Abdul* v. *Khandi Rao,* (1917) 41 Mad. 225; *Soorthingji* v. *Mahomed,* (1917) 32 MLJ 146.
3. *Metropolitan Water Board* v. *Dick, Kerr & Co.,* (1918) AC 119.
4. (1918) 42 Bom. 473 : 18 Bom. LR 915 : 37 IC 644.
5. (1926) 48 Mad. 538 : 87 IC 681 : 48 MLJ 374 : (1925) Mad. 626; **see also** *Firm Husseinbhoy* v. *Haridas,* (1928) Sind 21 : 105 IC 319 (Contract for delivery of Java sugar—Ships requisitioned by Government—Contract discharged). As to the meaning of *"force majeure"* **see** *Ezekiel Abraham* v. *Ramjusroy,* (1921) 63 IC 267 : 33 CLJ 151 : (1921) Cal. 305. **See** *Biswas* v. *Sakina Begum,* AIR 1973 Cal. 135.
6. (1971) 2 SCWR 697 : AIR 1971 SC 1756; **see also** *Satyabrata* v. *Mugneeram,* AIR 1954 SC 44 : (1954) 1 MLJ (SC) 41 : **see** *In re. H.E.H. The Nizam Jewellery Trust,* AIR 1980 SC 17; *Union of India* v. *Damani & Co.,* AIR 1980 SC 1149 : 1980 UJ (SC) 706 : 1980 Supp. SCC 707. **See also** *C.T. Xavier* v. *Joseph,* AIR 1995 Ker. 140.

the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence coming within the purview of Section 56. The view that Section 56 applies to cases of physical impossibility and that were the section is not applicable recourse can be had to the principle of English law on the subject of frustration is not correct. Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. The impossibility contemplated by Section 56 is not confined to something, which is not humanly possible. If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view, then it must be held that the performance of the contract had become impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the very root of the contract.

In the case before the Supreme Court the plaintiffs sought to take on lease the concerned properties with a view to enjoy those properties either by personally cultivating them or by sub-letting them to others. The object became impossible because of supervening events. The terms of the agreement relating to taking possession also became impossible of performance on account of communal troubles and long drawn out tension between India and Pakistan. The Supreme Court held that the contract had became impossible of performance and void.

Where a vehicle was released by the Customs Authorities on execution of a bond to pay its value in the event of damage, destruction etc., on account of any accident and on depositing certain sums liable to forfeiture, and the vehicle was destroyed in rioting. Section 56 will apply and the deposit cannot be forfeited.[1]

The concept of frustration of the agreement, which is consensual as envisaged in the Contract Act, cannot have *ipso facto* application to the situation arising under a specific statute like the Abkari Act.[2]

In *Fulchand* v. *Pragdas*,[3] the Privy Council pointed out the dangers of extending the principle of frustration. In that case, the defendant had failed to deliver goods because a third party with whom he had arranged for manufacture of the goods had taken up a Government contract in preference to the defendant's order. The Bombay High Court had held that in such circumstances there had been a frustration of the contract; the Privy Council however pointed out that there was no frustration, and that the defendant

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1. *Jagannath* v. *Collector of Customs*, (1981) 1 Karn. LJ 387 : 1981 Tax LR 2787.
2. *Sunnam Sattiah* v. *State of Andhra Pradesh*, AIR 1980 AP 18.
3. (1923) 47 Bom. 344 : (1923) PC 54 (2) : 27 CWN 878 : 44 MLJ 498.

had merely failed to perform the contract and that the facts of the case took it completely out of the principle of *Taylor* v. *Caldwell or Krell* v. *Henry.*

In *Sankaran* v. *District Board Malabar,*[1] a local authority sued for rentals from toll gate contractors and the defence was that the contract had become 'impossible' of fulfilment because an unforeseen accident, namely, the heavy rains washing away many bridges, had stopped traffic, and so precluded the possibility of collection of tolls for a substantial part of the year. There was a clause in the contract that the auction sales of the right to collect tolls were "subject to all risks". It was held that the risk of an interruption to traffic by weather conditions was not so remote as to have been beyond the contemplation of the parties, and that it could be brought within the operation of the clause above-mentioned.

In *Gouri Sankar* v. *Moitra,*[2] it was pointed out that "the principle of frustration will apply where the commercial object of the contract has been frustrated by the intrusion or occurrence of an unexpected event creating a state of things in which the parties could not have reasonably intended that the contract, as they made it, should be operative. Regard must be had to the nature and circumstances of the particular transaction, and the implied term, though it may be an addition to the contract, must be consistent with the express terms and with the intention of the parties gathered from those terms. No Court has a power of absolution and special care must be taken to avoid making a new contract 'for the parties.' **[492]**

In *Alopi Parshad* v. *Union of India,*[3] the facts of the case are:

On May 3,1937, M/s. Alopi Parshad and Sons Ltd. were appointed as agents by the Governor General for India in Council for purchasing ghee required for the use of the Army personnel. The Government of India, undertook to pay to the Agents the actual expenses incurred for purchasing ghee, cost of empty tins, expenses incurred on clearance of tins from the railway, export land- customs duty levied on ghee purchased and exported from markets situated in Indian States, octroi duty, terminal tax or other local rates on ghee and certain other charges incurred by the agents.

Subsequently another agreement was entered into between the agents and Govt. of India on 20-6-1942.

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1. (1933) MWN 1281 : (1934) Mad. 85 : 39 LW 51 : 66 MLJ 108 : 147 IC 964.
2. (1921) 26 CWN 573 : 70 IC 379 : (1921) Cal. 509. **See** *Piarey Lal* v. *Harilal,* AIR 1977 SC 1226 : 1977 (2) SCR 915 : 1977 (2) SCC 221; *Naiwani Jute Mills* v. *Khyaliram,* AIR 1968 SC 522; *Hari Prasad* v. *Union of India,* AIR 1973 SC 2380 : 1973 (2) SCC 746; *Boothalinga* v. *Periaswami,* AIR 1969 SC 110; *Mehta* v. *Tin Plate Dealers Association,* AIR 1965 MP 400.
3. AIR 1960 SC 588 : 1960 (2) SCA 45 : (1960) 2 An. WR (SC) 46 : (1960) 2 MLJ (SC) 46 : 1960 SCJ 763 : LR (1960) 2 Punj. 85 : (1960) 2 SCR 192.

The agents demanded enhancement of remuneration and contingencies by 20 per cent on account of high cost rising in view of altered conditions obtaining in war time. The claim was resisted by the Govt. of India. The Govt. of India also sought to enforce agreement of 20th July 1942. It was contended on behalf of the Govt. of India that the agents were fully aware of altered circumstances at the date when the modified schedule for payment of overhead charges contingencies and buying remuneration was agreed upon and therefore the contract is not frustrated because of the altered circumstances.

The Supreme Court of India held:

> "Performance of the contract had not become impossible or unlawful, the contract was in fact performed by the agents, and they have received remuneration expressly stipulated to be paid therein. The Indian Contract Act to ignore the express covenants thereof and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity.

In *Maritime National Fish* v. *Ocean Trawlers Ltd.*,[1] the Privy Council have pointed out that the essence of frustration is that it should not be due to the act or election of the party (*i.e*) it should not be a self-induced frustration.

In the case of *New System Telephones* v. *Hughes & Co.*,[2] the plaintiffs had agreed to erect and maintain an inter-office telephone system for a period of 14 years. The defendants under the contract had to pay in case of destruction of the installation by fire or theft £ 15 in respect of each instrument destroyed, and the defendants had the option of removing the installation to any other place at their cost. The premises having been destroyed by fire, the defendants removed to other premises but did not ask for the transfer of the installation. They paid £ 90 the value of six telephones lost by fire and contended that the contract had come to an end. The plaintiffs sued for £ 163-2 being the rent due under the contract calculated as in case of default. Singleton, J., held that the parties did not contract on the basis of the continued existence of the premises and that the plaintiffs were entitled to a decree.

In *Ganga Saran* v. *Ram Charan Ram Gopal*,[3] the defendant entered into a contract with the plaintiff under which he was to supply 61 bales of cloth of certain specifications manufactured by the New Victoria Mills, Kanpur. The agreement ran as follows: "We shall continue sending goods as soon as they are prepared to you upto Magsar Badi 15 Sambat 1998 (17-11-47). We shall go

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1. (1935) PC 128 : 156 IC 1046 : (1935) AC 524.
2. (1939) 2 AER 844.
3. AIR 1952 SC 9 : 1951 SCJ 799 : 1952 SCR 36.

on delivering the goods to you upto Magsar Badi 15 out of the goods noted above which will be prepared by the Mill". As the bales were not supplied the plaintiff sent a telegraphic notice on 20-11-41 to the following effect: 'give delivery of our 61 bales, through Bank. Otherwise suing within 3 days'. The plaintiff did not receive any reply and therefore instituted the suit for recovery of the loss sustained by him due to rise in market price. The main defence was that the contract had been frustrated by circumstances beyond their control.

It was held that on a true construction of the contract the delivery of the goods was not made contingent on their being supplied to the defendant by the Victoria Mills. The parties never contemplated the possibility of the goods not being supplied at all. The words 'Prepared by the Mill' were only a description of the goods to be supplied and the expression "as soon as they are prepared" and "as soon as they are supplied to us by the said Mill" simply indicated the process of delivery. Even apart from the construction of the agreement the defendant having admitted in his evidence that he was in a position to supply the bales of the contracted goods at the time when the breach of contract took place, it could not be held that the performance of the contract had become impossible unless he proved that the failure on his part was due to circumstances beyond his control. The case did not fall within para 2 of Sec. 56. Consequently, the doctrine of frustration could not avail the defendant when the non-performance of the contract was attributable to his own default.

Under the English common law the earlier cases laid down a rule of 'absolute contract' that when a duty was cast upon a person who bound himself by contract absolutely to do a thing, he could not escape liability for damages for breach by proof that as events turned out performance was futile or even impossible *see Paradine* v. *Jane.*[1] This rule was later mitigated by an exception that if further fulfilment of the contract is brought to an abrupt stop by some irresistible and extraneous cause for which neither party is responsible, the contract shall terminate forthwith and the parties be discharge see *Denny, Mott and Dickson Ltd.* v. *James B. Fraser and Co. Ltd.*[2] The rationale of the doctrine of frustration under the English common law need not be considered for in India the provisions of the Indian Contract Act have turned a limited exception under the English common law into a positive general rule in Sec. 56 of the Indian Contract Act. Section 56 in so far as it is material provides 'An agreement to do an act impossible in itself is void'.

A contract to do an act, which after the contract is made becomes impossible or by reason of some event which the promisor could not prevent unlawful becomes void when the act becomes impossible or unlawful.

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1. 1647 Aleyan 26.
2. 1944 AC 265.

Under Sec. 56 where an event, which could not reasonably have been in the contemplation of the parties when the contract was made, renders performance impossible or unlawful the contract is rendered void, and the parties are excused from performance of their respective obligations. Therefore where performance is rendered by intervention of law invalid, or the subject matter assumed by the parties to continue to exist is destroyed, or a state of thing assumed to be the foundation of the contract fails, or does not happen, or where the performance is to be rendered personally and the person dies or is disable the contract stands discharged.

In a suit for breach of contract to supply the balance of transformers, the contention of the defendant that supply could not be made in view of 400% escalation in price of transformer oil due to war conditions was held to be a valid ground to upset the very foundation upon which the parties rested their bargains amounting to frustration of the contract.[1]

Where the respondent company entering into an agreement with the appellant Army Welfare Housing Organisation agreeing to construct houses for the respondent organisation has stopped work in pursuance of the order of the Municipal Authority it cannot be faulted but the contract cannot be claimed to have been frustrated by such order on the ground of the commercial viability as large number of work men were to be engaged although it cannot carry out the major construction work for which the respondent might have been partially liable for damages.[2]

It has been held by this Court that the rule in Sec. 56 exhaustively deals with the doctrine of frustration of contracts, and it cannot be extended by analogies borrowed from the English common law. In *Satyabrata Ghose* v. *Magneerum Bangur and Co.*[3] Mukherjee, J., observed at p. 319 (of S.C.R.) (at p. 47 of A.I.R.)

> "The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable recourse can be had to the principles of English law on the subject of frustration. It must be held also that to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law *de hors* the statutory provisions".

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1. *Easun Engineering Co. Ltd.* v. *Fertilisers & Chemicals Travancore Ltd.*, AIR 1991 Mad. 158.
2. *M.D. Army Welfare Housing Organisation* v. *Sumangal Services Pvt. Ltd.*, AIR 2004 SC 1344 : 2003 (8) Supreme 520 : 2003 (3) Arbi. LR 361 : 2003 (3) Raj 447.
3. AIR 1954 SC 44 : 1954 SCR 310.

No useful purpose will be served by referring to the judgments of the Supreme Court of the United States of America and the Court of Sessions in Scotland to which our attention was invited. Section 56 of the Contract Act lays down a positive rule relating to frustration of contracts and the Court cannot travel outside the terms of that Section. The view expressed by the East Punjab High Court in *Parshottam Das Shankar* v. *Municipal Committee Batala,*[1] that the Contract Act is not exhaustive of the law relating to frustration of contracts in India must be deemed not to be good law to that extent.

We are unable to agree with counsel for the appellant in the present case that the relation between the appellant and the respondents rested on a contract. It is true that the Court of Wards had accepted the tender of the appellant and had granted him a lease on agreed terms of lands of Dada Siba Estate. But the rights of the parties did not after the lease was granted rest in contract. By Sec. 4 of the Transfer of Property Act, the chapters and sections of the Transfer of Property Act, which relate to contracts, are to be taken as part of the Indian Contract Act, 1872. That Section does not enact and cannot be read as enacting that the provisions of the Contract Act are to be read into the Transfer of Property Act. There is a clear distinction between a completed conveyance and an executory contract, and events which discharge a contract do not invalidate a concluded transfer.

By its express terms Sec. 56 of the Contract Act does not apply to cases in which there is a completed transfer. The second paragraph of Sec. 56, which is the only paragraph material to cases of this nature, has a limited application to covenants under a lease. A covenant under the lease to do an act which after the contract is made becomes impossible or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. But on that account the transfer of property resulting from the lease granted by the lessor to the lessees is not declared void.

By the agreement of lease the appellant undertook to pay rent for the year 1947-48 and the Court of Wards agreed to give on lease the land in its management. It is not claimed the agreement of lease was void or voidable. Nor is it the case of the appellant that the lease was determined in any manner known to law. The appellant obtained possession of the land. He was unable to continue in effective possession on account of circumstances beyond his control. Granting that the parties at the date of the lease did not contemplate that there may be riots in the area rendering it unsafe for the appellant to carry on cultivation, or that the crops grown by him may be being unable to remain in possession and to cultivate the land and to collect the crops, he will

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1. AIR 1949 EP 301.

not be liable to pay the rent. Inability of the appellant to cultivate the land or to collect the crops because of widespread riots cannot in the events that transpired him with the right to claim refund of the rent paid.

Authorities in the Courts in India have generally taken the view that Sec. 56 of the Contract Act is not applicable when the rights and obligations of the parties arise under a transfer of property under a lease. In *Abdul Hashem* v. *Balahari Mandal,*[1] the Calcutta High Court held that in a case here during the continuance of a tenancy, a notice was served on the tenant requiring, him to place a part of the land under his tenancy at the disposal of the Land Acquisition Collector, and the Collector took possession of the premises let out to him, even though the occurrence was unforeseen and was not contemplated by the parties when the lease was created, the occurrence was not so fundamental as to be regarded in law to strike at the root and destroy the basis of the relationship of landlord and tenant.

In *Tarabai* v. *Jivanlal Padamchand,* [2] it was held that monthly tenants or residential premises from whose occupation the premises were requisitioned continued to remain the monthly tenants of the landlord as before and that by reason of the requisition there was no eviction by title paramount or a frustration of adventure. The Court in that case observed that the doctrine of frustration did not apply where there is a lease whether it is one for fixed period or one, which can be terminated by notice to quit, and the estate vested in the lessee by a lease is not extinguished by the order of requisition, which is of a temporary nature.

In *Alanduraiappar Koli Chithakkadu* v. *T.S.A. Hamid,* [3] a lessee of a shandy tope agreeing to pay an annual rent for a period of five years was held not to be entitled to remission merely for the reason that the shandy was hit by two cyclones during the period of lease and that for some period on account of the cyclone, "the shandy did not form properly or regularly and the lessee did not get any income." The Court held in that case that in the absence of any provision for remission on account of losses, no such remission can be granted by the Courts.

In *Sri Amuruvi Perumal Devasthanam* v. *Sahapathi Pillai* [4] the plaintiff Devasthanam granted a lease of lands in open auction to the defendant on the terms and conditions set out in the auction notices and a deed of lease was executed by the Devasthanam and the defendants. The Government of Madras thereafter promulgated Ordinance IV of 1952, which restricted the quantum

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1. AIR 1952 Cal. 380.
2. AIR 1955 Bom. 89.
3. AIR 1953 Mad. 194.
4. AIR 1962 Mad. 132.

of rent payable by the tenants to the landlords. The defendants remained in possession till after the expiry of the period of the lease, but neglected to pay rent and failed to comply with the terms of the lease. It was held that the plaintiff was entitled to recover the stipulated rent from the defendants.

Our attention was, however, invited to certain cases in which counsel claimed that the doctrine of frustration had been applied to leases. In *Pershad Singh* v. *Campbell*,[1] the plaintiff agreed to cultivate indigo for the defendant for a specified number of years in certain lands with respect to a portion of which lands the plaintiff was sub-tenant only. During the continuance of the contract the plaintiff lost possession of those lands through his immediate landlord having failed to pay the rent and having been in consequence ejected therefrom by the owner. In a suit by the plaintiff to have so much of the contract as related to those lands cancelled, on the ground that it had become impossible of performance through no neglect on his part, it was held that the case fell within Cl. 2 of Sec. 56 of the Contract Act. But between the parties to the litigation there was no relation of landlord and tenant. The plaintiff was unable to raise indigo and supply to the defendants because the plaintiff's landlord failed to pay the rent due, and the plaintiff was on that account ejected from the land. That case does not in our view; support the contention that the doctrine of frustration applies to the case of a lease.

The case strongly relied upon by Counsel for the appellant was *Gurudarshan Singh* v. *Bishen Singh*.[2] In that case a lease was executed on January 8, 1947 in respect of agricultural land situated in an area, which on partition of India fell within West Pakistan. The Court found that possession of the demised land was not given to the lessee, and the landlord was on account of riots unable to deliver possession. Obviously on that finding the tenant was entitled to claim refund of the rent paid. But the Court proceeded to consider the question "whether the doctrine of frustration applies to a contract of lease of agricultural lands" and recorded an answer that the doctrine of frustration applies to leases. The Court observed at p. 13— "that the doctrine of frustration does apply terms to a contract of lease of agricultural land; the broad principle of frustration of contract applies to leases'. We are unable to agree with that observation and the observation at p. 11 that 'according to Indian law sales of land as also leases are contracts.' Under a lease of land there is a transfer of right to enjoy that land. If any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let out, because of fire, tempest, flood, violence of an army or a mob, or other irresistible force, the lease may at the option of the lessee, be avoided. This rule is incorporated in Sec. 108(e) of the Transfer of Property Act

1. (1881) ILR 7 Cal. 474.
2. AIR 1963 Punj. 49 (FB) : ILR (1962) 2 Punj 5.

and applies to leases of land, to which the Transfer of Property Act applies, and the principle thereof to agricultural leases and to leases in areas where the Transfer of Property Act is no extended. Where the property leased is not destroyed, or substantially and permanently unfit the lessee cannot avoid the lease because he does not or is unable to use the land for purposes for which it is let to him.

Knowledge of impossibility.—The second para of the section provides that the promisor who knowingly promises that which is impossible must compensate the promisee for loss sustained by non-performance. See Illustration (c) In *Seth Jaidayal* v. *Ram Sahae,*[1] where a person executed a usufructuary mortgage over property, which to his knowledge had been attached and was in the management of the Collector, it was held that the mortgagee was entitled to compensation, as the performance had become impossible.

Where a party undertaking to supply certain material expresses his inability and invokes the doctrine of frustration shall have the onus of proving it. When a promisor has promised to do something, which he knew or with reasonable diligence might have known and which the promisee did not to be impossible or unlawful, such promisor must make compensation to the promisee.[2]

A contracting party cannot be relieved from the performance of his part of the contract, if the frustration of the contract is self-generated or the disability is self induced. He must prove the impracticability and impossibility of the contract.[3]

The Supreme Court has pointed that there is a clear distinction between a completed conveyance and an executory contract and events which discharge a contract do not invalidate a concluded transfer.[4]

Return of benefit.—Where a contract becomes impossible subsequent to formation, the party who has received any benefit must refund it under Section 65. Questions of this kind have arisen in suits for return of advance freight. See Section 65, *infra.*

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1. (1899) 17 Cal. 432 (PC) as to the scope of this clause, **see also** *Husseinbhoy* v. *Haridas,* (1928) Sind 21 : IC 319.
2. *M/s. Gwalior Rayon Silk Mfg. (Wug) Co. Ltd.* v. *Shri Andavar & Co.,* AIR 1991 Ker. 134, 137.
3. *Eacom's Control (India) Ltd.* v. *Bailey Controls Co.,* AIR 1998 Del 365 : 1998 (74) DLT 213 : 1998 (2) Arbi. LR 188 : 1998 (4) AD Del 288.
4. *Rajan Dhruv Dev Chand* v. *Raja Harmohinder Singh,* AIR 1968 SC 1024 : 1968 (3) SCR 339; *Rajan* v. *Gopal,* AIR 1975 SC 261 : (1975) 4 SCC 302 : 1974 UJ 494 : 1974 RCR 462; *Mahadeo Prasad* v. *Calcutta D & C. Co.,* AIR 1961 Cal. 70; *Ramanada* v. *T.S.A. Hamid,* AIR 1963 Mad. 94; *Thomas* v. *Moram Mar,* AIR 1979 Kerala 156; *Valiapally* v. *Thomman,* AIR 1959 Kerala ; AIR 1959 TC 59.

57. Reciprocal promises to do things legal, and also other things illegal.—Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Illustration

A and *B* agree that *A* shall sell *B* a house for 10,000 rupees, but that, if *B* uses it as a gambling house he shall pay *A* 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that *B* may use the house as a gambling house, and is a void agreement.

Illegal Promises.—This section applies only where there are two distinct severable sets of promises, one legal, and the other illegal.[1] (See also Section 24 *ante*.) **[419]** If the parties themselves treat both the kinds of transactions as an indivisible whole, the Court will regard them as not severable and so avoid the whole.[2]

58. Alternative promise, one branch being illegal.—In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration

A and *B* agree that *A* shall pay *B* 1,000 rupees, for which *B* shall afterwards deliver to *A* either rice, or smuggled opium.

This is a valid contract to deliver rice and a void agreement as to the opium.

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1. *Poonoo Bibi* v. *Fyez Baksh*, (1874) 15 Ben LR Appx. 5.
2. *Davalt Singh* v. *Pandu*, (1884) 9 Bom. 176; *Meherally* v. *Saker*, (1905) 7 Bom. LR 602.

Alternative promises.—This section has to be read along with Sections 24 and 57. Where the illegal part of an alternative promise has been partly performed, it is submitted that an action will not lie for enforcing the legal part.

The principle of the section was applied by the Allahabad High Court in *Mahadeo* v. *Mathura*[1] where the contract was to transfer expectancy, and in default, to transfer some property to which the promisor was entitled *in praesenti.*

APPROPRIATION OF PAYMENTS

59. Application of payment where debt to be discharged is indicated.—Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations

(a) *A* owes *B*, among other debts, 1,000 rupees upon a promissory note which falls due on the 1st June. He owes B no other debt of that amount. On the 1st June *A* pays to *B* 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) *A* owes to *B*, among other debts, the sum of 567 rupees. *B* writes to *A* and demands payment of this sum. *A* sends to *B* 567 rupees. This payment is to be applied to the discharge of the debt of which *B* had demanded payment.

Appropriation.—This and the two succeeding sections deal with the appropriation of payments. They lay down, subject to some modification, the rule laid down in *Clayton's case.*[2] **[451]**

BY DEBTOR.—Where there are several debts owing to one person from another, and that other makes a payment, the question may naturally arise to which debt the payment is to be credited. The right to say to which

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1. (1931) ALJ 295 : 132 IC 321 : (1931) All. 589.
2. (1816) 35 ER 767 (781) : 15 RR 161.

debt a payment shall be appropriated belongs in the first instance to the person who makes the payment. This section accordingly declares that where a debtor owes several distinct debts to one person and makes a payment to him, it is the direction, either express or implied of the debtor, with regard to the application of the payment, which governs that payment's destination.[1] Where the debtor failed to give instructions, the creditor has discretionary power to apply the payment of debt to any of the debts including a time barred debt.[2] The creditor has discretionary power to apply the payment made by the debtor to any lawful debt actually due and payable to him in the absence of instructions from the debtor or circumstances indicating as to which debt, the payment is to be applied.[3] In the absence of instructions from the debtor, the application of debt is entirely left to the discretion of the creditor and he can apply such payment to any of his debts including time barred debt.[4] **[451]** But, the doctrine has no application when the parties have already entered into an arrangement with regard to the payment.[5] Where the debtor alleges appropriation in particular way, the onus is on him to prove the same.[6]

TIME FOR.—Such intimation must generally be synchronous with the payment.[7] But, in *Chegganmull* v. *Manicka,*[8] the Court held that the words "with an intimation" in the section are not inconsistent with an intimation after a reasonable interval. In such a case, the debtor will run the risk of the creditor making the appropriation before the intimation reaches him. Where a debtor gives such intimation and the appropriation is made it is not afterwards open to the creditor to vary or alter the appropriation. If the creditor does not agree to the proposed appropriation he must refuse to receive payment. He cannot receive it under protest.[9] Intimation to the Landlord after termination of tenancy that payments were made for and on behalf of the landlord was no intimation.[10]

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1. *In Re. Gopiram,* (1938) Cal. 20 : 173 IC 898 (2); *Shivaprasad Singh* v. *Prayag Kumari Debee,* (1934) 61 Cal. 711 : (1935) Cal. 39 : 154 IC 479; *Ram Nath* v. *Chiranji Lal,* (1935) 57 All. 605 : (1935) ALJ 177 : 155 IC 136 : (1935) All 221; *Relu Mal* v. *Ahmed,* (1926) 7 Lah. 17 : 92 IC 161 : (1927) Lah. 183. **See also** *Craft* v. *Lumley,* (1858) E.R 1459.
2. *State* v. *Bank of Baroda,* AIR 1997 Guj. 130, 132 : 1996 (3) Guj. LR 245 : 1996 (2) Guj. LH 372.
3. *Premnath Kapur* v. *National Fertilizer Corp. of India,* (1996) 2 SCC 71 : 1996 (1) UJ 180 : 1996 (1) CLT 220 (SC) : 1995 (9) JT 23.
4. *State* v. *Bank of Baroda,* AIR 1997 Guj. 130, 132 : 1996 (3) Guj. LR 245 : 1996 (2) Guj. LH 372.
5. *Dharam Deo* v. *Ramanuj,* (1938) Pat. 8 : 173 IC 133.
6. *Mohi-ud-din Kausa* v. *Chandra Mohan,* AIR 1966, J & K 64 : 1966 Kash. LJ 212.
7. *Ram Nath* v. *Chiranji Lal,* (1935) 57 All. 605.
8. (1926) 50 MLJ 242 : (1926) Mad. 792 : 94 IC 384; **but see** (1935) 57 All. 605.
9. *Foster* v. *R.M.A.L Chetty,* (1925) 2 Ran. 204 : 82 IC 660 : (1925) Ran. 4.
10. *Changu Sahu* v. *Patna Sugar Mills Ltd.,* 1958 ALJ 311.

IMPLIED INTIMATION.—A payment of the exact amount of one of several debts is an implied intimation. See Illustration (a) where a letter of demand is sent and the demanded sum is sent, the payment must be applied in discharge of the debt to which the demand relates. See Illustration.

In *Rameswar* v. *Mahomed,*[1] it was held that where there were two debts one with simple and the other with compound interest, the fact that the debtor had been unwilling to pay the compound interest was not sufficient indication of intention to appropriate to the debt carrying compound interest.

Where after a balance had been struck in respect of a previous running account, there were fresh borrowings, it was held that subsequent payments should be allocated first to the discharge of the balance.[2]

Where the judgment debtor against whom a decree was passed, has deposited decretal amount not in full, the adjustment of the amount so deposited by the decree holder first towards the costs and then towards interest and if balance remained towards the principal debt is lawful.[3]

SEVERAL DISTINCT DEBTS.—The section will not apply to a single debt, payment in instalments. The option given to the debtor under the section will not extend to such a case, and a debtor, paying towards one instalment, cannot dictate that it shall be credited to one particular instalment only.[4]

DEBTS.— Sections 59 to 61 have no application unless more than one debt is due from the debtor to creditor.[5] Section 59 does not apply where there is only one debt. Interest cannot be regarded as a debt distinct and separate from the principal.[6] In a suit the plaintiff bank seeking recovery of bank loan is entitled in view of the agreement between the parties or part of loan transactions and well settled principles, to credit the part of debt paid by the defendant debtors first towards the interest and then only towards principal.[7] When a pecuniary liability has come into existence and has been quantified or is capable of quantification on the basis of an admitted contract or principles embodied in law, a debt comes into existence. Rental arrears constitute a debt.[8]

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1. (1899) 26 Cal. 39 : 2 CWN 633 (PC).
2. *Sarab Dial* v. *Nanda Lal,* (1936) Pesh. 143.
3. *Mooliji (Bombay)* v. *Indian Railway Construction,* 2001 (128) PLR 24 (Del).
4. *Hari Kisan Das* v. *Nariman,* (1927) 29 Bom. LR 950 : (1927) Bom. 479 : 104 IC 673; *Fazal Husain* v. *Jiwan Ali,* (1906) 3 ALJ 430 (Decree payable in instalments); *Jagannath* v. *Jhunia,* (1914) 12 AWN 645 (Amount declared due under mortgage decree is a debt).
5. *Gurpreet Singh* v. *Union of India,* (2006) 8 SCC 457 : 2006 (10) SCALE 393 : 2007 (4) ALD 105 (SC).
6. *Bansilal Bullaki Ram* v. *Sant Ram Chopra,* AIR 1965 Punj. 375 : 67 Punj. LR 192.
7. *State Bank of India* v. *Mandor Udyog,* 2000 (3) CCC 213 (HP).
8. *Paras Nath Hiralal* v. *Krishanlal Chunilal,* AIR 1965 All. 189 : 1964 All. LJ 738.

Arrears of Government revenue,[1] and road cess payable under the Public Demands Recovery Act,[2] have been held to be debts within the section.

60. Application of payment where debt to be discharged is not indicated.—Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

Appropriation by Creditor.—Where the debtor has not taken advantage of the power conferred upon him by Section 59, the creditor is at liberty to apply the payment in liquidation of any lawful debt due and payable to him by the debtor, even if such debt be barred.[3] **[455]** A Patna ruling has drawn attention to the duty of the Court to see if any implied intimation of the debtor's intention could be spelt out of the circumstances.[4]

TIME FOR.—This right can be exercised until the last moment; and cases have held that he has plenary discretion to make the appropriation at any time, even up to the time of trial.[5] A Full Bench of the Allahabad High Court has held that the creditor can appropriate the payment to any debt until the judgement of the trial Court is pronounced, but not thereafter.[6] But the same Court [7] in an earlier case was inclined to the view that the creditor is

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1. *Lal Behary* v. *Rajendranath,* (1926) 53 Cal. 886 : 43 CLJ 468 : 95 IC 353; *Jogendra* v. *Umanath,* (1908) 35 Cal. 636 : 8 CLJ 41 : 12 CWN 646.
2. *Mahomed Jan* v. *Ganga Bishun,* (1910) 38 Cal. 537 (PC) : 38 IA 80; **see** *Dasherathy* v. *Khondkar,* (1928) 55 Cal. 624 : (1928) Cal. 68 : 47 CLJ 12 : 105 IC 15 (There must be nothing in the particular Act militating against the application of the section); *Nandan Missir* v. *Lala Harakh,* (1910) 14 CWN 607.
3. *Krishnaswamy Iyer* v. *Natesa Iyer,* (1930) Mad. 594 (Distinguishing, *Waller* v. *Lacy,* (1840) 133 ER 245); *Jwala Sahay* v. *Mathura Prasad,* (1934) 152 IC 786.
4. *Shyam Lal* v. *Raghunath,* (1937) Pat. 432 : 170 IC 480.
5. *Commr. of Income tax* v. *Kameshwar Singh,* (1933) 12 Pat 318 : 142 IC 437 : (1933) PC 108; *Jibanram* v. *Sagarmal,* (1933) Pat. 267 : 145 IC 611; *Kunja Mohan* v. *Karunakanta,* (1933) 60 Cal 1265 : 149 IC 262 : (1934) Cal 40. **See also** *Cory Bros* v. *Mecca,* (1897) AC 286; *Seymour* v. *Pickett,* (1905) 1 KB 715; *Relu Mal* v. *Ahmed* (1926) 7 Lah. 17 : (1927) Lah 183 : 92 IC 947 : 27 PLR 9; *Amerchand* v. *Ramdas,* (1914) 38 Bom. 255 : 21 IC 343 : 15 Bom. LR 890; *Munuswami* v. *Perumal,* (1919) 37 MLJ. 367 : 10 LW 329 : 52 IC 950; *Raghunathji* v. *Kisanlal,* (1937) Nag. 94 : 164 IC 714; *Mahomed Ismail* v. *Provincial Automobile Co.,* (1937) Nag. 198 : 171 IC 781.
6. *Gajram* v. *Kalyan Lal,* (1937) 58 All. 791 : (1937) All. 1 : (1936) ALJ 1224 : 166 IC 423.
7. *Kundan Lal* v. *Jaganath,* (1915) 37 All. 649 : 13 ALJ 908 : 30 IC 92; **see** however *Ram Nath* v. *Chiranji Lal,* (1935) 57 All. 605 : (1935) ALJ 285 : (1935) All. 221. Where it is said that he need not exercise the right at once; *Budhuram* v. *Kimatral,* (1924) Sind 137 : 84 IC 672 (Appropriation *ex post facto* not permissible).

bound to appropriate as soon as the payment is made. The reason suggested for this view is that any other interpretation will render the succeeding section supererogatory. The Madras High Court has held that the creditor can alter an appropriation made by him, so long as he has not communicated the fact of appropriation to the debtor.[1]

SINGLE DEBT.—The question has been raised in some cases whether the sections of the Act relating to appropriation should be applied to a single loan contracted by the manager of a joint Hindu family, part of which alone supported by legal necessity. Strictly, in such cases the debt is one only and there are no distinct debts, so as to attract the law of appropriation. But it has been suggested by a Full Bench of the Allahabad Court that if at the time of payment, it is definitely known that the loan towards which payment is made is supported by necessity only in part, there is no reason why at the time of payment the debtor cannot specify that the amount should go towards the discharge of one or the other portion. In most of such cases, however, the creditor will be interested only in maintaining that the debt is one. In such cases, therefore, the law of appropriation is inapplicable for it is not open to the creditor to appropriate a payment towards an unknown and unspecified portion of the debt.[2]

In a later case of the same Court where the finding was that a portion of the loan was for a purpose known to be not binding on the joint family, it was held that payments made by sale of the family property should be appropriated only against that part of the debt which was found to be binding on the entire joint family.[3]

The creditor may make the appropriation in the chronological order.[4] Where there are two bills outstanding and the amount paid does not cover even one, the creditor has the right to distribute it to both, so as to save them from limitation.[5] Where there are simple and secured debts, the creditor may appropriate to the former.[6]

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1. *Imperial Bank of India* v. *Avanasi Chettiar,* (1930) 53 Mad. 826 : (1930) Mad. 874 : 59 MLJ 513; *Kunja Mohan* v. *Karunakanta* (1933) 60 Cal. 1265 : 149 IC 262 : (1934) Cal. 40 (creditor need not declare his intention as to appropriation, in express terms); *Chegganmull* v. *Manicka,* (1926) 50 MLJ 242 : 94 IC 384 : (1926) Mad. 792; *Manistu* v. *Jameson,* (1926) 5 Pat. 326 : 94 IC 273 : (1926) Pat. 330.
2. *Gajram* v. *Kalyan Lal,* (1937) 58 All. 791 : (1937) All. LR 31 : (1936) ALJ 1224 : 166 IC 423: (1937) All. 1 (FB).
3. *Bedram* v. *Inderjit,* ILR (1938) All. 437 : (1938) ALJ 644 : (1938) All. 669 : 176 IC 619.
4. *Manistu* v. *Jameson,* (1926) 5 Pat. 326 : 94 IC 273 : (1926) Pat. 330; *Krishna Kumar De* v. *Kalinath Guha,* (1917) 41 IC 421.
5. *Maurice Mayahas* v. *Morley,* (1925) 29 CWN 496 : 87 IC 508 : (1925) Cal. 937, (C.L.) *Panna Lal* v. *Ram Singh,* (1929) 10 Lah. 750 : 116 IC 542 : (1929) Lah. 288; *Abdul Aziz* v. *Munna Lal,* (1921) 19 ALJ 555 : 63 IC 435 : (1921) All. 325.
6. *Munisami* v. *Perumal,* (1919) 37 MLJ 367 : 10 LW 329 : 52 IC 950.

Where a suit was decreed with interest but the challans by which the opposite party deposited the amounts showed the specification of the debt towards which the payments were intended as 'decretal amount' and the amounts were withdrawn by the decree-holder taking it to be payment of the 'principal amount', the decree-holder was held not entitled to appropriate the same towards interest.[1] Where the judgment debtor paid the decretal money in monthly instalments with the permission of the court to the creditor with instructions to appropriate the same as against the principal debt, the creditor cannot deviate from doing so and adjust to other heads.[2]

Reversing the aforesaid decision the apex court held that the provisions of Secs. 59 to 61 of the Contract Act do not deal with cases in which the principal and interest on a single debt, but only where a debtor owes several distinct debts to one person.[3]

PRINCIPAL AND INTEREST.—Though the Act does not expressly mention appropriate towards interest, the principle of these section is applicable to interest as well.[4] Where money is paid without definite appropriation by the debtor, the ordinary rule is that it is applied first to interest and the balance, if any, to the principal.[5] Where the debtor who received loan from the creditor bank, while making payment did not leave any instructions with the creditor Bank, the ordinary rule of appropriation will apply and the creditor Bank is entitled to adjust the amount received during pendency of suit, first towards the satisfaction of interest and then the balance towards the discharge of principal.[6] The normal rule in the case of a debt due with interest is that any payment made by the debtor is in the first instance to be applied towards satisfaction of interest and thereafter to the principal.[7] Where mortgagors made no payments under the mortgage decree directly to the mortgagee but from time to time made deposits in the Court under Order 21, Rule 1 of the Civil Procedure Code and in depositing some of the amounts

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1. *L.I.C of India* v. *Sumarendra Nath Roy,* AIR 1979 Cal 243; *L.I.C. of India* v. *Gadathur,* AIR 1978 Cal. 419; *Meghraj* v. *Baya Bai,* AIR 1970 SC 161 : (1970) 1 SCJ 27 : (1970) 1 SCR 523.
2. *Smithaben H. Patel* v. *Industrial Credit & Devl. Syndicate,* AIR 1997 Karn. 188, 193 : 1997 (2) Kant. LJ 262 : 1997 (3) Cur. CC 244.
3. *Industrial Credit & Development Syndicate* v. *Smt. Smithaben H. Patel,* 1999 (96) Com.Cases 1 (SC) @ 11 : AIR 1999 SC 1036 : (1999) 3 SCC 80 : 1999 (2) Supreme 67 : 1999 (1) SCJ 405.
4. *Malik Mukhtar* v. *Mt. Bibi Rahimunnissa,* (1922) Pat. 369 : 67 IC 606.
5. *Venkatadri Appa Rao* v. *Parthasarathy Appa Rao,* (1922) 44 Mad. 570 : 40 MLJ, 549 : 14 LW 25 : (1921) MWN 347 : 23 Bom. LR 644 : 19 ALJ. 465 : 26 CWN 33 : (1922) PC 233; *Ramchand* v. *Bank of Upper India,* (1928) Lah. 901 : 109 IC 592; *Barclay* v. *Mt. Dhandei,* (1923) Pat. 322 : 71 IC 937; *Mt, Shearani* v. *Gauri Shankar,* (1926) Oudh 514 : 95 IC 175. **See as** to *"Other circumstances" Sungut Lal* v. *Baijnath,* (1886) 13 Cal. 164; *Rulia Devi* v. *Raghunath Prasad,* AIR 1979 Pat. 115; *Perianna Chettiar* v. *Radhakrishna Chetty,* (1979) 1 MLJ 165; *Mohd, Akbar Khan* v. *Attar Singh,* AIR 1945 PC 170; *Shanmugam Pillai* v. *Annalakshmai,* AIR 1950 FC 38. **See also** *Subbaramma Chetty* v. *Audiseshan Sarma,* (1970) 2 An. WR 215.
6. *National Bank* v. *Surinder Singh Mandyal,* AIR 1996 HP 1, 8.
7. *Mehraj* v. *Mst. Rayabai,* AIR 1970 SC 161:(1970) 1 SCJ 27 : (1970) 1 SCR 523

they stated that the payments were towards the principal due but without evidence of the mortgagee having accepted the amounts towards the principal, it was held that the amounts so paid could be appropriated first towards interest and then towards the principal due. Unless the mortgagee was informed that the mortgagors had deposited the amounts towards the principal and not towards the interest and the mortgagee agreed to withdraw the money from the Court accepting the conditional deposit the normal rule as set out above would apply.[1] Where a creditor is unwilling to accept an appropriation towards the principal by the debtor, he must refuse to accept the payment.[2]

Where the trial court while passing the decree is silent as to mode of adjustment of payment by the debtor and also the debtor failed to indicate in what manner the payment is to be adjusted it cannot be said that the creditor has discretion to apply first towards interest and then towards principal, but if the debtor indicates the manner in which it is to be applied then the creditor has no choice and that being so however he may not agree to the mode of payment, in which case he must refuse the payment refunding the amount to the debtor.[3]

"LAWFUL DEBT".—It is incumbent on a creditor invoking this section, to establish in the first instance that there was a lawful debt to which the appropriation has been made.[4] For instance, where a decree is set-aside in part in appeal, and nothing is said by the appellate Court about debts in the Court of first instance, the successful appellant cannot claim such cost as a lawful debt within this section, and appropriate payment made by the other party, towards such costs.[5]

"PAYMENT"—The "payment" which can thus be appropriated will not include an amount deposited for a specified purpose;[6] nor will it comprise, in case of payments towards a floating account (subject to a maximum borrowing) an amount more than is necessary to keep down the interest.[7] In the case of a joint deposit, the amount due under it cannot be credited to the debt due by one alone of the depositors.[8]

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1. *Mehraj* v. *Mst. Rayabai,* AIR 1970 SC 161 : (1970) 1 SCJ 27 : (1970) 1 SCR 523.
2. *Seth Nemichand* v. *Seth Radhakishen,* (1922) 48 Cal. 839 : (1922) PC 26 : 26 CWN 153 : 14 LW. 391 : 63 IC 904; **see also** *Biswanath* v. *Someswar,* (1917) 21 CWN 1055 : 41 IC 348.
3. *Industrial Credit and Development Syndicate* v. *Smt. Smithaben H. Patel,* AIR 1999 SC 1036, 1041 : (1999) 3 SCC 80 : 1999 (2) Supreme 67 : 1999 (1) SCJ 405 : 1999 (96) Com. Cas 1.
4. *Croy Bros* v. *Mecca,* (1827) AC 286; *Sibnarayan Sah* v. *Maisa Tabo,* (1922) Pat. 446.
5. *Dwarkanath* v. *Sree Gobinda,* (1927) Cal. 906 : 104 IC 799.
6. *Narayan* v. *Waman,* (1921) Nag. 133 : 59 IC 121.
7. *Damodharam* v. *Bansilal,* (1928) 51 Mad. 711 : 28 LW 521 : 111 IC 297 : (1928) Mad. 566 : 55 MLJ 471.
8. *Simla Banking Industrial Co.* v. *Bhagwan Kaur,* (1928) Lab. 316 : 111 IC 554.

61. Application of payment where neither party appropriates.—Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

Appropriation by neither.—This section provides for cases—necessarily very rare—where neither party has made an appropriation. As was said in a Lahore case, this section illustrates that a code attempts to provide for all possibilities. It is to be applied only where there is neither express intimation nor course of conduct, which will show the intention of the parties as to the mode of appropriation. **[456-457]**

Where a subscriber to a Fund, liable as such to pay Rs. 20 monthly, borrowed from the Fund covenanting to repay at Rs. 20 per month, and subsequently sent in Rs. 20 every month without specifying whether the amount was for the subscription or for the debt due, and the Fund simply received the amounts without making any appropriation, the Court held that the payments should be credited towards the loan, and not the subscriptions.[1] Where a mortgagor liable for the mortgage debt in his personal capacity as well as in his capacity as manager of a joint family made payments towards the mortgage debt without specifying anything, the Court directed appropriation proportionately towards the two parts of the mortgage debt.[2]

Running account.—Where the suit is for money due on a running account, there is no reason why payments made within three years of suit should not be treated as appropriated to the satisfaction of earlier advances, though such advances may have been time-barred at the date of suit or even at the date of the payments.[3] As was pointed out by the Patna High Court,[4] in the case of running accounts, there is no question of appropriation, properly speaking, but it is assumed as a matter of law that the payment would go towards the earlier items in the account. In this connection, the observations of the Master of Rolls in *Clayton's Case*[5] are noteworthy: "There is no room for

1. *Kannappa* v. *Madura Hindu Permanent Fund,* (1909) 1 IC 909; **see also** *Vijaya* v. *Evalappa,* (1914) 39 Mad. 17 : 25 IC 91; *Bhishun Perkash* v. *Mohammed Sadique,* (1916) 1 Pat. LJ. 474 : 35 IC 375.
2. *Ram Nath* v. *Chiranji Lal,* (1935) 57 All. 605 : (1935) ALJ 177 : (1935) All. 221.
3. *Satappa vs. Anappa,* (1923) 47 Bom. 128 : 24 Bom. LR. 1248 : 76 IC 45 : (1923) Bom. 82; *A. Ramavel* v. *Pandyan Automobiles,* AIR 1973 Mad. 359 : 1973 (1) Mad.LJ. 286 : 86 Mad.LW 237.
4. *Jibanram* v. *Sagarmal,* (1933) Pat. 267 : 145 IC 611; *Dayal & Co.* v. *Rama Krishna,* (1935) Lah. 559 : 158 IC 20; *Sha Manmall Misrimall* v. *K. Radhakrishnan,* AIR 1972 Mad. 108 : 84 Mad.LW 745 : (1971) 2 Mad.LJ. 487.
5. (1816) 35 ER 767 (781) : 15 RR 161; **see also** *Albermarle Supply Co.* v. *Hind,* (1928) 1 KB. 307.

any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account; presumably it is the first sum paid in that it is first drawn out; it is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side; the appropriation is made by the very act of setting the two items against each other." Upon that principle, all accounts current are settled, and particularly cash accounts.

Burden of proof.—In *Radha Kishun* v. *Hira Lal,*[1] the Privy Council said, "the burden is upon the party to prove the appropriation which he seeks".

CONTRACTS WHICH NEED NOT BE PERFORMED

62. Effect of novation, rescission, and alteration of contract.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations

(a) *A* owes money to *B* under a contract. It is agreed between *A*, *B* and *C* that B shall thenceforth accept *C* as his debtor, instead of A. The old debt of *A* to *B* is at an end, and a new debt from *C* to *B* has been contracted.

(b) *A* owes *B* 10,000 rupees. *A* enters into an arrangement with *B*, and gives *B* a mortgage of his (*A's*) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) *A* owes *B* 1,000 rupees under a contract, *B* owes *C* 1,000 rupees. *B* orders *A* to credit *C* with 1,000 rupees in his books, but *C* does not assent to the arrangement. *B* still owes *C* 1,000 rupees, and no new contract has been entered into.

Discharge by consent.—This section deals with one mode of discharge of contract by consent. Even as a contract is concluded by a consensus

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1. (1927) 52 MLJ 715 : (1927) MWN 73 : 31 CWN 566 : 29 Bom. LR 791 : (1927) PC 50 : 100 IC 668

so, a consensus between the parties may discharge the contract or alter it.[1] This may happen in more ways than one. The original contracting parties may agree to substitute a new contract either between themselves or between different parties the consideration being the discharge of the old contract. Or they may rescind or alter the terms of the original contract.[2] One contract is rescinded by another between the same parties, where the latter is inconsistent with and renders impossible the performance of the former.[3] In English law, the term novation is used only in cases of substituted contract introducing a new party. **[475]**

Where the dispute between the parties is that the contract itself does not subsist either as a result of its being substituted by a new contract or by rescission or alteration, an arbitration clause incorporated in the contract would also perish if the averment is found to be valid and the dispute cannot be referred to arbitration.[4]

Where from the original agreement the implication is that both plaintiff and the defendant have equally contributed for the construction of two houses, but the plaintiff subsequently relinquished his and his family member's rights over the properties by making an endorsement, alters the intent of the parties and thereby the original agreement is materially altered and unenforceable.[5]

Essentials of Novation.—The essential feature of novation is that the right under the original contract is relinquished and new rights referable to a new contract are created.[6] When there are material or substantial changes, which go to the root of the agreement, then it would be regarded in law as a new agreement.[7] Where the original contract was in the form of writing,

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1. *Noorbhai* v. *Karuppan,* (1925) PC 232 : 1926 23 LW 182. As to abandonment, **see** *Fisher* v. *Eastwoods,* (1936) AER 421. *Syed Israr Masood* v. *State of M.P.,* AIR 1981 SC 2010 : (1981) 4 SCC 289 : 1982 (1) SCR 894 : 1982 UJ 51 (2); *Brijmohan Das* v. *PNB,* AIR 1982 NOC 65 (MP).
2. *Balak Ram* v. *Telu,* (1935) Lah. 897 (Balance Struck instalment bond executed there fore novation complete). *Devan Man Mohan Lal* v. *L.Piary Lal,* AIR 1973 All. 16 : 1972 All.LJ. 865.
3. *Mathura Mohan* v. *Ram Kumar Saha,* (1915) 43 Cal. 790 : 23 CLJ 26 : 20 CWN 370 : 315 IC 305.
4. *Damodar Valley Corporation* v. *K.K. Kar,* AIR 1974 SC 158 : (1974) 1 SCC 141 : (1974) 2 SCJ 6.
5. *D. Narasimhamurthy* v. *D.Krishnamurthy Rao,* AIR 2005 AP 485 : 2005 (1) CCC 566 (AP) : 2005 (1) ALD 75 : 2005 (1) ALT 485.
6. *Dhanpat Mal* v. *Niamat Rai,* (1933) Lah. 335 : 34 PLR 440 (No Acceptance by promisee of performance by third party — No novation); *Prem Das* v. *Md. Hussain,* (1936) Lah. 51; *Muhammed Shah* v. *Sarsuti* (1883) AWN 254; *Ganpat* v. *Mahadeo,* (1925) Nag. 26 : 85 IC 264; *Nadimulla* v. *Channappa,* (1903) 5 Bom. LR 617; *Abdul Kayam* v. *Bahadur,* (1911) 14 Bom. LR 26; *Indian Bank* v. *S. Krishnaswamy,* AIR 1990 Mad. 115 : 1989 TNLJ 87 : (1989) 104 Mad.LW 105.
7. *Andheri Bridge View Co-op. Housing Society Ltd.* v. *Krishnakant Anandrao Deo,* AIR 1991 Bom. 129.

subsequent contract is also necessary to be in writing for the discharge of the original contract by reason of novation and a mere disclaimer cannot be a valid ground for pleading novation.[1] The substituted contract must in order to affect a novation, been enforceable.[2] Therefore if the document evidencing the new agreement or contract is for any reason, (*e.g.,*) want of registration,[3] stamp,[4] etc., unenforceable or the promisor under the new contract has disabled himself from performance, the liability under the old contract continues to subsist.[5] Where the substituted contract is subject to a condition precedent, it does not become operative unless the condition is fulfilled and in the absence of such fulfilment, the old contract will be enforceable.[6] For the purpose of novation, rescission or alteration of a contract it is necessary for the parties to the original contract to enter into a fresh agreement by agreeing to substitute the original contract with a new contract or rescind or alter, but it cannot be made unilaterally.[7] In case of Novation, a substituted contract should rescind or alter or extinguish the previous contract, but if the terms of the two contracts are inconsistent and they cannot go together, the subsequent contract cannot be said to be in substitution of the earlier contract.[8] Again, to effect a novation, there must be a new substituted contract. A mere agreement to substitute in future such a contract will not avail to extinguish the rights and obligations under old contract.[9] Where the right of reverting to the original contract is reserved unless the new transaction becomes complete, there is no true novation.[10] Where an agreement by the insolvent to sell the property

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1. *Hindustan Petroleum Corpn. Ltd.* v. *University of Hyderabad,* AIR 2003 NOC 448 (AP) : 2003 (1) ALD (NOC) 37.
2. *Ramjivan* v. *Diku,* (1905) 16 CLJ. 264 : 16 IC 246; *Ratanlal* v. *Firm Mangilal,* AIR 1963 MP 323.
3. *Angan Lal* v. *Saran Behari Lal,* (1929) 51 All. 799 : (1929) All. 503 : (1929) ALJ 526 : 121 IC 221; *Abdul Kayam* v. *Bahadur,* (1911) 14 Bom. LR 26; *Nundo Kishore* v. *Ramsookhee,* (1880) 5 Cal. 215; *Gharati* v. *Kehar,* ILR (1937) Nag. 353 : (1937) Nag. 104 : 170 IC 120.
4. *Sunder Das* v. *Puran Singh,* (1922) Lah. 225 : 67 IC 856; *Rahmat Ali* v. *Dewa Singh,* (1923) 4 Lah. 151 : 5 LLJ 361 : 75 IC 827 : (1923) Lah. 396 ; *Kuttayan Chetty* v. *Palaniappa,* (1907) 27 Mad. 540; **see also** *Harchandi* v. *Sheoraj,* (1917) 39 All. 178 : (1916) PC 68 : 15 ALJ 223 : 19 Bom. LR 444 : 25 CLJ 316 : 32 MLJ 241 : 39 IC 343; *Najaf Shah* v. *Ranga Ram,* (1921) 2 Lah. 323 : (1921) Lah. 80 : 66 IC 47.
5. *Sunder Das* v. *Puran Singh,* (1922) Lah. 225 : 67 IC 856; *Mathura Mohan* v. *Ram Kumar,* (1915) 43 Cal. 790 : 20 CWN 370 : 35 IC 305; *Duraiswami* v. *Krishna,* (1919) MWN 797 : 10 LW 466 : 54 IC 318; *Brijmohan Das* v. *Punjab National Bank,* 1981 MPLJ 978 : 1982 Jab. LJ 82; *Subramanian Chettiar* v. *Muthia Chettiar,* AIR 1984 Mad. 215 : (1983) 2 Mad.LJ. 426.
6. *Prem Das* v. *Md. Hussain,* (1936) Lah. 51 : 162 IC 382 (2).
7. *Citi Bank N.A.* v. *Standard Chartered Bank,* AIR 2003 SC 4630 : (2004) 1 SCC 12 : 2004 (1) Bank Cas 211 : (2003) 7 Supreme 618.
8. *Lata Construction* v. *Ramesh Chandra Ramniklal Shah,* AIR 2000 SC 380, 385 (DB) : (2000) 1 SCC 586 : 2000 (3) R.A.J.136 : 1999 (9) Supreme 534 : 2000 (1) SCJ 137.
9. *Angan Lal* v. *Saran Behari Lal,* (1929) ALJ 526 : 51 All. 799 : 121 IC 221; *Krishanaji* v. *Tukaram,* (1928) Nag. 289 : 111 IC 402; *Guran Ditta* v. *Labhu Ram,* (1936) 38 PLR 155.
10. *Kishen Lal* v. *Gholi,* (1938) Lah. 757 : 40 PLR 689.

with option to repurchase existed and no mention of it is made in the sale deed executed jointly by the insolvent and official liquidator, there is no novation.[1] In case of substitution of a new contract, consideration is necessary, but not for mere variation of terms.[2] It has however been recently held that no further or independent consideration is necessary to validate a substituted contract in the place of the old.[3] Where a number of persons are under a joint liability to pay a definite sum and a new contract is entered into between the creditor and some of the persons originally liable, by virtue of which contract the liability is reduced, it has been held that the benefit of the new agreement ensures in favour of the person not party thereto.[4] Where a compromise having been reached between the creditor Bank and the debtor to withdraw the pending suit by creditor bank on account of default of the debtor provided the debtor discharged his liability under the old agreement, payment of suit claim in full bars the creditors to claim for overdue interest for delay.[5] When a memorandum of understanding was arrived at between the appellant bank and the respondent while the application of the appellant bank against the respondent for the recovery of the money was pending before Debt Recovery Tribunal providing subject to the conditions (1) the suit by the respondent shall be withdrawn against the appellant, (2) the respondent agreeing to pay the guarantee amount of Rs. 2.33 lakhs and (3) agreeing to file compromise petition in accordance with the terms of MOU before the appropriate court, the respondent having failed to comply with the conditions, no fresh contract is said to conclude between the parties attracting Sec. 62 of Contract Act.[6] Where the appellant agreed to pay the balance of loan instalments on behalf of a defaulting debtor in connection with the purchase of a bus and obtained the possession of a bus seized by the respondent Finance Corporation, the agreement is a novation of contract relieving the original debtor from his contractual liability.[7]

A party to a contract cannot transfer his liability thereunder without the consent of the other party. Such liability can only be transferred by a tripartite agreement which will, in such cases, amount to novation.[8] An agreement between the parties to the contract to substitute a new contract in place of original contract, it being a novation of contract, any transfer of liability

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1. *Babu Ram* v. *Sri Indra Pal Singh*, 1998 (6) Supreme 439.
2. *Vasudeva* v. *Vellappa*, (1917) MWN 779 : 6 LW 717 : 43 IC 401.
3. *Sesnia Pillai* v. *Taluk Board, Shermadevi*, (1930) MWN 1228 : 33 LW 70 : 131 IC 124 : (1932) Mad. 200.
4. *Laltapati Kuer* v. *Narain Mahton*, (1934) Pat. 563 : 152 IC 989.
5. *Central Bank of India* v. *V.G. Naidu & Sons (Leather) Pvt. Ltd.*, AIR 1992 Mad. 139, 147.
6. *United Bank of India* v. *Ramdas Mahadev Prashad*, 2004 (13) AIC 250 (SC).
7. *Godan Namboothiripad* v. *Kerala Financial Corporation*, AIR 1998 Ker. 31, 33.
8. *Turner Morrison & Co.* v. *Hungerford Investments Trust*, AIR 1969 Cal. 238.

under the contract with the consent of the parties to the contract does not amount to assignment of contract.[1]

Where the appellant has agreed to be the guarantor in respect of the finance provided by the respondent corporation for the proprietary business venture of the appellant's son and subsequently the proprietary business was converted into a Private Limited Company with the consent of the respondent corporation and the appellant's son along with another entered into a fresh agreement as guarantors, the liability of the appellant as a guarantor, ceases since the fresh agreement operates as the novation of the original contract.[2]

Novation contemplated in Sec. 62 of the Act, involves an annulment of one debt and the creation of another. In every case of this nature the court has to consider not only whether the new debtor has consented to assume liability but also whether the creditor has agreed to accept the liability of the new debtor in substitution of the original debtor. In other words, novation is not consistent with the original debtor remaining liable in any form, since the essential element of novation is that the rights against the original contractor shall be relinquished and the liability of the new contracting party accepted in its place. Under the law therefore one of the requisites of novation is the agreement of the parties to the new contract.[3]

Merely because a memorandum of understanding has been reached between the appellant bank and the respondents, the MOU cannot be considered as novation by putting an end to the old contract and the appellant bank is free to enforce the contract in the event of the breach committed by the respondent.[4]

Applicability.—The Allahabad High Court has observed *in passing* in a Full Bench ruling, that it is doubtful how far Sec. 62 will apply to cases of transfer of property.[5]

Time for Novation.—There has been some difference of opinion as to when novation must be made, whether it can take place, even after breach of the original contract. In *Manohor* v. *Thakur Das*,[6] the Calcutta High Court held that the section was merely a legislative expression of the common law and that its provisions are not applicable when parties come to a fresh agreement after the breach of the old. This view has been adhered to in a ruling of the

1. *JKNP Limited* v. *Syndicate Bank*, ILR 2001 Karn 312.
2. *Satish Chandra Jain* v. *National Small Industries Corpn. Ltd.*, AIR 2003 SC 623 : 2002 (1) Supreme 520 : 2002 (1) Bank CLR 244 : 2002 (49) Arbi. LR 539.
3. *State Bank of India* v. *Mrs. T.R. Seethavarma*, AIR 1995 Ker. 31, 35.
4. *United Bank of India* v. *Ramdas Mahadeo Prashad*, (2004) 1 SCC 252.
5. *Kanhaiya Prasad* v. *Hamedan*,ILR (1938) All. 714 : (1938) ALJ 746 : 176 IC 492 : (1938) All. 418 (FB).
6. (1888) 15 Cal. 319. **See also** *Ramiah* v. *Somasi*, (1915) 29 MLJ 125 : 29 IC 449.

same Court in *Brijmohan* v. *Mahabeer,*[1] In *Sakarachand* v. *Ismail,*[2] the Rangoon High Court agreed with the Calcutta High Court on this point. In Madras, however, the view taken in *K.H.P.R.N.M. Firm* v. *Theperumal,*[3] was that a novation is possible even after breach of the original contract. The Allahabad High Court in *Ramnath* v. *Mannulal,*[4] appears inclined to the Madras view. It would appear that there is more justification for the view adopted by the Calcutta High Court, for though it is true that a breach does not 'discharge' the contract, in the strict sense; still, the parties will, upon a breach of contract be only adjusting the remedial right flowing out of the breach.

Negotiable Instruments.—Where a promissory note or other negotiable instrument is given to the creditor in respect of a debt, the question has very often arisen, in what circumstances could the creditor sue on the debt, where the negotiable instrument is for some reason unenforceable. The rule applicable in such a case was laid down in *Sheikh Akbar* v. *Sheikh Khan,*[5] by Garth, C.J., in the following terms:

> "When a cause of action for money is once complete in itself, whether for goods, sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost, or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person.

But when the original cause of action is the bill or note itself, and does not exist independently of it, as for instance, when in consideration of *A* depositing money with *B, B* contracts by a promissory note to repay it with interest at six months' date, here there is no cause of action for money lent, or otherwise than upon the note itself, because the deposit is made upon the

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1. (1936) 63 Cal. 14 : 40 CWN 808.
2. (1931) Ran. 189 : 131 IC 510.
3. (1922) 45 Mad. 180 : 67 IC 905 : 42 MLJ 236 : (1922) Mad. 314. **See *also*** *Mallappa* v. *Matum Naga Chetty,* (1919) 42 Mad 41 (48).
4. (1933) 45 All. 472 : 21 ALJ 380 : 73 IC 615 : (1923) All. 518.
5. (1881) 7 Cal. 256. For other cases on either side, **see** *Tarachand* v. *Tamijuddin,* (1935) Cal. 658 : 39 CWN 1241 : 139 IC 511; *Ramendra Mohan* v. *Keshabchandra,* (1934) 61 Cal. 433 : (1934) Cal. 554; *Jacob & Co.* v. *Vicumsey,* (1927) 29 Bom. LR 432 : (1927) Bom. 437; *Ravjibhai* v. *Ranchod,* (1930) 31 Bom. LR 1262 : (1930) Bom. 66; *Raja of Ramnad* v. *Subramania,* (1928) 52 Mad. 465 : 30 LW 36; *Rajinder* v. *Tekchand,* (1933) Lah. 628 : 80 IC 26; *Maug Shwe Myut* v. *Maung Po Sin,* (1925) 3 Ran. 183 : (1925) Ran. 282 : 89 IC425; *Maung Chit* v. *Roshan,* (1934) 12 Ran. 500 : 152 IC 1038 : (1934) Ran. 389; *Ramanadhan* v. *Gunbu,* (1928) MWN 680 : 113 IC 456 (FB); *Pramatha Nath* v. *Dwarkanath,* (1896) 23 Cal. 851 (Insufficiently stamped document — Debt. admitting liability — Decree may be passed); *Indra Chandra* v. *Hiralal,* (1936) Cal. 127 : 40 CWN 696. (Insufficiently stamped note no need for independant express contract implied promise decree on); *Krishnaji* v. *Rajmal,* (1899) 24 Bom. 360.

terms contained in the note. In such a case, the note is the only contract between the parties, and if for want of a proper stamp or some other reason, the note is not admissible in evidence, the creditor must lose his money. There is no doubt as to the principle of these authorities. The difficulty often is to ascertain, as a matter of fact, to which class any particular case belongs".

An exhaustive discussion of the subject belongs properly to the province of the Law of Evidence (Sec. 91) and the Stamp Law (Sec. 35). But the matter may be briefly summarised thus as dealt with by a Full Bench of the Madras High Court.[1] Where there is an antecedent debt and the (improperly stamped) note is given therefor the creditor may sue on the debt and ignore the note.[2] Different considerations will arise where the note is given at the time of the loan or in pursuance of the arrangement then made, and fully embodies the terms of the contract.[3] In such a case, the writing itself (*i.e.,*) the promissory note may be the only repository and appropriate evidence of the agreement between the parties[4] and the rule as embodied in Sec. 91 Evidence Act is that oral proof cannot be substituted for written evidence of any contract, which the parties have put into writing,[5] and Sec. 35 Stamp Act will similarly stand in the way in regard to promissory notes which are insufficiently stamped. But it is possible that the whole of the contract between the parties may not have been reduced to the form of such a document.[6] The question of the terms on which the note is given is one of fact and not of law.[7] It is not the time when,

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1. *Perumal Chettiar* v. *Kamakshi Ammal,* ILR (1938) Mad. 933 : 177 IC 236 : 48 LW 220 : (1938) MWN 722 : (1938) Mad. 785 : (1938) 2 MLJ 189.
2. *Krishnaswamy* v. *Rangaswami,* (1883) 7 Mad. 112; *Dargavarapu Sarsapu* v. *Rampratapu,* (1901) 25 Mad. 580; *Murugappa* v. *Nachiappa,* (1934) 67 MLJ 30 : 40 LW 160 : (1934) Mad. 530; *Salig Ram* v. *Radhay Shiam,* (1931) ALJ 522 : 134 IC 625 : (1931) All. 560; *Varadaraja* v. *Venkatarama,* (1927) Mad. 378 : 99 IC 625; *Hakim Rai* v. *Canga,* (1926) 7 Lah. 206 : 96 IC 445 : (1926) Lah. 356.
3. *Pothi Reddi* v. *Velayuda Sivan,* (1886) 10 Mad. 94; **see also** *Yarlagadda Veera Raghavayya* v. *Gorantla Ramayya,* (1905) 29 Mad. 111 : 15 MLJ 484; *Muthu Sastrigal* v. *Viswanatha Pandara Sannadhi,* (1913) 38 Mad. 660 : 26 MLJ 19; *Chockalingam* v. *Palaniappa,* (1934) 58 Mad. 261 : 67 MLJ 595 : (1934) MWN 1261 : 42 LW 979 : 155 IC 184 : (1935) Mad. 23; *Pulugurata Somaraju* v. *Machiraju Venkatasubbarayudu,* (1924) 20 LW 943; *Cura Sahu* v. *Tangi Krishnamma alias Babu Patro,* (1932) Mad. 687 : 36 LW 432 : 139 IC 361; *Chandrasekharam* v. *Srinivasa,* (1933) Mad. 71 : 37 LW 723 : (1932) MWN 1260 : 140 IC 193; *Alimane Sahiba* v. *Kolisetti Subbarayudu,* (1932) 63 MLJ 303 : 36 LW 470 : (1932) MWN 793 : 139 IC 486 : (1932) Mad. 693.
4. *Ankur Chunder Roy Chowdhary* v. *Madhub Chunder Ghose,* (1873) 21 WR 1; *Nazir Khan* v. *Ram Mohan Lal,* (1931) 53 All. 183 : (1931) ALJ 64 : 133 IC 307 : (1931) All. 183 (FB); *Chanda Singh* v. *Amritsar Banking Co.,* (1922) 2 Lah. 330 : 66 IC 221 : (1922) Lah.307.
5. *Subramanian* v. *Lutchman,* (1922) 50 Cal. 338 (344) : 50 IA 77 : 44 MLJ 602 (PC).
6. *Kundan Lal* v. *Bikhari Das Iswashar Das,* (1929) 51 All. 530 : (1929) ALJ 333 : 116 IC 293 : (1929) All. 254; *Chidambaram Chettiar* v. *Ayyasami Thevan,* (1916) 40 Mad. 585 : 31 MLJ 401.
7. *Perumal Chettiar* v. *Kamakshi Ammal,* ILR (1938) Mad 933 : (1938) MWN 722 : 177 IC 236 : (1938) Mad 785 (FB) ; *Maung Chit* v. *Roshan & Co.,* (1934) 12 Ran 500 : 152 IC 1038 : (1934) Ran 389 (FB).

but the terms on which the loan was made that matters.[1] It cannot be taken as a general presumption that in every case the giving of a negotiable instrument operates as a conditional discharge and only suspends the creditor's remedy on the debt.[2] If the promissory note where contemporaneous, is the consideration for the loan and in other cases, is accepted in satisfaction of the original debt, the lender's rights [3] are restricted to the instrument alone. But if it is given only by way of conditional payment or collateral security a suit on the original debt will lie, the burden being on the plaintiff to prove facts warranting an inference to that effect. It may also be added that a person who is a mere indorsee of a negotiable instrument (as distinct from the original debt) is not permitted to fall back on the original loan.[4]

Other Illustrations.—An acknowledgment of a balance and agreement to pay at different rate of interest will be a novation. Where upon a settlement of accounts a certain sum is found due and the creditor giving up a portion takes a hundi for the balance, and passes a receipt, it is a clear case of novation.[5] Again, the acceptance by the creditor, of the sole liability of one of two joint debtors is a good consideration of his agreement to discharge the other from liability.[6] In the case of 'cross contracts,' the parties are deemed to intend that the contracts shall be cancelled and in lieu of the existing contracts, there shall be a fresh contract under which one party has to pay the difference on the due date.[7] Where a settlement contract is made, it does not necessarily follow that the first should disappear.[8] If the latter of two contracts is inconsistent with the former, and renders the former impossible of performance, the latter one rescinds the former, but if the two can be read together, the second merely ratifies the first.[9] In a contract for sale of goods,

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1. *Maung Chit* v. *Roshan & Co.* (1934) 12 Ran 500 : 152 IC 1038 : (1934) Ran 389 (FB).
2. For this view *Ramaswami* v. *Murugiah Padayachi,* (1936) 59 Mad 268 : 70 MLJ 267 : (1935) MWN 855 : 43 LW 145 : 161 IC 273; (11936) Mad 179 (FB); *Subramanian Chetty* v. *Muthia Chetty,* (1911) 35 Mad 639; *Firm Budhu Mal* v. *Gokal Chand,* (1926) 7 Lah 113 : 92 IC 1015 : (1926) Lah 328; *Mohan* v. *Ramji,* (1931) Nag 113 : 134 IC 283; *Gopala Padayachi* v. *Rajagopal Naidu,* (1926) Mad 1148 : 1926 MWN 757 : 98 IC 75 and other case regarding it as a presumption of law will not be correct law. **See also** *Ma Kyhi* v. *P.R.M.A.C.T.V.R. Chettiar Firm,* (1935) Ran 365 : 159 IC 720.
3. *Bhagat Ram* v. *Harjas Mal,* (1928) Lah 454 : 112 IC 619.
4. *Maung Poo Mya* v. *Dawood & Co.,* (1921) 66 IC 584; *Marudamthu Naiker* v. *Kadir Badsha,* ILR (1938) Mad 568 : (1938) MWN 238 : (1938) 1 MLJ 378 : 47 LW 309 : (1938) Mad 377.
5. *Hari Dass Mal* v. *Bhagat Ram,* (1934) Lah 128 (2).
6. *U. San Ya* v. *P.R.M.P.S.P.L. Firm,* (1936) Ran 396 : 162 IC 388.
7. *Ramgopal* v. *Ram Sarup,* (1934) 36 Bom. LR 84 : (1934) Bom 91.
8. *Uttam Chand* v. *Jewa Mamooji,* (1919) 46 Cal 534 : 54 IC 285; *Kishindas* v. *Meghraj,* (1925) Sind 144 : 81 IC 834.
9. *Mathura Mohan* v. *Ram Kumar,* (1915) 43 Cal 790 : 20 CWN 370 : 35 IC 305; *Raghumul* v. *Luchmandas,* (1915) 20 CWN 708 : 38 IC 278.

containing an arbitration clause, mere extension of time for delivery creates no novation.[1] A composition with creditors operates as a satisfaction of the several debts and affords an answer to an action based on the original liability.[2] So, a decree passed on a compromise, though not in the nature of a contract, supersedes the compromise.[3]

Question of fact.—Whether there has been a novation with the result of extinguishing all rights and liabilities under the old contract is a question of fact depending on the circumstances of each case.[4] Where a contract note relating to shares was made out in *A's* name, but subsequently, at *A's* request, the vendor of the shares deleted *A's* name and made out a fresh contract note in *C's* name, it was held that the onus lay heavily on the vendor to prove that, in spite of the altered terms of the contract note, *A* continued liable.[5] It might, in some instances, happen that a novation though not effective, may yet have the effect of extinguishing the original contract. The Court has to consider the real substance of the transaction and not merely the form.[6]

Material alteration.—Where the parties to the contract agree to alter some of the terms of the contract by consent, there is no difficulty. But where one party alters the terms without the knowledge of the other, the question arises, what will be the effect of such alteration? Will it avoid the document in *toto?* There is no statutory provision in the Indian law of contracts, (the Negotiable Instruments Act provides only with reference to negotiable instruments) and so, the principles of the English law as laid down in the leading cases[7] on the subject will have to be applied. The answer may be shortly stated thus. If the alteration is what is called a material alteration, the document becomes void and unenforceable; but if it is a mere immaterial

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1. *Lachminarain* v. *Hoare Miller & Co.,* (1914) 41 Cal 35 : (1913) 21 IC 217; *Davindar Singh* v. *Mt. Lacchhmi Devi,* (1930) Lah 985.
2. *Teoomal* v. *Dharamdas,* (1929) Sind 49 : 114 IC 109.
3. *Arunachallam* v. *Sethupathi,* (1925) 22 LW 195 : 91 IC 338 : (1925) Mad 1260.
4. *Kshetra Nath* v. *Harasukdas,* (1926) 31 CWN 703 : 102 IC 871 : (1927) Cal 538; *Brijmohan* v. *Mahabeer,* (1936) 63 Cal 194 : 40 CWN 808; *Markandrai* v. *Virendrarai,* (1917) 19 Bom. LR 837 : 42 IC 815; *Ram Singh* v. *Tek Chand,* (1933) Lah 464 : 146 IC 562; *Sheo Gobind* v. *Jai Sri,* (1931) Oudh 97 : 130 IC 503; *Subramania Moopanar* v. *Subbiah,* (1930) MWN 658; *Krishnaswamy Iyer* v. *Natesa Iyer,* (1930) Mad 594 : 124 IC 51; *Elagan* v. *Nanjappa,* (1925) Mad 919 : 85 IC 964; (Cf) *Badri Das* v. *Besu,* (1933) Lah 174 : 145 IC 159; *Harji Dass Mal* v. *Bhagat Ram,* (1934) Lah 128 (2); *Balak Ram* v. *Telu,* (1935) Lah 897.
5. *Liladhar Nemchand* v. *Rawji Jugjiwan,* (1935) PC 93 : 154 IC 1090 : 41 LW 661 : 68 MLJ 530; **see also** *B.N.Ray.* v. *Ruttanji Ramji,* (1935) Cal 347 : 156 IC 643.
6. *(cf) Radhar* v. *Moham,* (1931) ALJ 223 : 131 IC 593 : (1931) All 325 (Simple bond for balance under mortgage bond – Bond altered – No suit on original mortgage because original contract was intended to be extinguished). **See also** *Waliul Hassan* v. *Gopal Saran,* (1901) 6 CWN 905; *Bhabuti Prasad* v. *Parbati Kaur,* (1935) Oudh 366.
7. *Master* v. *Miller,* (1791) 99 ER 1042 : 2 RR 399; *Aldous* v. *Cornwell,* (1868) 3 QB 573; *Lowe* v. *Fox,* (1887) 12 AC 206; *Suffel* v. *Bank of England,* (1882) 9 QBD 555.

alteration, it does not affect the validity of the instrument. Where the plaintiff purchaser and the defendant seller have entered into a sale agreement for the purpose of purchase and sale of the land, subsequent introduction of two independent persons who are related to the said parties as marginal witnesses into the original agreement cannot amount to material alteration rendering the agreement as invalid.[1] A material alteration is one, which changes the legal effect of the instrument, one which alters its legal character or identity. A material alteration is one, which varies the rights, liabilities or legal position of the parties ascertained in the deed in its original state. But if the alteration merely expresses that which was implied by law in the deed as originally written or which carries out the intention of the parties, already apparent on the face of the deed, it is not material provided that the alteration does not otherwise prejudice the party liable thereunder.[2] Whether any benefit accrues to the party making the alteration is an irrelevant consideration.[3] An alteration will be immaterial if it is merely correction of clerical errors, or making explicit what was already expressed through not completely, in the document. Alteration in a deed made in good faith in order to give effect to the real intention of the parties is not a material alteration.[4]

What are material alterations.—A bond in which the signature of some executants are forged;[5] alteration of the date of a bond so as to extend limitation;[6] change effected in document so as to alter the forum of suit;[7] inclusion in a mortgage bond of property not originally comprised in the bond;[8] alteration of rate of interest in bond, and insertion of default clause;[9] alteration of the parties to the document;[10] alteration of a Bill of Exchange so as to vary liability.[11] Where recital of passing of possession of the property is added subsequent to the agreement by means of interpolation, insertion of possessory title clause subsequently amounts to material alteration rendering the agreement voidable.[12] Even minor alterations in the agreement by substituting the witnesses to the document amounts to material alteration.[13]

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1. *Ramkhilona* v. *Sardar,* AIR 2002 SC 2548 : (2002) 6 SCC 375 : 2002 (5) Supreme 1 : 2003 (1) Arbi. LR 1 (SC).
2. *Kalianna Gounder* v. *Palani Gounder,* (1970) 2 SCJ 18 : (1970) 2 MLJ (SC) 19 : (1970) 2 SCR 455 : AIR 1970 SC 1942.
3. *Bushan Bibee* v. *Hurray Kristo,* (1882) 8 Cal. 926.
4. *Bijay Krishna* v. *Kali Charan,* AIR 1978 Cal. 153 : 1977 (1) Cal.LJ. 142: 81 Cal.WN. 392.
5. *Gourchandra Das* v. *Prasanna Kumar,* (1906) 33 Cal. 812 : 3 CLJ 363 : 10 CWN 788 (Suit fails even as against the real executant).
6. *Govindswami* v. *Kuppusami,* (1889) 12 Mad. 239; *Mt. Gomti* v. *Meghraj,* (1933) ALJ 907 : 145 IC 147 : (1933) All. 443; *Ramaswami* v. *Bhawani,* (1868) 3 MHCR 247.
7. *Lakshmammal* v. *Narasimharaghava,* (1914) 38 Mad. 746 : 21 IC 445.
8. *Ganga Ram* v. *Chandan Singh,* (1881) 4 All. 62; *Godla Thammya* v. *Narasimmulu,* (1925) 3 Ran. 227 : 89 IC 657 : (1926) Ran. 283.
9. *Christacharlu* v. *Karibsayya,* (1885) 9 Mad. 399 (FB).
10. *Kamalkhan* v. *Nizammuddin,* (1921) 20 ALJ 987 : (1923) AII. 123 (2) : 71 IC 412.
11. *Mesha Ahronel* v. *National Bank of India,* (1903) 5 Bom. LR 524.
12. *Janab M.H.M. Yakoob* v. *M. Krishnan,* AlR 1992 Mad. 80, 87.
13. *Sardar* v. *Ram Khilauna,* AIR 1997 All. 268, 271 : 1997 All. LJ 1437 : 1997 All CJ 443 : 1997 (1) All. WC 271 : 1997 (1) Civil Court C 498.

Where the right to terminate the original contract is postponed through a supplemental agreement for six months, it cannot be said that such agreement seeks to modify the original contract and is therefore by way of novation requiring consideration.[1] Where the original contract is altered by adding new terms and conditions, a party to such contract cannot claim any relief on the basis of the old contract as the same is deemed to be discharged on account of novation.[2]

What are not material alterations.—Alteration in a document which is not the foundation of the suit but which is used for a subsidiary purpose (*e.g.*) saving limitation;[3] addition of attestation to a document not requiring attestation;[4] addition of a clause excepting some prior dues in a sale note for goods;[5] insertion of the words 'per cent' where the context obviously required it;[6] adding a mere description of the property covered by a document.

Where the contract relating to sale and purchase of immovable property is not concluded and is at executory stage, the purchaser cannot be compelled to go ahead with the purchase on the ground that the purchaser had prior knowledge of defective or imperfect title and does not prevent the purchaser to change his mind.[7]

Effect of material alteration.—The party in fault cannot rely on the document. Where he is the plaintiff, amendment of pleading will not be allowed.[8] Nor can he claim to fall back on the original consideration or bond if any.[9] The altered document may however be used for collateral purposes.[10] Where the suit is laid not on the bond as altered but on the original right, the suit will not be dismissed merely because of the alteration.[11] And, though a person cannot sue on the altered document, he may be entitled to restitution under Sec. 65.[12]

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1. *Unikool Bottlers Ltd.* v. *Dhillon Cool Drinks,* AIR 1995 Del. 25, 36.
2. *Nagendra Kumar B. Singh* v. *Hindustan Salts Limited,* 2001 (1) GCD 532 (Guj).
3. *Atma Ram* v. *Umedram,* (1901) 25 Bom. 616 : 3 Bom. LR 213.
4. *Ramayyar* v. *Shanmugan,* (1891) 15 Mad. 70 (Mortgage executed before the T.P. Act no attestation required); *Venkatesh* v. *Baba,* (1890) 12 Bom. 44; *Kashy Nath* v. *Surbanand,* (1885) 12 Cal. 317.
5. *Govindaswami* v. *Kuppuswami,* (1893) 3 MLJ 265.
6. *Ananda Mohan* v. *Ananda Chandra,* (1917) 44 Cal. 154 : 35 IC 182.
7. *P.L.Pinto* v. *F.F. Menzes,* AIR 2001 Kam. 141, 146.
8. *Gogun Chunder* v. *Dhuronidhur,* (1881) 7 Cal. 616.
9. *Rajdhar* v. *Mohan,* (1931) ALJ 223 : 131 IC 563 : (1931) All. 325.
10. *Subramania* v. *Krishna,* (1899) 23 Mad. 137; *Parbati Charan* v. *Amarendranath,* (1926) 53 Cal. 418 : 96 IC 97 : (1926) Cal. 831; *Gomti* v. *Maghraj Singh,* (1933) All. 443 : 145 IC 147 : (1933) ALJ 907.
11. *Mangal Sen* v. *Shanker Rai,* (1903) 25 All. 580 (FB) (alteration of mortgage deed document admissible to prove the *factum of* mortgage).
12. *Anantha Rao* v. *Surayya,* (1920) 43 Mad. 703 : 38 MLJ 256 : (1920) MWN 187 : 11 LW 390 : 55 IC 697.

63. Promisee may dispense with or remit performance of promise.—Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Illustrations

(a) *A* promises to paint a picture for *B*. *B*, afterwards forbids him to do so. *A* is no longer bound to perform the promise.

(b) *A* owes *B* 5,000 rupees. *A* pays to *B*, and *B* accepts, in satisfaction of the whole debt 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) *A* owes *B* 5,000 rupees. *C* pays to *B* 1,000 rupees, and *B* accepts them, in satisfaction of his claim on *A*. This payment is a discharge of the whole claim.

(d) *A* owes *B* under a contract, a sum of money, the amount of which has not been ascertained. *A*, without ascertaining the amount gives to *B*, and *B* in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) *A* owes *B* 2,000 rupees, and is also indebted to other creditors. *A* makes an arrangement with his creditors, including *B*, to pay them a [composition][1] of eight annas in the rupee upon their respective demands. Payment to *B* of 1,000 rupees is a discharge of *B's* demand.

Consideration unnecessary.—The application in English law of the doctrine of consideration to the discharge of contracts has already been referred to **[169]**. It was there pointed out that the resultant doctrine of "accord and satisfaction", does not find a place in the Indian statute book. The present section widely departs from English law, and enacts that a promisee may, at his discretion, dispense with or remit performance, or extend time for

1. This word was substituted for the word "compensation" by S. 2 and Sch. II of the Amending Act, 1891 (XII of 1891).

performance, or accept anything instead of performance, and that consideration is not necessary for such dispensation, remission or extension or acceptance of substituted satisfaction.[1] It will be noticed that the section does not require any agreement between that parties,[2] such as is referred to in the previous section. It simply says that the promisee may act in any one of the four ways mentioned with the consequence will be that the promisor will be absolved from performance of his promise.

The point has been made absolutely clear by the Privy Council ruling in *Chhunna Mal* v. *Moolchund,*[3] that the language of the section does not refer to pay agreement and ought not to be enlarged by any implication of English doctrine; therefore the decision in *Abaji* v. *Trimbak Municipality,*[4] that there must be a proposal of the dispensation, and acceptance thereof, must be taken to be no longer good law.

Dispensing with or remitting performance.—This properly speaking, refers to a state of things *prior* to the date of performance. Where the promisee before the time for performance arrives, chooses to dispense with performance, [See Illustration (a) such dispensation will be enough to discharge the promisor.

Such a waiver of performance may be express or implied from conduct, which is inconsistent with the continuance of the original right.[5] So, a mere declaration releasing the promisor from liability is enough. Thus a debt may be relinquished wholly or in part, and that, without any consideration therefor.[6] A promisee can only dispense with the performance of the promise by a voluntary conscious act. It must be an affirmative act on his part. A mere omission to assert his rights cannot amount to a dispensation within the meaning of Section 63.[7]

1. *Mahadeo* v. *Mathura,* (1931) ALJ 295 : 132 IC 321 : (1931) All. 589 (2); *Hiranand* v. *Sher Mahomed Khan,* (1930) Sind 199 : 123 IC 225; (dubitante) *Sheopartap* v. *Murlidhar,* (1934) Pat. 144 : 148 IC 501; *Rajalakshmy* v. *Asst. Engineer,* AIR 1980 Kerala 68 : 1980 Ker.LT 59 : ILR (1980) 1 Ker. 272.
2. *Mahamud Umar Abdul Rahim Naruavala* v. *Firm of Shah Manilal Gokaldas,* (1968) 9 GLR 104 : ILR (1967) Guj. 1159.
3. (1928) 9 Lah. 510 : 26 ALJ 603 : 30 Bom. LR 837 : 32 CWN 738 : 108 IC 678 : 28 LW 251 : 55 MLJ 1 : (1928) PC 99.
4. (1903) 28 Bom. 66.
5. *Kawa Daji* v. *Gangram,* (1925) 64 IC 461; *L.I.C. of India* v. *Ramdas,* AIR 1979 Pat. 124 : 1979 BLJR 225 : 1979 Pat.LJ. 232; *Mohammad Usman* v. *Union of India,* AIR 1982 Raj. 100 : 1981 Raj.LW 500. (Unilateral revocation by Railway Refund of deposit accepted by auction purchaser. He acquiesced in revocation).
6. *Gosetti* v. *Varigonda,* (1904) 27 Mad. 368; *Chhuna Mal* v. *Moolchand,* (1928) 9 Lah. 510; *Lodd Govindoss* v. *Muthia* (1925) 48 MLJ 721 : (1925) Mad. 660; *Vedachala* v. *Sivaperumal,* (1914) 25 IC 741 (Case under S. 26 of the Madras Estates Land Act of relinquishment by a landlord, of a portion of his claim).
7. *Mahamud Umar Abdul Rahim Naruawala* v. *Firm of Shah Manilal Gokaldas,* (1968) 9 GLR 104 : ILR (1967) Guj. 1159; *Bai Hariben Ambashankar* v. *Shantilal Jadavji Shah,* (1980) 21 GLR 778.

A relinquishment may be conditional;[1] in such a case, the promisor is effectually released only on fulfilment of the condition: if the condition is not fulfilled, the creditor may enforce all his rights.[2]

A remission once made is irrevocable, and it is not open to the promisee to recover the amount remitted.[3]

Extension of time for performance.—Where the promisee chooses to enlarge the time for performance, such extension furnishes a valid plea is bar to an action on the original promise. Such an extension may be gratuitous, and needs no consideration for its validity.[4] The decision of the Rangoon High Court in *Maung Pu* v. *Maung Po Thaut,*[5] that an agreement to give time is *nudum pactum* seems wholly insupportable, on the plain language of the section. But as laid down in *Muthayya* v. *Lekku,*[6] it is not open to the promisee to extend the time for performance for his own purposes, and without reference to the promisor. Thus, in *Gopalan Nair* v. *Dt. Board, Malabar,*[7] where on default by a toll contractor, the District Board gave notice of re-auction of the right to collect tolls, and on that sale proving abortive, ordered a fresh auction, and sued more than three year after the first re-sale, for recovery of the loss sustained, it was held that the notice of the first re-sale was the exercise of an option to put an end to the contract and that the District Board could not thereafter purport to extend the time for performance, so as to suit its own purposes.

The section is applicable only in case of a mere extension of time. If in addition, there be some other terms, this section cannot be invoked.[8] There is

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1. *Abraham* v. *Lodge "Goodwill"*, (1912) 34 Mad. 156.
2. *Parasharam* v. *Shivram*, (1929) Nag. 321 : 118 IC 477.
3. *Gopalakrishna* v. *Venkatasubba*, (1900) 9 MLT 270.
4. *Jugal Kishore* v. *Chari & Co.*, (1927) 49 All. 599 : 25 ALJ 385 : 101 IC 643 : (1927) All. 451 (undertaking by creditor not to take steps to recover his dues till expiry of period specified); *Annamalai Chetty* v. *Velayudha Nadar*, (1914) 39 Mad. 129 (FB) : 3 LW 38; *Davis* v. *Cundasami*, (1896) 19 Mad. 398 : 6 MLJ 202; *Narendra Lal* v. *Tarubala Dasi*, (1921) 48 Cal. 817 : 25 CWN 800 : 66 IC 209 : (1921) Cal. 67; *Hiranand* v. *Sher Mahomed Khan*, (1930) Sind 199 : 123 IC 225; *Mulchand* v. *Tarachand*, (1929) Nag. 137 : 116 IC 646. **But see** *Sundareswaran* v. *Shri Krishna Refineries*, AIR 1977 Mad. 109 : 89 Mad.LW 593 : 1997 (1) Mad.LJ. 51. (promise cannot unilaterally extend time for performance); *Keshavlal Lallubhai Patel* v. *Lalbhai Trikumlal Mills Ltd.*, AIR 1958 SC 512 : 1959 SCR 213 : 1958 SCJ 866 (Extension of time question of fact).
5. (1928) 6 Ran. 191 : 110 IC 612 : (1928) Ran. 144, **see also** *Ma on Baw* v. *V.E.P.R. Chettiar*, (1935) Ran. 188 : 156 IC 743 (curiously enough, the same position is taken).
6. (1912) 37 Mad. 412 : 22 MLJ 413 **see also** *Asmat Ullah* v. *Bihari Lal*, (1923) Lab. 117 : 68 IC 912.
7. (1933) MWN 825 : 38 LW 533 : (1933) Mad, 704 : 145 IC 476.
8. *Mahadeo* v. *Mathura*, (1931) All. 589 (2) : (1931) ALJ 295.

also authority for saying that a creditor can extend the time even after the expiry of the time fixed originally.[1]

Acceptance in satisfaction.—[177] Here again, there is a marked divergence from the English Law of accord and satisfaction. As Illustration (c) shows payment of a lesser sum may discharge the whole claim. It is a question of fact whether the lesser sum is received in satisfaction of the whole or whether it is taken as a mere payment on account. Where the debtor sends a cheque for a lesser amount in full satisfaction of a larger sum due, the mere fact that the creditor retained and cashed the cheque is not conclusive of the creditor's intention to accept it is full satisfaction.[2] Where damages are claimed by the consignor, payment made by railway through cheques while stating that it is in full and final settlement of the claim, it does not operate as accord and satisfaction when the consignor encashed the same under protest and in part payment of the claim.[3]

Where the plaintiff claimed a sum of £ 486. 50 payment of a lesser sum of £ 150/- by defendant in settlement of full payment, it cannot constitute accord and satisfaction unless the plaintiff receives some additional benefit by way of consideration in order to compromise the claim.[4]

Illustration (e) to the section shows that a third party may take advantage of a release made for his benefit.[5]

Illustration (c) to the section has been applied to a case where a creditor attempted to resile from a composition on the plea that the debtor had secreted some properties.[6]

The section is intended to apply only to cases where the old contract subsists but there is a voluntary remission of performance of some promise in it (*e.g.*) a remission of part of the debt when it becomes payable. The section cannot apply to cases where the old contract has supplemented. In such a case Section 62 will apply.

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1. *Mahadeo* v. *Mathura,* (1931) ALJ 295 : 132 IC 321 : (1931) All. 589 (2); **see also** *Krishnaswamy* v. *Natesa,* (1930) Mad. 594 : 124 IC 51; (Cf) *Trimbak* v. *Bhagwandas,* (1898) 23 Bom 348.
2. *Basdeo Ram Sarup* v. *Sewak Ram,* (1922) All. 461; *Union of India* v. *Gangaram,* AIR 1977 MP 215 : 1977 MPLJ 318 : 1977 Jab.LJ 763; *Aryavart Overseas (P) Ltd.* v. *Kay Aar Biscuits (P) Ltd.,* AIR 1983 NOC 14 (Delhi).
3. *Union of India* v. *Navilakha & Sons,* AIR 1997 Bom. 209, 211 : 1997 (2) Mah. LJ 737 : 1997 (2) All. Mah. LR 520 : 1997 (99) Bom. LR 638.
4. *Ferguson* v. *Davies,* (1997) 2 All. ER 315 (CA).
5. **See** *Industrial Bank of Western India, In Re.,* (1931) 32 Bom. LR 1656 : 129 IC 890 (2) : (1931) Bom. 123.
6. *Dargahi Lal* v. *Sant Lal,* (1933) Oudh 361 : 145 IC 801.

Agreement to remit—The section will not cover the case of a binding *promise to remit in future.* For such an agreement, as pointed out consideration is necessary.[1] In *Vaidyanatha Rao* v. *Kandappa,*[2] in a suit on a mortgage providing for interest at 7 $^{1}/_{2}$ percent, and in default at 9 per cent, rate of interest and to receive only at the original rate. Such evidence was held inadmissible by itself, but it was pointed out that it was open to the defendant to prove an *actual remission, which had been given,* and payments and accountings made on that footing. As was said in another case, *Balasundara* v. *Ranganatha,*[3] what the section permits is not an agreement to remit but an actual remission. It was there pointed out that Section 92(4) of the Evidence Act does not touch any act of a creditor which extinguishes a debt by taking a smaller sum; but where the act of the debtor does not extinguish debt but only gives better terms which have to be worked out *in futuro,* then Section 92(4) of the Evidence Act will stand in the way. As was pointed out in *Karampalli* v. *Therku Vittil,*[4] a discharge of the whole of a debt on receipt of a smaller amount is quite valid, though the remission itself is in pursuance of an oral agreement inadmissible under Sec. 92, Evidence Act.

64. Consequences of rescission of voidable contract.—When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he had received any benefit there-under from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

Rescission of voidable contract.—The section applies to all cases of voidable contracts—voidable, whether *ab initio* or subsequently.[5] The word "rescinds" implies an "express and unequivocal cancellation of the contract."[6]

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1. (Minor) *Ramaswami* v. *Gurukur Rudrappa,* (1939) MWN 464.
2. (1931) 54 Mad. 889 : (1931) Mad. 636 : 33 LW 517 : 132 IC 292 : 61 MLJ. 556.
3. (1930) 53 Mad. 127 : (1929) Mad. 794 : 30 LW 293 : 58 MLJ 503; **see also** *Collector of Etah* v. *Kishori Lal,* (1930) All. 721 : (1930) ALJ 1193 : 127 IC 443.
4. (1902) 26 Mad. 195.
5. **See** *per contra, Brohma Dutt* v. *Dharmo Das,* (1898) 26 Cal. 381. ('Voidable' refers only to contracts falling within S.19); *Natesa Iyer* v. *Appavco,* (1915) 38 Mad. 178; *Abdul Hamid* v. *Peshawar Municipal Committee,* (1935) Pesh. 124 : 157 IC 897; *Anil Gupta* v. *Atul Kumar,* AIR 1982 NOC 43 (Delhi) (Agreement for sale of shares deposited with bank. Time treated as of essence. Vendee required to get them released by fixed date and required to make payment by instalments. Vendee failing to obtain release within time but vendors continuing to accept payments. Held by acceptance of payment vendors were estopped, from rescinding contract).
6. *Etbari* v. *Bellamy,* (1938) Ran 207 : 176 IC 526.

Therefore, a person who, under Sec. 39, "puts an end' to the contract will be a 'party rescinding a voidable contract'.[1] Similarly, a person who has been prevented from performance by the other party can avoid the contract. Again, the promisee under a contract of which time is of the essence may avoid the contract in case of non-performance before the period. It would seem that the section will cover also cases of avoidance on the ground of absence of legal necessity, etc., *e.g.* mortgage by a certificated guardian of minor.[2]

Section 64 applies to the case of rescission of a Muslim marriage, which is a contract under Muslim law, and where the husband unilaterally pronounces talak, the husband is liable to return all the benefits received under the marriage.[3]

It may be mentioned that the principle of this section is embodied also in Sec. 35 of the Transfer of Property Act and Secs. 30 to 33 of the Specific Relief Act, 1963.

"Restore such benefit".—In all these cases of avoidance, the law casts an obligation on the party to refund any benefit received under the contract. Equity demands that if rescission is to be granted both parties must be restored to *Status quo ante.* Section 64 is based on this principle.[4] When the karnavan of a Malabar tarwad executed a *Kanom* over the illom properties but the money borrowed was used for the benefit of the illom, the Court set aside the transaction only on condition of refund of the sum borrowed.[5] Where a sale executed by plaintiff was set aside as having been induced by fraud, the decree in plaintiff's favour was made conditional on payment of the amount of consideration paid by the defendant.[6] A minor seeking to avoid a contract by his guardian must likewise restore benefits received.[7] On the principle of this section, and Illustration (c) to Sec. 65, it was held by the Madras High Court that a servant who quits the service before the expiry of the contract

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1. *Subba Rao* v. *Devu Shetti,* (1894) 13 Mad. 126; *Md. Mumtaz Ali* v. *Altaf-ul-Rahman,* (1922) Oudh 259 : 69 IC 789 (Benefit is only the balance of advantages received under the contract) *Gurdial Singh* v. *Pearey Lal,* AIR 1982 Delhi 120 : 1981 (20) DLT 318.
2. *Sinayya* v. *Munisami,* (1898) 22 Mad. 289.
3. *Mahmad* v. *Hurbanu,* (1978) Mah. LJ. 26.
4. *Surendranath Talukdar* v. *Lohit Chandra Talukdar,* 1975 Gau. 58.
5. *Mundakath Muthu* v. *Vishnu Nambudripad,* (1932) Mad. 303 : 136 IC 3 : 50 LW 171 : (Cf.) *Swaminatha Aiyar* v. *Jambukeswaraswami Temple,* (1930) Mad. 372 : 117 IC 139; *Parbhu* v. *Puttu,* (1927) 1 Luck 144 : 95 IC 995 : (1927) Oudh 93; *Dwijendra Mohun* v *Manorama,* (1922) 49 Cal. 911 : 28 CWN 57 : 36 CLJ 326 : 70 IC 990 : (1922) Cal. 150.
6. *Dwarka Prasad* v. *Kandhi,* (1934) Oudh 170 : 149 IC 348 : 11 OWN 603.
7. *Limbaji* v. *Rahi,* (1925) 49 Bom. 576 : 88 IC 643 : (1925) Bom. 499; *Sinayya* v. *Munisami,* (1898) 22 Mad. 289 : 9 MLJ 64; *Tej Pal* v. *Ganga,* (1903) 25 All. 59; *Zinda* v. *Roshnai,* (1928) Lah. 250 : 113 IC 53 : 10 LLJ 183; *Khairu* v. *Dheru,* (1927) Lah. 722 : 99 IC 734.

period is entitled to be paid for the full months he worked, less any damages sustained by the master.[1]

Where a life insurance policy was vitiated on account of fraudulent suppression of material facts by the policyholder when entering into the contract, it was held that the policyholder being guilty of fraud no one claiming under him can ask for refund of money paid by the policy holder to the insurance company.[2] There is no right to refund of money paid in such a case and Section 64 is inapplicable.[3]

BENEFIT.—It must be observed that it is only the benefit, if any that has to be restored. There is no provision, as in the succeeding section, for *compensation* to paid.

Where an alienation was invalidated, the alienee is entitled only to a refund of the money paid and cannot claim the benefit of any profit resulting to the vendor by its investment.[4]

Where for the protection of the purchaser contracting with a guardian or a qualified owner, a particular dealing with the consideration money was in the direct contemplation of the parties such as the purchase of other lands and the money is so applied, the benefit which the other party obtains will be the land or other property acquired with the consideration, and should be held as benefit accruing to the estate of the vendor under the alienation and must be directed to be given to the alienees on rescinding the sale.[5]

Where the guardian of a minor alienates the minor's property for purposes not binding on the minor and buys other property with part of the sale proceeds, it has been held that the property purchased is not a 'benefit' within the meaning of this section.[6] Similarly, a deposit or earnest money paid in respect of a sale not completed is not a 'benefit'.[7] Again, the term 'benefit' will not include improvements effected by a usufructuary mortgagee.[8]

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1. *Chokkalinga* v. *Mahomed,* (1912) 23 MLJ 680 : (1912) MWN 1912 : 17 IC 894.
2. *Bhanumati Sidibai* v. *L.I.C. of India,* (1970) Lab. IC 598.
3. *Mithoolal Nayak* v. *L.I.C. of India,* AIR 1962 SC 814 : 32 Com. Cas. 177.
4. *Chandrasekhara Pillai* v. *Kocha Koshi,* 1961 Ker. L T 1018 : 1961 Ker. LJ 1226.
5. *Cheriathu Varkaj* v. *Kamakshi Amma,* 1965 Ker. LJ 265 : 1964 Ker. LT 952.
6. *Chinnaswami* v. *Krishnaswami,* (1919) 42 Mad. 56 : 35 MLJ 652; *Ram Din* v. *Mansa Ram,* (1929) 51 All. 1027 : (1929) All. 890 : (1929) ALJ 1140 (Unauthorised contract by certificated guardian) : A fortiori, where the minor is not proved to have been benefited, *Badar Din* v. *Natho,*(1929) 11 LLJ 14 : 115 IC 855 : (1929) Lah. 279.
7. *Natesa v Appavu,* (1913) 38 Mad. 178 : (1913) MWN 341 : 24 MLJ 488 : 19 IC 462. **See** however *Baji Rao* v. *Sheoram,* (1927) 100 IC 860 : (1927) Nag. 161.
8. *Bechu* v. *Bhadhanti,* (1930) 124 IC 731 : (1931) All. 231.

It is hardly necessary to add that the section will not apply to a 'benefit' under a contract made by a person, incompetent to contract.[1]

65. Obligation of person who has received advantage under void agreement or contract that becomes void.—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Illustrations

(a) *A* pays *B* 1,000 rupees in consideration of *B's* promising to marry *C, A's* daughter. *C* is dead at the time of the promise. The agreement is void, but *B* must repay *A* the 1,000 rupees.

(b) *A* contracts with *B* to deliver to him 250 maunds of rice before the first of May. *A* delivers 130 maunds only before that day, and none after. *B* retains the 130 maunds after the first of May. He is bound to pay *A* for them.

(c) *A*, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her a hundred rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre, and *B*, in consequences, rescinds the contract, *B* must pay *A* for the five nights on which she had sung.

(d) *A* contracts to sing for *B* at a concert for 1,000 rupees, which are paid in advance. *A* is too ill to sing. *A* is not bound to make compensation to *B* for the loss of the profits which *B* would have made if *A* had been able to sing, but must refund to *B* the 1,000 rupees paid in advance.

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1. *Mohori Bibi* v. *Dhurmodas*, (1903) 30 Cal. 539 (PC) : 5 Bom. LR 421 : 7 CWN 441; *Kehr Singh* v. *Asa Singh*, (1924) 60 IC 519; *Bishen Singh* v. *Bishna*, (1924) Lah. 294 : 69 IC 543; *Motilal* v. *Maneklal*, (1921) 45 Bom. 225.

Scope—This section provides for the restitution of any advantage received under a void agreement or contract. The principle of the section is that the *status quo ante* should, as far as possible, be restored.[1] An 'agreement which is *discovered* to be void' includes, according to the view of the Privy Council an agreement which is void from its inception, while a "contract which *becomes* void," is one in which there was no taint in the formation, but some subsequent circumstance renders it void. The obligation to restitute the benefit arises under Sec. 65 not only in a situation where the contract is discovered to be void or subsequently it becomes void, but also in a situation where the contract is void from its inception.[2] It would seem that it is only when an agreement is subsequently *discovered* to be unenforceable on account of some latent defect or when a perfectly valid contract becomes unenforceable by subsequent events or circumstances that this section will come into operation. It can have no application where the parties knew the void or illegal character of the agreement or contract; on this point, however there is some difference of opinion.[3]

Whatever money paid under an unlawful agreement the person is entitled for the refund of the money as long as the unlawful agreement is not performed. [4]

It will be noticed that the liability for refund of benefit extends to *'any person'* who has got any advantage and is not restricted to the parties to the contract.[5]

But the advantage should have been received directly under the contract. So, where an occupancy tenant surrendered his right for consideration to a fractional co-sharer, and the lambardar had the transfer set aside under Sec. 13 of the C.P. Tenancy Act, and entered into possession, it was held that the plaintiff (fractional co-sharer) had no right to recover as

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1. *See Municipal Board, Lucknow* v. *Deb,* (1933) 8 Luck 1 : (1932) Oudh 193 : 137 IC 574 (Principle of restitution embodied in the section is that of giving relief upon Quantum Meruit); *Madras Consolidated Sugar and Spirit Factories Ltd* v. *Shaw,* (1904) 14 MLJ 443; *Malik Abdul Ahad Shah Jalil Ahmed Aktar* v. *State,* AIR 1982 J&K 16.
2. *Tarsem Singh* v. *Sukhminder Singh,* AIR 1998 SC 1400, 1404 : 1998 (1) Supreme 275.
3. *Nathu Khan* v. *Sewak Koeri,* (1911) 15 CWN 408; *Jijibhai* v. *Nagji,* (1909) 11 Bom. LR 693; *Ledu Coachman* v. *Hira Lal,* (1915) 43 Cal. 115. **See also** *Union of India* v. *Venkateswara Rao,* (1978) 2 An. WR 96; *Bhaskarrao* v. *Saru,* AIR 1978 Bom. 322 : 1978 Mah. LJ 528 : *Lakhiram Agarwal* v. *Brajara Agarwalla,* (1973) 39 Cut. LT 1107 : 1973 (2) CWR 1420; *Kuju Collieries* v. *Jharkhan & Mines Ltd.,* AIR 1974 SC 1892 : 1975 (1) SCR 703 : (1974) 2 SCC 533; *Bhudu Lal* v. *Deccan Banking Co. Ltd,* AIR 1955 Hyd. 84 (FB).
4. *Andhra Bank* v. *Vattikuti Sreemannarayana,* AIR 2005 AP 108 : 2004 (5) ALD 111 : 2004 (2) APLJ 468 : 2004 (6) ALT 11 : 2004 (3) LS 37.
5. *Girraj Baksh* v. *Hamid Ali,* (1886) 9 All. 340.

against the landlord, though the latter had derived a benefit incidentally.[1] In a Lahore ruling however, the principle of Sec. 65 would appear to have been invoked, rather unwarrantedly, it is submitted, to give relief to an assignee of mortgage rights are against his assignor, when it was found that the mortgage itself was void as having been executed by a minor.[2]

Where the plaintiff paid Rs. 800 to the defendant and the defendant acknowledged a past debt of Rs. 11853-06 agreeing to mortgage his proprietary rights in certain lands but the agreement became void due to coming into force of legislation meantime, it was held that the defendant was liable to refund not only the sum of Rs. 800 but the entire sum agreed to as well as interest as agreed upon.[3]

The principle of Section 65 will not apply to a suit by an auction purchaser against the decree-holder for recovery of money paid by him for purchase of the property in auction on its being found subsequent to the confirmation of the auction sale that the judgment debtor had no saleable interest in the property.[4]

"Discovered to be void."—In *Harnath Kunwar* v. *Indra Bahadur Singh,*[5] the Privy Council held that, on the language of the section, an agreement "discovered to be void" would include an agreement destitute of legal effect from its inception. It has been held that though normally in the case of an agreement void *ab initio* the discovery must be held to have occurred at the date of the agreement, the Court may, in the special circumstances of a case, say that the discovery was later than the date of the agreement.[6]

Now, an agreement may also be void for any of the reasons mentioned in Sections 23 to 30. As regards agreements for an unlawful consideration, the words 'discovered to be void' have given rise to difference of opinion. In *Jijibai* v. *Nagji,*[7] it was said that agreements for an unlawful consideration will come within the section. Such a construction will virtually annihilate the doctrine of *in pari delicto,* for every agreement for an unlawful consideration or object being void *ab initio, it* will be possible to recover under this section even when

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1. *Genda Singh* v. *Gowardhan,* (1938) Nag. 451.
2. *Hajj Ghulam* v. *Feroze,* (1938) Lah. 566 : 40 PLR 528.
3. *Rameshwardas Khemraj* v. *Jagannath Sitaram,* 1977 MPLJ 484.
4. *Vishwanath* v. *Jan Mohammed,* AIR 1982 Bom. 30 : ILR (1981) Bom. 1222.
5. (1922) 45 All. 179 : 71 IC 629 : 27 CWN 949 : 18 LW 383 : (1922) PC 403 : 44 MLJ 489; *Madhura Municipality* v. *Raman Servai,* (1936) MWN 85 : 43 LW 39 : (1936) Mad. 98; *Asaram* v. *Ludheshwar,* (1938) Nag. 335 (FB); *Dalip Singh* v. *Jagat Singh,* (1938) Lah. 721 (agreement offending S. 19 of the Punjab Colonisation of Government Lands Act).
6. *Raja Mohan Manucha* v. *Nisar Ahmad,* (1936) OWN 1033 : 164 IC 94.
7. (1909) 11 Bom. LR 693.

the unlawful object has been achieved, and the agreement worked out. Besides, it seems a misuse of language to talk of "discovering" an agreement to be void, in the case of an unlawful agreement, known to the parties to be such.

In *Gulabchand* v. *Fulbai,*[1] the plaintiff promised to pay a certain sum to defendant as consideration for the latter's promise to marry his niece to the plaintiff's son. The son died before the marriage and the suit was to recover Rs. 750 advanced. The plea was that the arrangement being a marriage brokage contract was *ab initio* void and the section therefore did not apply. The Court observed that as the section speaks generally of an agreement discovered to be void without express reference to the origin or cause of the void character, the agreement in question came within the ambit of Sec. 65 but directed a refund on another ground, (*viz.,*) that it was a claim for money had and received, and there was no need to invoke Sec. 65 Reference was made to the sharp antithesis between "*agreement* discovered to be void" and "*contract* becoming void," and it was pointed out that the former expression embraces agreements which, being void *ab initio* never reached the stage of contract. The Court however expressed the view that there is difficulty in applying the section to agreements void under Secs. 23 and 24 of the Act. But in *Nathu Khan* v. *Sewak Koerr,*[2] the Calcutta High Court held the section inapplicable if the agreement was known to be illegal by both parties. The same view has been reaffirmed by that Court in a recent case.[3] On this view a person who has paid money to another for an unlawful purpose will not be able to recover it, even where the illegal purpose has not been carried out—which will be opposed to the well-established principle in *Petherperumal* v. *Muniandi.*[4] Besides, such a construction will run counter to the spirit of Sec. 84 of the Trusts Act, which embodies the rule of English law on the subject.

It is perhaps in view of this difficulty of construction that cases have held that the present section has no application to agreement void under Secs. 23 and 24.[5]

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1. (1909) 33 Bom. 411 : 11 Bom. LR 649 : 3 IC 748. **See also** *Ismail* v. *Dattatreya,* (1916) 40 Bom. 638.
2. (1911) 15 CWN 408; (Cf.) *Labh Singh* v. *Jamnun,* (1931) Lah. 694 : 134 IC 1116; *Ananda Rao* v. *Tukaram,* (1918) 46 IC 3261; *Firm Prabhu Mal* v. *Firm Babu Ram,* (1926) Lah. 159 : 89 IC 684.
3. *Durgesh Nandini* v. *Bhownipur Banking Corporation,* (1939) 43 CWN 260; **see also** *Rudragowda* v. *Gangowda,* (1937) 39 Bom. LR 1124.
4. (1908) 35 Cal. 551.
5. *Hemandas* v. *Chellaram,* (1921) 15 IC 836 : 9 SLR 267; *Ledu Coachman* v. *Hira Lal,* (1915) 43 Cal.115; *Venkataraju* v. *Ramanujam,* (1918) 34 MLJ 561 : 7 LW 518 : (1918) MWN 230 : 44 IC 319; *Hari Bhai* v. *Nathubhai,* (1914) 38 Bom. 249 : 16 Bom. LR 62 : 23 IC 602; *Srinivasa* v. *Sesha,* (1918) 41 Mad. 197 : 34 MLJ 288 : 6 LW 42 : 51 IC 783.

The question whether parties can enforce their rights flowing from a contract, which is illegal, is not categorically decided in India. The correct principles relating to this aspect of the matter do not seem to have been considered. In this context, we have to consider the decisions in: *Ramagya Prasad Gupta* v. *Murli Prasad* [1] in *Kuju Collieries Ltd.* v. *Jharkhand Mines Ltd.*[2] in the light of the judgment of the Supreme Court in *Gherulal Parkash* v. *Mahadeodas Maiya,*[3] which had not been brought to the notice of the Supreme Court in the two cases decided by the Supreme Court in 1974.

In England, as we find from Chitty on Contracts Vol. 1 (24th Edition) paragraphs 906 to 910 and Cheshire and Fifoot on Law of Contracts 9th Edition page 345 etc. the position is that once the contract is illegal, the knowledge of parties about the illegality is not relevant to consider its enforceability on the principle that no man can plead ignorance of law.

Where money was paid under a contract which subsequently becomes void, the person who made the payment is entitled to the return of the money as money had and received.[4]

In *Gherulal Parkash* v. *Mahadeodas Maiya,*[5] the Supreme Court held that the law in India is not different. It observed:

> "Some of the decisions both English and Indian cited at the Bar which bring out the distinction between a contract which is forbidden by law and that which is void may now be noticed. In *Thacker* v. *Hardy,*[6] *the* plaintiff, a broker who was employed by the defendant to speculate for him upon the stock exchange, entered into contracts on behalf of the defendant with a third party upon which he (the plaintiff) became personally liable. He sued the defendant for indemnity against the liability incurred by him and for commission as broker. The Court held that the plaintiff was entitled to recover notwithstanding the provisions of 8 & 9 Vict. C. 109. Sec. 18 (English Gaming Act 1845)

In *Ramagya Prasad Gupta* v. *Murli Prasad,*[7] some persons entered into partnership by means of an oral agreement to buy an electrical undertaking in the name of one Mahendra Prasad who is one of the partners. It was also agreed that all the partners would contribute to the total purchase money in

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1. AIR 1974 SC 1320 : 1974 (3) SCR 915 : (1974) 2 SCC 266.
2. AIR 1974 SC 1892 : (1974) 2 SCC 266.
3. AIR 1959 SC 781 : 1959 (2) SCR 406.
4. *South Tyneside Metropolitan Borough Council* v. *Svenska International Plc.,* (1995) 1 All. ER 545.
5. AIR 1959 SC 781.
6. (1978) 4 QB 685.
7. AIR 1974 SC 1320 : (1974) 2 SCC 266 : 1974 (3) SCR 915.

proportion to their share in the partnership and also agreed for obtaining the licence in the name Mahendra Prasad. Chapra Electric Supply Co. Ltd., which went into liquidation, was sold by the official liquidator to Mahendra Prasad with the consent of the State Govt. Before the final instalment of purchase money was paid, the oral arrangement was reduced to the form of partnership deed and registered under the Registration Act. Further owing to subsequent changes in the constitution of partnership, another partnership deed was also executed and registered. Subsequently by the licencee was informed by the Electricity Department that the partnership was illegal and void as it is in contravention of the provisions of Electricity Act. This being so one of the partners Parasnath Prasad filed a suit seeking the dissolution of the partnership and rendition of accounts. While this suit was pending before the Court, the State Govt. revoked the licence of Mahendra Prasad and deposited a sum of Rs. 3,00,000/-in the Court in view of its decision to purchase the electrical undertaking. Mahendra Prasad instituted a suit seeking a declaration that being the sole licencee and also being the sole owner of the undertaking, he alone is entitled to receive the purchase price. The question was when the partnership was illegal contravening the provisions of the Electricity Act, whether the principle in *pari delicto* is attracted.

The Supreme Court held that the words when the agreement is discovered to be void" employed by Sec. 65 of Contract Act necessarily imply the preexistence of something which is subsequently found out and thus even an agreement which is *ab initio* void can be discovered to be void subsequently. The appellants were held to be entitled to proportionate share in the purchase money and the respondent cannot be said to be entitled solely for the compensation money irrespective of the matter whether the agreement was void ab initio or was void or valid initially but became void or discovered to be void subsequently.

Sec. 2 of the Contract Act emphasises that only agreements, which are enforceable by law, are Contracts and which are not enforceable by law are void. The first part of Sec. 65 of Contract Act refers to an agreement being discovered to be void which implies that the agreement is not enforceable and consequently cannot be a contract. There may be a case where the parties or one of the party to the contract may not be aware initially that the agreement was not enforceable but they may discover subsequently that the agreement was in law not enforceable. The later part of Sec. 65 refers to a contract becoming void. This is a case where an agreement which is originally enforceable in law and thus a contract, is rendered void owing to subsequent happenings. In both of these cases Sec. 65 compels the person who received any advantage under the agreement to restore such advantage or to compensate the person from whom he received it. But where, even at the time when the agreement is entered into, the parties were aware that it was not lawful and consequently

void, no contract can said to have resulted but only an agreement and it is not case of it being discovered to be void subsequently. It cannot also be said that it is a case of a contract becoming void on account of subsequent happenings. Sec. 65 has no applications to these cases. This is the view expressed by the Supreme Court in the case [1]

In the above case a mining lease was granted by the first respondent but alleged to have been done so in the name of the first respondent by the second respondent in favour of *Haricharan Singh, J.D. & Co.* In pursuance of the grant of lease a sum of Rs. 80,000/- was paid to the first respondent. There was an earlier lease in respect of the same property in favour of respondents 3 and 4, which already expired just before the commencement of lease to appellants. Hari Charan Singh, J.D.& Co. later changed its name to *Kaju Co. Diaries Ltd.* When the plaintiff did not get the possession of the leased property it instituted the suit for recovery of possession of the leased property along with mesne profits and in the alternative for refund of the sum of Rs. 80,000/-.

The first and the second respondents took the stand that the first respondent company was not the creation of second respondent and the lease was by the first respondent and the amounts were paid to the first respondent. Further it was also contended by the first respondent that the possession of leased properties were handed over to the plaintiff and that they were not aware that, respondents 3 and 4 were resisting the plaintiff's claim and that he was in no case responsible and therefore the plaintiff is not entitled to any relief.

After the institution of the suit, Bihar Land Reforms Act came into force. By virtue of this Act since the plaintiff was not working mines any claim in respect of the possession of mines became unenforceable. The appellants therefore confined his claim to the refund of the sum of Rs. 80000/-.

The trial Court held that since any stipulation of payment of Salami was illegal and the lease on that basis was also illegal, the plaintiff was not entitled to claim relief under Sec. 65 of the Contract Act.

The High Court also held that neither Sec. 65 nor Sec. 72 of the Contract Act are applicable. The Supreme Court of India also while holding that Sec. 65 is not applicable and the plaintiff was not entitled to claim refund of the sum paid in pursuance of the leased observed:—

> "Section 65 makes a distinction between an agreement and a contract. According to Sec. 2 of the Contract Act an agreement, which is enforceable by law, is a contract and an agreement, which is not enforceable by law, is said to be void. Therefore,

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1. *Kuju Collieries* v. *Jarkhan & Mines,* AIR 1974 SC 1892.

when the earlier part of the section speaks of an agreement being discovered to be void it means that the agreement is not enforceable and is, therefore, not a contract. It means that it was void. It may be that the parties or one of the parties to the agreement may not have, when they entered into the agreement, known that the agreement was in law not enforceable. The second part of the section refers to a contract becoming void. That refers to a case where an agreement which was originally enforceable and was therefore a contract, becomes void due to subsequent happenings. In both these cases any person who has received any advantage under such agreement or contract is bound to restore such advantage or to make compensation for it to the person from whom he received it. But where even at the time when the agreement is entered into both the parties knew that it was not lawful and therefore void, there was no contract but only an agreement and it is not a case where it is discovered to be void subsequently. Nor is it a case of the Contract becoming void due to subsequent happenings. Therefore Sec. 65 of the Contract Act did not apply".

Contract with Corporations.—Where a corporation has, under the Act constituting it, power to contract only under seal, but, in pursuance of a contract made in breach of the imperative provision, the other party has performed his part, and brings a suit against the corporation later on, the question has arisen whether the agreement or contract can be said to have been 'discovered to be void' or to have 'become void' within the meaning of this section so as to cast a liability on the corporation to compensation under the terms of this section. The decided cases have held that where the provision is mandatory and the contract is not under seal, the fact of the consideration having been executed in favour of the corporation will not entitle the other party who contracted with knowledge of the circumstances, to sue the corporation. To give relief in such cases on a *quantum meruit* will be virtually to make the requirements of the statute a dead letter.[1] But, where a corporation, in pursuance of such a contract, has executed the consideration in favour of the other party, a suit by the corporation is maintainable and relief will be given as on an implied contract.[2]

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1. *Young* v. *Mayor of Spa.* (1882) 8 AC 517; *Municipal Board, Lucknow* v. *Deb,* (1933) 8 Luck 1 : (1932) Oudh 193 : 137 IC 574. **But see** *Mohammed Ebrahim Molla* v. *Commissioners for the Port of Chittagong,* (1927) 54 Cal. 189 : 103 IC 2 : (1927) Cal. 465; *Zulaing* v. *Yamathin District Council,* (1932) 10 Ran. 522 : 140 IC 747 : (1932) Ran. 176; *Arunachala* v. *Sriviliputtur Municipal Council,* (1933) 37 LW 429 : 144 IC. 714 : (193) Mad. 332; *Gonda Municipality* v. *Bachchu,* AIR 1951 All. 736.
2. *Municipal Committee, Gujranwala* v. *Fazal Din,* (1929) 11 Lah. 121 : 121 IC 187 : (1929) Lah. 742; (Cf.) *Nabi Baksh* v. *Muhammadi,* (1929) Lah. 330 : 116 IC 552 (Loan by Co-operative Credit Society to non-member is recoverable though contract is void as beyond its competency).

Right when accrues.—In *Hansraj Gupta* v. *Official Liquidators of the Dehra Dun Mussorie Tram Co.*,[1] the Judicial Committee held, affirming the principle laid down by them in *Annada Mohan Roy* v. *Gour Mohan*,[2] that the time at which an agreement is "discovered to be void" within the meaning of this section is, *in the absence of special circumstances*, the date of the agreement, and that such date is the terminus a quo for purposes of limitation for a suit for recovery of money paid under it. What will be the special circumstances is illustrated in another decision of the Judicial Committee[3] In *Moroti Ashroba Sodner* v. *Balaprasad Govardhandas*,[4] the Bombay High Court observes that it is not seldom that parties to the contract are ignorant of the various private rights relating to or arising out of the contract and to this extent ignorance of law is considered to be understandably a reality of life; hence when the ignorance is realised and light is thrown upon the same through the legal decision, the courts are inclined to take the view that the agreement is "discovered" by the party concerned to be a void agreement only at that point of time or, in any event, after the date of the agreement.

The decision of a Court may furnish a cause of action for a fresh suit, based on Section 65 of the Contract Act, on the ground that the discovery that the agreement was void was made when the Court passed its decree.[5] But, it is not open to the Court to decide in a single suit that an agreement is void and on the basis of that very decision, proceed to award relief under this section.[6]

"Becomes void".—A contract may become void, *e.g.*, because of impossibility (vide Section 56). Also, where a person by his own act, makes it impossible to sue upon it, the contract becomes void, (*e.g.*,) material alteration of document by the party claiming thereunder.[7]

In *Satgur* v. *Har Narain*[8] the Privy Council said that the words "when a contract becomes void" are sufficient to cover the case of a voidable contract, which has been avoided.

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1. (1933) 54 All. 1967 : (1933) ALJ 175 : 37 CWN 379 : 35 Bom. LR 319 : 57 CLJ 166 : (1933) MWN 190 : 37 LW 445 : (1933) PC 63 : 142 IC 7 : 64 MLJ 403. **See also** *Gopila* v. *Pandurang*, (1926) Nag. 241 : 92 IC 640; *Gulam Hussein* v. *Mir, Jakirli*, (1938) NLJ 409; *Ram Samujh* v. *Mainah Kuar*, (1925) Oudh 737 : 91 IC 176.
2. (1923) 50 Cal. 629 : 50 IA 239 (PC).
3. *Harnath Kunwar* v. *Indra Bahadur Singh*, (1922) 45 All. 179; **see also** *Bassu Kuar* v. *Dhum Singh*, (1888) 11 All. 47 (PC).
4. (1982) Mad. LJ 255.
5. *Bassu Kuar* v. *Dhum Singh*, (1888) 11 All. 47 (PC).
6. *Shamboo Shukul* v. *Dhaneshar Singh*, (1927) Oudh 177 : 101 IC 265; **but see** *Contra*, *Raja Mohan* v. *Manzoor Ahmad*, (1937) Oudh 410 : 169 IC 785.
7. *Anantha Rao* v. *Surayya*, (1920) 43 Mad. 703 : 38 MLJ 256 : (1920) MWN 187 : 11 LW 390 : 55 IC 69.
8. (1932) 59 IA 147 : (1932) PC 893 : 136 IC 108 : 36 CWN 461 : (1932) ALJ 297 : (1932) MWN 502 : 35 LW 667 : 34 Bom. LR 771 : 62 MLJ 451 (PC).

Restore such advantage—ADVANCE FREIGHT.—Under this section, it has been held that where money has been advanced under a charter party, but the voyage stipulated for becomes impossible, *e.g.*, by the stranding of the ship, or any such reason leading to the frustration of the venture, the advance freight can be recovered.[1]

Where the Development Authority promised to allot developed plots to the subscribers and committed breach of promise on account of non-performance is liable to refund the consideration received from the subscribers along with an interest of 12% per annum.[2]

Where the plaintiff paid earnest money towards the purchase of land property, which is prohibited to be alienated under Sec. 7 of the Nazool Land (Transfer) Rules 1956 (prohibiting transfer of land belonging to Scheduled Castes), the defendant receiving the earnest money must restore the advantage to the plaintiff by refunding the earnest money along with interest.[3]

MINOR'S CONTRACTS.—In *Mohori Bibi's case,* the judicial Committee observed that this section like the preceding section, starts from the basis of there being a contract between competent parties and has no application to a case in which there never was, and never could have been any contract.[4] There is therefore no liability in the case of contracts entered into with minors to make compensation under the section. But, as the Judicial Committee pointed out, the Court may, on principles of equity, and also under Section 31 to 33 of the Specific Relief Act, 1963, make orders for restoration of benefits received.[5] Of course, the Court will take care to see that under the guise of restitution, the very contract, which is void, is not virtually enforced against the minor. For instance, where only money has been lent, no decree can be passed against the minor on the contract of loan.[6]

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1. *Gandha Korliah* v. *Janoo Hason,* (1926) 49 Mad. 200 : 22 LW 842 : 91 IC 780 : (1926) Mad. 175 : 49 MLJ. 738; *Sivanandam* v. *Surayya,* (1925) 48 Mad. 459 : 21 LW 445 : (1925) Mad. 727 : 48 MLJ 413; *Boggiano & Co.* v. *Arab Steamers,* (1916) 40 Bom. 529 : 18 Bom. LR 126; **but see** *Narsi* v. *Gopalji,* (1930) Sind 282.
2. *Ghaziabad Development Authority* v. *Union of India,* AIR 2000 SC 2003, 2007 (DB) : (2000) 6 SCC 113 : 2000 (4) Supreme 373 : 2000 (2) CLT 259 (SC) : 2000 (3) Arb. LR 170 : 2000 (7) JT 256.
3. *Swaran Singh* v. *Balwant Singh,* 2005 (1) CTLJ 251 (P & H).
4. *Motilal* v. *Maneklal,* (1921) 45 Bom. 225 : 59 IC 245 : (1921) Bom.147; *Punjabi* v. *Bhagwandas,* (1929) 53 Bom. 309 : 117 IC 518 : (1929) Bom. 89; *Ajudhia* v. *Chandan Lal,* ILR (1937) All. 860 : (1937) ALJ 688 : (1937) All. 610; *Lilla Dhar* v. *Piarey,* (1921) All. 326 : 62 IC 258 : 19 ALJ 578; *Dullla* v. *Farid,* (1913) 18 IC 485 : 98 PLR 1913; *Chandradwaj Deo* v. *Artraram Deo,* (1936) Nag. 15 (Money advanced to person whose estate was under the Court of Wards); *Janardan* v. *Vishwanath,* (1927) Nag. 116 : 98 IC 650.
5. *Hamida Bibi* v. *Nanhemal* (1933) All. 371; *Bisheshkar* v. *Rup Narain,* (1928) 26 ALJ 401 : 108 IC 566 : (1928) All. 286; *Appaswamy* v. *Narayanaswamy,* (1930) MWN 891; *Dattaram* v. *Vinayak,* (1901) 28 Bom. 181 : 5 Bom.LR 916; *Girraj Baksh* v. *Kazi Hamid,* (1887) 9 All. 340.
6. *Harimohan* v. *Dulu Miya,* (1935) 61 Cal.1075 : 155 IC 1017 : (1935) Cal. 198; *Gulabchand* v. *Seth Chunilal,* (1929) Nag. 156 : 25 NLR 85. **See also** *Leslie* v. *Sheill,* (1914) 3 KB 607; *Stocks* v. *Wilson,* (1913) 2 KB 235.

OTHER CASES.—Where there was a default in payment of premium on account of premium cheque being dishonoured rendering the insurance contract void, the insured cannot retain the insurance money disbursed by the insurance company and is bound to restore the same to the insurer.[1] Where on a sale being set aside, the purchaser sued for recovery of amounts paid in discharge of a mortgage on the property, and the sale itself was found to be a sham transaction, it was held he could not recover.[2] Where a flower garden was acquired by Government during the subsistence of a lease for which the rent had been paid in full, the lessor was held bound to compensate the lessee.[3] Again, where an agreement under Section 28 of the Legal Practitioners Act was discovered to be void, the client was directed to pay compensation for the advantage received.[4] So too, an alienee of property not transferable by law was entitled to recover his purchase money on the alienation being declared void.[5] Upon the same principle, on a material alteration of a deed, the party who has received a benefit thereunder must restore it.[6] Similarly, an agreement by a holder of a Karnam service inam to transfer his interest in the property on enfranchisement is void, and the money advanced should be refunded.[7] Again, in a case falling under Sec. 66 of the Civil Procedure Code, the consideration, if proved to have proceeded from the plaintiff will be recoverable under the section.[8] On the same principle, it has been held that a Municipal council whose contract with a lessee of rights auctioned by it is void as offending the District Municipalities Act, is entitled to relief under this section.[9]

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1. *National Insurance Co. Ltd.* v. *Seema Malhotra,* AIR 2001 SC 1197 :(2001) 3 SCC 151 : 2001 (2) Supreme 92 : 2001 (1) SCJ 380 : 2001 (2) Scale 140.
2. *Raghunath* v. *Lahanu,* (1931) Bom. 39 : 32 Bom. LR 1376 : 128 IC 907.
3. *Muhammed Hashim* v. *Misri,* (1922) 44 All. 229 : 65 IC 263 : (1922) All. 6 : 20 ALJ 41; **see also** *Dhuramsey* v. *Ahmedbai,* (1899) 23 Bom. 15 (Leased premises destroyed by fire).
4. *Thangammal* v. *Krishnan,* (1929) 57 MLJ 756 : 53 Mad. 309 : 30 LW 876 : 124 IC 502 : (1930) Mad. 132.
5. *Krishnan v Sankara Varma,* (1886) 9 Mad. 441; (Cf.) *Sadia* v. *Ambhiria* (1929) Nag. 241 : 116 IC 497 (Mortgage in contravention of CP Tenancy Act — Refund of money ordered); *Wahidmya* v. *Janki Prasad,* (1931) Nag. 137 : 134 IC 281; *Ghulam Dastagir* v. *Nur Ali,* (1935) Lah. 401; *Usman Khan* v. *Sitara Khan,* (1935) All. 56 : (1935) ALJ 339 : 157 IC 1096; *Bahadur* v. *Mahomed* (1934) Lah. 979 : 151 IC 172 (Sale in contravention of the Punjab Alienation of Land Act); *Labh Singh* v. *Jamnun,* (1934) 26 PLR 233 : 155 IC 1 : (1934) Lah. 853; *Gajadhar* v. *Dayaram,* (1934) Nag. 248 : 17 NLJ 135 : 152 IC 644 (Non performance of contract because of circumstances not contemplated by the parties refund of consideration paid); *Amar Singh* v. *Himmat Singh,* (1935) Nag. 58 : 31 NLR 208 : 157 IC 737.
6. *Hemchand* v. *Gobind,* (1925) Nag. 243 : 86 IC 185; *Anantha Rao* v. *Surayya,* (1920) 43 Mad. 703 : (1920) MWN 187 : 11 LW 390 : 55 IC 697 : 38 MLJ 256.
7. *Auryaprabhura* v. *Gummudu Sanyasi,* (1925) 48 MLJ 598 : (1925) MWN 400 : 88 IC 557 : (1925) Mad. 885.
8. *Abdulla* v.*Jalam Singh,* (1923) Nag. 11 : 68 IC 559.
9. *Mohamed Rowther* v. *Tinnelly Municipal Council,* (1938) Mad. 746 : 47 LW 668 : (1938) MWN 634; *Dharapuram Municipal Council* v. *Ansari Sahib,* (1934) Mad. 335 : (1934) MWN 592 : 149 IC 503 : 39 LW 508.

So too, where a contract failed by reason of not being executed in strict compliance with the rules framed therefor, the Madras High Court held that the principle of the section was applicable and the money advanced under the abortive contract should be refunded.[1] And the Nagpur Court has held that a lessee for a term may recover a proportionate part of the premium paid in case the property is destroyed by fire during the currency of the lease.[2] Where money had been paid for purchase of a plot of land under a "lay-out plan" sanctioned by the Municipal authority and subsequently, the plan was disallowed, so that the foundation of the agreement between the parties *viz.*, the sanction by the Municipality failed, it was held that the money paid was recoverable.[3]

RECEIPT OF ADVANTAGE—NECESSITY.—It is only where an advantage has been received that the liability for restoration arises. In *B. Harjivanlal* v. *Radhakison,*[4] the plaintiffs sued for recovery of sums due from defendants in respect of transactions between the parties in cotton, wheat and silver, after appropriating various amounts already received from the defendants towards losses arising from carrying out their instructions. The defendants pleaded that the transactions in cotton were void under the Bombay Cotton Contracts Act, and counterclaimed for the amounts already paid by them to the plaintiffs. The Judicial Committee observed that the counter claim should be dealt with as a claim for restoration of an advantage under Sec. 65, but held that as the plaintiffs had incurred and met losses in carrying out the defendant's instructions and appropriated the payments towards such losses, they could not be said to have received an advantage within the meaning of Sec. 65.

66. Mode of communicating or revoking rescission of voidable contract.—The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

Rescission should be express—The rescission of the voidable contract must be express and unequivocal, whether it is by communicating the rescission as provided for in Section 66 or bringing a suit to set aside the contract.[5]

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1. *Palaniswami Gounder* v. *E & S. Co-operative Wholesale Societies Ltd.,* (1933) Mad. 145 : 145 IC 412.
2. *Shrawan* v. *Sheoratan,* (1935) Nag. 208 : 31 NLR 368 : 158 IC 358.
3. *Din Mohammad* v. *Sethi,* (1937) Lah. 781; **see** *Hajee Gulam* v. *Feroz,* (1938) Lah. 566 : 40 PLR 528 for a rather extreme application of the principle of the section.
4. (1938) PC 4 : (1938) ALJ 77 : (1938) OWN 10 : (1938) NWN 83.
5. *K Venkatasubbayya* v. *K Padmanabayayya,* (1969) 1 An. WR 244; *Hindustan General Insurance Society Ltd* v. *Khushiram,* (1983) 53 Comp. case. 713.

67. Effect of neglect of promisee to afford promisor reasonable facilities for performance.—If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration

A contracts with *B* to repair *B's* house.

B neglects or refuses to point out to *A* the places in which his house requires repair.

A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

Refusing facilities of performance.—Section 38 provides for a case where the promisee declines to accept performance. Section 53 deals with the effect of the promisee's failure to afford reasonable facilities for performance instance, if the promisee fails to name a reasonable place for performance (Section 49), the promisor will be absolved from liability for non-performance. Thus, in *Basanta* Mat *Devi Dial* v. *Uma Dat,*[1] where under a contract for delivery of goods, the plaintiffs were to procure priority certificates and because of their failure to do so, the defendants were unable to perform, the Court held that the defendants were absolved from liability.

The term 'promisee' in this section has been held to include a person interested in the estate of a deceased creditor so that a tender of payment, made to a person who would ordinarily succeed to such creditor, will be valid.[2]

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1. (1927) 110 IC 835 : 10 LLJ 211.
2. *Adm. General, Madras* v. *Jagirdar of Arni,* (1908) 4 MLT 335.

CHAPTER V

Of Certain Relations Resembling Those Created By Contract

68. Claim for necessaries supplied to person incapable of contracting, or on his account.—If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Illustrations

(a) *A* supplies *B*, a lunatic, with necessaries suitable to his condition in life. *A* is entitled to be reimbursed from *B's* property.

(b) *A* supplies the wife and children of *B*, a lunatic, with necessaries suitable to their condition in life. *A* is entitled to be reimbursed from *B's* property.

Quasi Contracts or Implied Contracts.—This chapter deals with certain relations resembling those created by contract. These are called Quasi Contracts or Constructive contracts in English law. The feature of these obligations is that, if without any agreement and without delict or any breach of duty on either side, a person receives some benefit from another, the law considers it just that an obligation analogous to that created by contract should be imposed upon him **[588]**

The first of such obligations in the nature of contract is dealt with in the present section.

Claim for Necessaries.—Under this section, the price of necessaries supplied to a person incompetent to contract or to any one whom such person is bound to support, can be recovered out of the property of such incompetent person.[1] It is essential that the necessaries supplied should be suited to the condition in life of such person.[2] **[195]** Besides, there must be intention on the

1. *Thakur Hamraj* v. *Panna Lal,* (1921) Nag. 105 : 61 IC 563 (Section exhaustive on the question of necessaries — No need to invoke S. 70 in such cases).
2. *Sadasheo* v. *(Firm) Hiralal,* (1938) Nag. 65 : 175 IC 149; *Daw Nyun* v. *Maung Nyi Pu,* (1938) Ran. 359.

part of the person supplying, to be repaid. And the burden of proving the necessity for the goods supplied is on the person who seeks to make the property liable.[1]

Necessaries.—The term "necessaries" is not confined to goods. It includes money borrowed to enable the minor to obtain "necessaries". It extends also to transactions, which promote the conservation of the minor's property or estate from imminent danger. Besides, where the personal law to which the minor is subject imposes obligations upon him in virtue of his possession of ancestral estate, contracts in discharge of such obligations will be binding. As observed in a Madras case,[2] money advanced for necessary purposes can be treated as money advanced for necessaries within the meaning of the section. It was therefore rightly held in a case where the guardian of a minor had contracted to sell the minor's property ostensibly for discharge of pressing debts and received a portion of the amount from the vendee that in the absence of proof of the application of the money, no decree could be passed against the minor's estate under this section.[3] A house for the minor for the purpose of living and continuing his studies is for a necessity suited to the conditions of the minor's life.[4] The marriage expenses of a minor,[5] or those of a sister of a minor[6] (where the law casts a duty on the minor to provide for the marriage expenses of female members) will be 'necessaries'; similarly money advanced to save the minor's property from sale in execution;[7] similarly, cloth supplied and cash lent for effecting necessary repairs;[8] so also a loan given for

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1. *Sadasheo* v. (Firm) *Hiralal,* (1938) Lah. 65 : 175 IC 149; *Sadesheo* v. *Shankar Gobind,* (1938) Nag. 68 : 175 IC 494; *Hira Singh* v. *Sunder Singh,* (1930) Oudh 299; *Umrao* v. *Banarsidas,* (1927) Lah. 414 : 101 IC 702.
2. *Meenakshisundaram* v. *Rang Ayyangar,* (1932) Mad. 696 : 139 IC 383; *Compare Lewis* v. *Allecyne,* (1888) 4 TLR 560.
3. *Raghunathan* v. *Ravuthakanni,* ILR (1938) Mad. 928 : 48 LW 112 : (1938) MWN 779 : (1938) Mad. 765 : (1938) 2 MLJ 277; *Ramalingam* v. *Babanambal Ammal,* AIR 1951 Mad. 431; *Bhageran Rai* v. *Bhagwan Singh,* AIR 1962 Pat. 319; Cf. *Venkataramanamurthy* v. *Subbayamma,* (1966) 1 ALT 233 : (1966) 1 An.WR 368 (Money advanced by vendee utilised for minor's benefit minor liable to pay back the amount his share in the joint family property liable).
4. *Kunwarlal* v. *Surajmal,* AIR 1963 MP 58:1961 Jab LJ 1279
5. *Mukundi* v. *Sarabuksh,* (1884) 6 All. 417; *Pathak Kali Charan* v. *Ram Deni Ram,* (1917) 2 Pat. LJ 627 : 42 IC 963, dissented from in ILR (1938) Mad 928, above.
6. *Nandan* v. *Ajudhia,* (1910) 32 All. 325 : 7 ALJ 236 : 5 IC 413; *Shrinivasa Rao* v. *Babu Ram,* (1933) Nag. 285 : 145 IC 350 ; *Jai Indra Bahadur* v. *Mt Dilraj Kuar,* (1921) Oudh 14 : 61 IC 278; *Ramajogayya* v. *Jagannathan,* (1919) 42 Mad. 185 : 49 IC 872.
7. *Mahmood Ali* v. *Chinki Shah,* (1930) ALJ 347 : 123 IC 827: (1930) All. 128; *Watkins* v. *Dhunnoo,* (1881) 7 Cal. 140.
8. *Ramchandra* v. *Hari,* (1936) Nag. 12.

defending the minor in a criminal case will be one for 'necessaries.'[1] A supply of plough bulls to an infant ryot has been held to be 'necessaries' within the meaning of the section.[2] The Oudh Chief Court, however, has held that money lent for the obsequies of the father of the minor will not be recoverable under this section.[3]

GUARDIAN OF MINOR.—In a Rangoon case,[4] the present section was unsuccessfully invoked in order to validate a mortgage executed by a *de facto* guardian of a minor. But where a loan is taken by a guardian on behalf of a minor for the purpose of some necessity or for the benefit of the minor's estate, the creditor can invoke the principle of this section and get relief.[5] On the other hand, as no guardian can bind a minor by an agreement for sale of the minor's property, earnest money paid to the guardian under such an agreement cannot be recovered from the minor's estate.[6]

It has been held in *Annamalai Chetty* v. *Muthuswami Maniagaram,*[7] that the rule in *Hanuman Prasad's case* applies also to simple contract debts incurred by the guardian for the benefit or necessity of the minor or his estate and in such a case the creditor is protected if he had made *bona fide* enquiry and satisfied himself as to the necessity for the loan even though there be no proof of actual application of the money.

ACTUALLY REQUIRED.—If the minor is already supplied with articles of the same kind the article will not fall within the description of 'necessaries.'[8] **[208]**

INTEREST.—It has been held that that no interest can be allowed on the value of necessaries supplied.[9]

No personal liability.—The section is clear that reimbursement can be had only out of the property of the incapable person.[10] In no case will such person be personally liable. In a Rangoon case where a mother and her minor

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1. *Sham Charan* v. *Debya Singh,* (1894) 21 Cal. 872.
2. *Srinivasa* v. *Balasubramania Odayar,* (1926) MWN 294 : (1926) Mad. 592 : 94 IC 534.
3. *Bechu Singh* v. *Baldeo Prasad,* (1933) Oudh 132 : 145 IC 180.
4. *MaungThin Maung* v. *Ma Saw Shin,* (1933) 11 Ran.193 : 146 IC 922 : (1933) Ran 83.
5. *Benares Bank* v. *Dip Chand,* (1936) All. 1723 : 160 IC 64; *Phat Ram* v. *Ayub Khan,* (1927) 49 All. 52 : 24 ALJ 895 : 98 IC 657 : (1927) All. 55.
6. *Raghunatha* v. *Ravuthakanni,* ILR (1938) Mad. 928 : (1938) 2 MLJ 277 : 48 LW 112 : (1938) MWN 779 : (1938) Mad. 765 dissenting *fromPathak Kali Charan* v. *Ram Deni Ram,* (1917) 2 Pat. LJ 627 : 42 IC 963.
7. (1939) 1 MLJ 729 : 49 LW 635 : (1939) MWN 473.
8. *Daw Nyun* v. *Maung Nyi Pu,* (1938) Ran. 359.
9. *Jagan Ram* v. *Mahadeo,* (1909) 36 Cal. 768 : 13 CWN 643 : 1 IC 742.
10. *Umrao Singh* v. *Banarsidas,* (1927) Lah. 412 : 101 IC 702; *Ramchandra* v. *Hari,* (1936) Nag. 12.

daughter entered into a contract with a film company for the daughter acting in some films, and the company had advanced monies to the mother to be adjusted against salary to be earned by the daughter, it was held that the contract with the daughter was void and that the company could recover damages only against the mother for the daughter's failure to act up to the contract.[1]

Expenses in preparation for intended contract:—Where negotiations take place between the parties for the purpose of concluding a contract and if one of the party incurred expenses in preparation for intended contract, the same cannot be recovered on the basis of Quasi Contract in the event of contract not taking place.[2]

69. Reimbursement of person paying money due by another, in payment of which he is interested.—A Person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Illustration

B holds land in Bengal, on a lease granted by *A*, the zamindar. The revenue payable by *A* to the Government being in arrears, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of *B's* lease. *B*, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from *A*. *A* is bound to make good to *B* the amount so paid.

English Law.—The second of the obligations *quasi ex contractu* is dealt with in this section. Where one person is bound by laws to pay money, and another being interested in the payment, pays it, the law imposes an obligation on the former to reimburse the latter. **[604]**

Payment by person interested.—The section is in some respects wider than the corresponding English law. Under the English law, the payment must have been made under compulsion. But, under the present section, it is enough if the person making the payment was *'interested'* in the payment by the other party.

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1. *Jodhi Singh* v. *Chhotu Mahto,* (1926) Pat. 399 : 95 IC 548.
2. *Regalian Properties Plc* v. *London Dockland Development Corp.,* (1995) 1 All.ER 1005 (Ch. D).

Section 69 applies only to payments and *bona fide* for protection of one's own interest. It is meant to afford to a person who pays money in furtherance of some existing interest an indemnity in respect of the payment against any other person, who could have been made liable in law to make the payment.[1] Privity of contract is not necessary for applying Section 69 as it deals with relations resembling those created by contract. It will suffice if he is a person interested in the payments of money, which another was bound by law to pay.[2]

Essentials.—

(1) The defendant must be *bound by law to pay.*

(2) The plaintiff must be a *person interested in such payment.*

(3) *Actual payment* must be made because of such interest.

Where these three conditions are present, a right to reimbursement arises.[3]

1. Defendant "Bound by law to pay."—

(i) THE PERSON AGAINST WHOM REIMBURSEMENT IS SOUGHT MUST BE BOUND BY LAW TO PAY.—Thus no cause of action will lie against a trespasser for amounts paid on his behalf, for a trespasser is not a person "bound by law to pay".[4] Where property is sold, the vendor is not, in the absence of special agreement, bound to pay revenue, which has accrued due before the sale and the purchaser cannot claim repayment of it under the section.[5] An unregistered owner is not bound to pay revenue under the Revenue Recovery Act and a registered owner paying it on behalf of the former cannot recover.[6] Nor can he plead, in a suit for reimbursement in respect of revenue arrears by a mortgagee from the true owner, that he was a mere benamidar for such owner.[7] So, a co-mutawalli in enjoyment of the endowed properties and paying off the beneficiaries cannot sue the other mutawalli for contribution for the plaintiff himself is bound by

1. *Kantilal Jadhavji* v. *Ramachandarao G. Deshmukh,* 1977 MPLJ 737.
2. *Ayodhyaram* v. *Muthuswamy,* (1967) 12 Law Rep. 432 : (1967) 2 Mys. LJ 499.
3. *Eastern Mortgage & Agency Co.* v. *Muhammad Fazlul,* (1926) 52 Cal. 914 : 90 IC 851 : (1926) Cal. 385.
4. *Ramakrishnayya* v. *Nagarazu,* (1925) 22 LW 836 : 91 IC 608 : (1926) Mad. 152 (Vendors continuing in possession of property sold are in the position of trespasser).
5. *Dost Mahomed* v. *Sajjad Ahmed,* (1883) 6 All. 67; *Chhedi Lal* v. *Ansar Begam,* (1934) All. 712 : 151 IC 351; *Habibul Rahman* v. *Sheonandan,* (1928) Pat. 552 : 111 IC 243.
6. *Sellappa* v. *Vridhachala,* (1907) 30 Mad. 35 : 16 MLJ 569; (Cf.) *Subramania* v. *Mahalingaswami,* (1910) 33 Mad 41.
7. *Umesh Chandra* v. *Khulna Loan Co.,* (1907) 34 Cal. 92; *Ma May* v. *Ma Lon,* (1933) Ran. 112 : 114 IC 392 (A Mortgagee who pays revenue to avert sale may recover under this section).

law to pay, being in possession.[1] But where a mortgagor pays revenue, which, under the terms of the mortgage, has to be paid by the mortgagee, he can recover.[2] Again, where in execution of a mortgage decree against two persons, the properties were sold and one deposited the entire amount and sued the other for contribution, it was held that merely by reason of a sale in execution of a decree, the parties do not cease to be 'bound by law' to pay the amount, and if one takes steps to have the sale set aside to protect his interest, such payment would be sufficient to attract the provisions of the section.[3] It was also held that the plaintiff was not entitled to claim contribution in respect of the statutory compensation to the auction purchaser, because the defendant was not *bound by law* to pay it.

A second or subsequent mortgagee paying off a prior mortgage in order to avert a sale may recover under this section, apart from his rights under the Transfer of Property Act.[4] So too, a subsequent incumbrancer of property paying off a charge created under a maintenance decree, is entitled to reimbursement against those liable under the maintenance decree.[5] On the same principle, where a prior mortgagee decree holder having received the mortgage money fails to pay off a sub-mortgage created by him, any person who to protect his interests in the property is compelled to pay the sub-mortgage has the right of reimbursement from the mortgage decree holder.[6]

(ii) THE LIABILITY MAY BE STATUTORY OR CONTRACTUAL.—In *Mothoornat* v. *Kristo Kumar,*[7] the Court observed that the words are wide enough to cover the case of a lessee paying rent to a superior landlord for which an intermediate lessee was liable. It may be a *contractual* liability also. But, in *Kunchitapadam* v. *Palamalai,*[8] the Madras High Court construed the expression "bound by law to pay" as importing a legal as distinguished from a contractual liability.

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1. *Mahomed Quli Khan* v. *Mubarak Fatima,* (1935) All. 758 : (1935) ALJ 503 : 154 IC 716.
2. *Krishna* v. *Ambu Kurup,* (1927) 51 MLJ 633 : (1927) Mad. 59 : 98 IC 802. For a converse case **see** *Balwant* v. *Tulsa,* (1937) Nag. 255 : 171 IC 740.
3. *Bhagwati* v. *Maiyan Murat,* (1931) 10 Pat. 528 : 134 IC 139 : (1931) Pat. 394.
4. *Durga Charan* v. *Ambica Charan,* (1927) 54 Cal. 424 : 45 CLJ 109 : 101 IC 130 : (1927) Cal. 393; *Sarajubala* v. *Kamini Kumar,* (1926) 43 CLJ 142 : 94 IC 811 : (1926) Cal. 765; *Bara Shib Lal* v. *Munni Lal,* (1922) 44 All. 67 : 19 ALJ 840 : (1922) All. 153 : 63 IC 604.
5. *Savitri Bai* v. *Nanhelal,* (1934) Nag. 84 : 148 IC 815 : 30 NLR 148.
6. *Subbakke Shettithi* v. *Anthamma Shettithi,* (1934) 40 LW 673 : (1934) MWN 893 : (1934) Mad. 628.
7. (1878) 4 Cal. 369; **see** *Sarajubala* v. *Kamini Kumar,* (1926) Cal. 765 : 43 CLJ 142 : 54 IC 811. **See also** *Govind Ram* v. *Gondal State,* AIR 1950 PC 99 (The expression 'bound by law' covers obligations of contract or tort and is not confined to those public duties which are imposed by statute or general law).
8. (1917) 32 MLJ 347 : (1917) MWN 166 : 39 IC 405; *Umed Singh* v. *Behari Lal,* (1922) Nag. 50 : 70 IC 310; *Biraj Krishna* v. *Purna Chandra,* AIR 1939 Cal. 645; **but see** *Govind Ram* v. *Gondal State,* AIR 1950 PC 99; **see also** *Rajasthan Golden Transport Co. (P) Ltd.* v. *United India Fire & Insurance Co.,* AIR 1980 Guj. 184. (Insurer of consignment entitled to sue for loss of goods consigned); *K. Venkat Rao* v. *Commercial Goods Transport,* AIR 1982 AP 203 : 1982 (1) An.WR 118 : 1982 LS (AP). (Carrier intrusting goods to another carrier can sue the latter for short delivery).

(iii) THE LIABILITY NEED NOT BE MERELY PERSONAL[1]**—** It may be a liability attaching to land of which the person bound is the owner.

(iv) THE LIABILITY NEED NOT BE TO THE PLAINTIFF— If may be that the defendant may be compelled to pay at the suit of any person. In *Rasappa* v. *Doraiswami,*[2] the third defendant sold some property to plaintiff free of encumbrances, and certain other property to the first defendant directing him to pay off various charges. The first defendant, failed to pay, and all the properties including those sold to plaintiff were attached and brought to sale. The plaintiff who paid off the decree amount was held entitled to recover, though the first defendant was not bound by law to pay to plaintiff.

2. Plaintiff interested in the payment.

(i) EVEN A BONA FIDE BELIEF IN ONE'S INTEREST IS SUFFICIENT.— The word "interested in the payment of money" does not mean that the interest should be such, as would stand the test of judicial trial; it is sufficient if the person making the payment honesty believes that his own interest requires that it should be made. It does not cover a person making gratuitous payment.[3] It may include the apprehension of any kind of loss or inconvenience or at any rate, any detriment capable of being assessed in money.[4] But an interest resting merely on grounds of sentiment or on moral or social obligations is not an "interest."[5]

An attaching creditor has been held to be "interested" within the meaning of this section.[6] Similarly, where one person's goods are attached to realise arrears of revenue due by another, the former is entitled to recover any money paid to save the goods from sale.[7] So also, a Hindu reversioner may recover arrears of revenue paid by him and due from the estate in the hands of

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1. *Murlidhar* v. *Naunihal,* (1932) 9 OWN 414 : (1932) Oudh 222 : 138 IC 137; *Jessore Loan* Co. v. *Gopal Hari,* (1926) Cal. 657 : 30 CWN 366 : 94 IC 811; *Sarajubala* v. *Kamini Kumar,* (1926) Cal. 765 : 43 CLJ 142 : 97 IC 811; *Chandra Dayal* v. *Bhagaban,* (1916) 23 CLJ 125 : 32 IC 200.
2. (1925) 49 MLJ 88 : (1925) MWN. 486 : 90 IC 545 : (1925) Mad. 1041.
3. *Kantilal Jadhavji* v. *R.G Deshmukh,* 1977 MPLJ 737 (Person holding lease from bhumiswami not exercising option of renewal but continuing in possession after expiry of lease could not be "a person interested" within section 69).
4. *Site Fakir* v. *Chand Bewa,* (1928) 32 CWN 1087 : 108 IC 46 : (1928) Cal. 389; *Munni Bibi* v. *Triloki Nath,* (1932) 54 All. 140 : (1932) All. 332 : (1932) ALJ 63 : 136 IC 66; *Eastern Mortgage & Agency* Co. v. *Muhomad Fazlul,* (1926) 52 Cal. 914 : 90 IC 851: (1926) Cal. 385. **See *also*** *Juljin* v. *Bibi Ali,* (1925) Pat. 201 : 77 IC 157; *Bemasena Rao* v. *Narayana Rao,* (1927) Mad. 459 : 99 IC 845; *Nagendranath* v. *Jugal Kishore,* (1925) 29 CWN 1052 : 90 IC 281 : (1925) Cal. 1097; *Jhanku Lal* v. *Rewati,* (1921) 19 ALJ 73 : 61 IC 892.
5. *Jai Indra* v. *Mt. Dilraj Kuar,* (1921) Oudh 14 : 61 IC 278.
6. *Abid Hussain* v. *Ganga Sahai,* (1928) 26 ALJ 435 : 113 IC 441 : (1928) All. 353; *Chunni Lal* v. *Manikchand,* (1926) All. 745 : 97 IC 319.
7. *Tulsa Kunwar* v. *Jageshar,* (1906) 28 All. 563.

the widow.[1] Again, a payment made by a vendee to satisfy a decree obtained on foot of a mortgage not mentioned in the sale deed to him was held to be a payment under compulsion, recoverable under Section 69.[2] Similarly, a purchaser of property, paying money to raise an attachment of the property in a suit against the vendor is 'interested' within the meaning of the section.[3] A usufructuary mortgagee whose tenant had raised crops in the land is a person interested in getting the attachment of the crops raised by paying the Government the instalment of loan, which the mortgagor had failed to pay.[4] Where property was gifted to a person, subject to the condition of paying the *jodi* due in respect of some other land, the owner of such land may on default of payment by the donee, pay it himself and claim reimbursement under this section.[5] Likewise, a darpatnidar if a share of a patni paying the whole rent to avert a sale in execution of a decree against some of the patnidars is a person "interested".[6] So too, where in execution of a decree against a Hindu widow, the entire property was put up for sale, a reversioner was held to be 'interested' in making a deposit under Or. 21, R. 89, C.P.C.[7]

In cases however where a person buys property subject to a charge, he is liable to pay it off, and cannot recover from the party originally liable. Thus in *Mangalathammal* v. *Narayanaswami Iyer,*[8] in the case of a Court sale subject to a maintenance charge, it was held that the purchaser could not claim reimbursement from the debtor for the charge paid off, and that the principle of Sec. 55(2) of the Transfer of Property Act applied also to Court sales. Similarly, if a mortgagee of a tenure buys it in execution of his own decree, he cannot recover amounts paid to satisfy rent decrees for a period prior to his purchase, for in such cases, he is only discharging his own liability.[9]

The position may however be different where for instance, a person is not personally bound by a maintenance decree but is only a subsequent charge-

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1. *Sambasiva* v. *Seethalakshmi,* (1909) 19 MLJ 331 : 41 IC 169.
2. *Bhagawati* v. *Banarsi Prasad,* (1928) 50 All. 371 : 26 ALJ 550 : 30 Bom. LR 834 : 32 CWN 705 : 28 LW 150 : (1928) PC 98 : 54 MLJ 689; (Cf.) *Muthurakku Moniakarun* v. *Rakkappa,* (1913) 26 MLJ 66; (1913) MWN 1047 : 22 IC 9 (Purchaser of part of mortgaged property free of encumbrance can sue purchaser of the other part who bought subject to mortgage).
3. *Subramania* v. *Rungappa,* (1909) 33 Mad. 232; *Bada Mahomed* v. *Gunaminitali,* (1911) 11 IC 155 (case held to fall either under S.69 or 70).
4. *Sami Pillai* v. *Ramulu Naidu,* AIR 1972 Mad. 4 : (1972) 2 MLJ 206 : 84 Mad.LW. 569.
5. *Somashastri* v. *Swami Rao,* (1918) 42 Bom. 93 : 19 Bom. LR 939 : 43 IC 482.
6. *Rajani Kanta* v. *Haji Lal,* (1917) 21 CWN 628; *Kangal Chandra* v. *Gopinath,* (1920) 24 CWN. 1068; *Deblal* v. *Kuman Das,* (1925) Pat. 737 : 93 IC 994.
7. *Pankhabati* v. *Nani Lal,* (1914) 18 CWN 778 : 21 IC 207 : 19 CLJ 72.
8. (1907) 30 Mad. 461 : 17 MLJ 250; **see also** *Manindra Chandra* v. *Jemahir,* (1905) 32 Cal. 643; *Dost Mahomed* v. *Sajjad Ahmed,* (1883) 6 All. 67 (Vendor and purchaser in similar circumstances). **But see** *Kishan Lal* v. *Megli Singh* , (1901) AWN 37.
9. *Ranglal Sahu* v. *Kali Shankar,* (1924) 2 Pat. 890 : 77 IC 73.

holder in respect of the property and he pays up the maintenance charge.[1] In such a case, it is clear that there will be a right to reimbursement.

In two cases, however, the Nagpur High Court has observed that there is no reason why a person legally bound to make a certain payment should not be held to be a person who is interested in the payment; and of this line of reasoning, a mortgagee who had foreclosed and obtained possession had been held entitled to recover arrears of land revenue due by the defaulting mortgagor.[2]

(ii) INTEREST EXISTING AT THE TIME OF PAYMENT IS ENOUGH.—Thus a person in possession under a decree pending appeal and paying revenue to avert a sale can recover.[3] So too, a person paying kist in respect of land decreed to him but of which he is not yet in possession is interested in payment of the revenue thereon.[4]

(iii) THE PAYMENT MUST BE IN GOOD FAITH AND NOT VOLUNTARY.[5]—In *Ram Thaul* v. *Biseswar,*[6] the Privy Council observed. "It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be concluded by nice considerations of what may be fair and proper according to the highest morality. To support such a suit there must be an obligation, express or implied to repay. It is well settled that there is no such obligation, in the case of a voluntary payment by A of B's debt." Thus in *Mahalakshmamma* v. *Secretary of State,*[7] where payment of water cess was made on demand, under circumstances which would amount to a threat of restraint, it was held that there was no voluntary payment such as to exclude the operation of the present section.

In *Pheku Ram* v. *Ganga Prasad,*[8] where a security deposit by A for the benefit of B was appropriated by Government on B's default, it was held that C, who had joined B, as a partner in the business, was liable to A, jointly with B, inasmuch as both had benefited by the security deposit.

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1. **See** *Savitri Bai* v. *Nanhelal,* (1934) Nag. 34 : 30 NLR 148 : 148 IC 815.
2. *Mulabai* v. *Balakdas,* (1938) Nag.459 : 178 IC 405; *Balwant Rai* v. *Tulsa,* (1938) Nag. 225 : 171 IC 740; **see also** *Vishram* v. *Panna Lal,* (1937) Nag. 152 : 169 IC 298.
3. *Dakhina* v. *Saroda,* (1893) 21 Cal. 142. **See also** *Nagendranath* v. *Jugal Kishore,* (1925) 29 CWN 1082 : 90 IC 281 : (1925) Cal. 1097; *Kushal Singh* v. *Khowni Lal,* (1906) 3 ALJ 665; *Subbe Gowda* v. *Keshva Murthy,* AIR 1950 Mys 6.
4. *Chinnaswamy* v. *Ratna Sabapathy,* (1903) 27 Mad. 338.
5. *Sitayya* v. *Kotayya,* (1931) 134 IC 1211 : 34 LW 669.
6. (1875) 15 Ben LR 208; *Pankhabati* v. *Nani Lal,* (1913) 18 CWN 778 : 21 IC 207 : 19 CLJ 72; *Ramaswami* v. *Vishwanatha,* AIR 1950 Mad. 343.
7. (1910) 34 Mad. 295 : 20 MLJ 823.
8. (1938) All. 207 : (1938) ALJ 223.

Payment not bona fide.—But, where a person gained possession of property under a false title and made payments though there was no danger of imminent loss of the property, it was held he could not recover.[1] Similarly, a person who knowingly takes a transfer of a minor's property from a person who is not the proper guardian cannot be reimbursed in respect of amounts paid for the benefit of the minor.[2] Again, where a surviving partner was charged super tax in respect of the profits of a deceased partner and paid the same, it was held to be a voluntary payment and therefore, not recoverable.[3] Where a mortgagor merely with a view to confirm his title, voluntarily paid the assessment, which the mortgagee was willing to pay, he was held not entitled to recover.[4]

Payments made to create title. —Again, where a payment is made in order to create title, it will not be a *bona fide* payment under the section.[5] But, where a benamidar sets aside a sale of the property standing in his name, in execution of a decree against the real owner, he is entitled to reimbursement under this section. This setting aside of the sale is conceived of as a repurchase by him and the real owner cannot have the benefit of that repurchase without repaying the money spent by the benamidar in setting aside the sale. This will be, in a way, an exception to the rule that where a person makes a payment in assertion of a hostile title, and for the protection of his own interests, so as to save property claimed to be his from passing out of his hands, the mere fact of advantage to the other party will not implement a claim for reimbursement, if the person making payment is found to have no title.[6] So too, a person who as lambardar pays Government Revenue will not be a volunteer though ultimately his claim as lambardar may be found against.[7] On the same principle, a person making payments in accordance with the conditions of a sale deed, which is subsequently found to be not *bona fide,* cannot be said to have made the payment merely to create evidence of title.[8]

Actual payment to another necessary.—The payment must be actually made to another person.[9] In *Secretary of State* v. *Fernandez,*[10] where the

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1. *Saradamba* v. *Pattabiramayya,* (1930) MWN 601 : (1931) Mad. 207; *Binda* v. *Bonda,* (1884) 7 All. 660.
2. *Chinna Alaguperumal* v. *Vinayagathammal,* (1929) Mad. 110 : 29 LW 6 : 117 IC 731 : 55 MLJ 861.
3. *Mitchell* v. *McNeil,* (1927) 31 CWN 630 : 103 IC 120 : (1927) Cal. 518.
4. *Ramachandra Atmaram* v. *Damodar,* (1899) 1 Bom. LR 371.
5. *Gordhanlal* v. *Darbar Shri Surajmal,* (1902) 26 Bom. 504 (Payment of local fund cess merely to create evidence of right as a superior holder).
6. *Mollayya Padayachi* v. *Krishnaswami Iyer,* (1925) 47 MLJ 622 : 21 LW 336 : 85 IC 855 : (1925) Mad. 95.
7. *Bhora Hazari* v. *Bhora Naurang,* (1930) ALJ 1103 : 123 IC 335 : (1930) All 517.
8. *Gopala* v. *Mummachi,* (1923) 17 LW 254 : 74 IC 461 : (1923) Mad. 392.
9. *Fitzgerald* v. *Musa,* (1904) 31 P .R.; *Bhikkam Singh* v. *Sant Baksh,* (1933) Oudh 478.
10. (1907) 30 Mad. 375 : 17 MLJ 337 : 2 MLT 320.

Government as mulgeni tenant under a landlord, paid to itself, (in its capacity as tenant) the arrears of revenue due from the landlord, it was held that the Government could not recover, because the payment had not been made to another person.

The section has been held to apply to the following cases :—A surety paying a decree debt which other debtors besides the one for whom he stood surety were bound to pay,[1] a co-tenant paying the entire rent to avert a sale;[2] a joint judgment-debtor under a rent decree paying the amount due under the decree;[3] a party in possession of property depositing the decretal amount on the understanding that the decree-holder should refund the amount in case the property was not saleable.[4]

PAYMENT IF CREATES A CHARGE—On the question whether payment under this section creates any charge over the property so saved, there is a difference of opinion.[5] The Allahabad, Bombay and Calcutta High Courts are of the view that no charge is created and that the remedy is only a personal one against the party sought to be charged. But the Madras High Court has held, especially in cases of co-shares liable under a common burden in respect of the property, that the discharge of the whole burden by one will give him a charge only over the remaining land, and not a personal remedy.[6]

Contribution.—There is a difference of opinion as to the applicability of this and the succeeding section to cases of contribution, where the plaintiff starts with an admission of his liability, but only complains that he has had to pay more than his fair share. In *Anandakishore Chaudhuri* v. *Panchu Kapali,* [7] the Calcutta High Court has clearly held that Sec. 69 is applicable to a suit for contribution where both the plaintiff and the defendant were liable for the money paid by the plaintiff. In *Jessore Loan Co.* v. *Gopal Hari,*[8] the same Court

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1. *Tirumalai* v. *Royar,* (1921) 40 MLJ 529 : (1921) MWN 334 : 13 LW 559 : (1921) Mad. 530 : 62 IC 706.
2. *Dinu Ghosh* v. *Kali Ghose,* (1926) Cal. 1031 : 95 IC 545; *Ram Ratan* v. *Gaura,* (1930) All. 516 : 122 IC 765.
3. *Debendranath* v. *Prasonna Kumar,* (1926) Cal. 951 : 95 IC 47; *Bepat* v. *Sham Lal,* (1931) 10 Pat 168 : 134 IC 107 : (1931) Pat 234; *Sakalsingh* v. *Chander Diplal,* (1919) 49 IC 627; *Ram Rachhpal* v. *Banwari Lal,* (1935) Lah. 981.
4. *Ram Saran* v. *Chhoti Lal,* (1928) All. 668 : 110 IC 365.
5. *Munni Bibi* v. *Trilokinath,* (1932) 54 All. 140 : (1932) ALJ 63 : 136 IC 66 : (1933) All. 332; *Seth Chitor Mal* v. *Shib Lal,* (1892) 14 All. 273 (FB); *Kinu Ram* v. *Muzaffer Hussain,* (1887) 14 Cal. 809; *Shiv Rao* v. *Pundlik,* (1902) 26 Bom. 437.
6. *Amman Pariyayi* v. *Pakan Haji,* (1913) 36 Mad. 493; *Raja of Vijayanagaram* v. *Raja Setrucherla Somasekhara,* (1903) 26 Mad. 686 (FB).
7. (1934) 61 Cal. 864 : 88 CWN 758 : 59 CLJ 423 : 152 IC 510 : (1934) Cal. 709 (Joint decree for costs against landlord and tenants — Landlord paying up decree and suing for contribution). **See also** *Rajani Kanta Ghose* v. *Ram Nath Ray,* (1914) 19 CWN 458; *Joy Krishna* v. *Kali Krishna,* (1938) Cal. 413. Cf., *Gyan Prakash* v. *Triloke Prakash,* (1969) All WR (HC) 316.
8. (1926) 30 CWN 366 : 94 IC 159 : (1926) Cal. 657; *Ram Lal* v. *Khiroda Mohini,* (1913) 18 CWN 113 (Joint judgment debtor purchasing decree entitled under this section to compensation as it amounts to paying off decree); *Mothoornath* v. *Kristo Kumar,* (1878) 4 Cal. 369; *Prosunno Kumar* v. *Jamaluddin,* (1913) 18 CWN 327.

held a person may be 'interested' within the meaning of the section, though he may be liable to pay only a portion of the money. In an earlier case, it was doubted whether a suit for contribution came at all within the ambit of he section.[1] The Madras High Court is of opinion that this section does not apply to suits for contribution.[2] The right of contribution has its foundation in justice, equity and good conscience, and may therefore be enforced quite apart from the provisions of these sections.

70. Obligation of person enjoying benefit of non-gratuitous act.—Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Illustrations

(a) *A*, a tradesman, leaves goods at *B's* house by mistake, B treats the goods as his own. He is bound to pay *A* for them.

(b) *A* saves *B's* property from fire. *A* is not entitled to compensation from *B*, if the circumstances show that he intended to act gratuitously.

English Law.—The third obligation *quasi ex contractu* is that which the law imposes on a person who has enjoyed the benefit of a non-gratuitous of another.

This section is a wide departure from English Law and goes far beyond it. Under English law, a purely voluntary payment cannot be recovered, and for the determination of the question whether a benefit is purely voluntary, the test is whether the recipient had the option of accepting or declining the benefit. In general, where services are offered or goods sent, to a person in the course of business and such services or goods are accepted, or retained, the law implies from such acceptance an agreement to pay for them. Sec. 70 applies as much to individuals as to corporations and the Government.[3]

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1. *Manindra* v. *Jamahir,* (1905) 32 Cal. 643; *Futteh Ali* v. *Ganganath,* (1881) 8 Cal.113.
2. *Jagapatiraju* v. *Sadrussanamma,* (1916) 39 Mad. 795 : 29 MLJ 639 : 2 LW 1046 : 31 IC 255; *Kunchithapadam* v. *Palamalai,* (1917) 39 IC 405 : 32 MLJ 341 : (1917) MWN 166; *Gopinath* v. *Raghubansh Kumar,* AIR 1949 Pat. 522; *Raijnath Thakur* v. *Bijadhar,* AIR 1961 Pat. 103; *Biraj Krishna* v. *Purna Chandru,* AIR 1939 Cal. 645.
3. *State of West Bengal* v. *B.K. Mondal & Sons,* AIR 1962 SC 779 : 1962 Suppl. (I) SCR 876

It would seem that where there is an express contract, this section can have no application, but in a Calcutta case it has been said that the section is not inapplicable merely because the plaintiff has another right of action arising out of some other cause such as one founded on contract, express or implied or where for some reason such contract is unenforceable.[1]

Where a contract for supply of a commodity or execution of a work entered into by a person with Government was void and unenforceable for non-compliance with a formality for its formation prescribed by the Constitution of India or Government of India Act, but in pursuance of it, the person had performed his part and the Government had reached the benefit thereof, Section 70 would apply and the Government was bound to pay compensation for the value of the commodity supplied or work done by the other party.[2]

Where the respondent bank under an agreement advancing money to the agriculturist for the purpose of buying the shares in the plaintiff's Co-op. Society and the share amount was kept in S.B. A/c of the plaintiff, the respondent bank cannot refuse to pay interest on the plea that opening of such amount and crediting of the interest is not permissible under the guidelines set by the Reserve Bank of India in view of the fact that the same was suppressed and not brought to the knowledge at the time when the contract was entered into.[3]

Where a building contractor made additional construction to a building (not covered by the original contract), which were not done gratuitously a claim for compensation in respect of such construction, will lie under Section 70.[4]

And in a Bombay case where a contract with a municipality was found to be not binding on it by reason of non-conformity with the provisions of the Municipal Act, the Court held that Section 70 of the Indian Contract Act was

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1. *Moselle Solomon* v. *Martin & Co.,* (1935) 62 Cal. 612 : 39 CWN 461.
2. *New Marine Coal* Co. *Ltd.* v. *Union of India,* AIR 1964 SC 152 : (1964) 2 SCR 859: (violation of S 175, Govt. of India Act, 1935); *Mulchand* v. *State of M.P.,* AIR 1968 SC 1218 : (1968) 2 SCWR 397:(non compliance with Art, 299 (I) of the Constitutional); *Nanalal Madhavji Varma* v. *State of A.P.* AIR 1982 Cal. 167; *Union of India* v. *Sahab Singh,* AIR 1977 All. 277 : (1977) 3 All.LR 217; *Great Eastern Shipping Co. Ltd.* v. *Union of India,* AIR 1971 Cal. 150; *State of M.P.* v. *Firm of Gopal Chand,* 1971 MPLJ 898; *Manohar Lal* v. *Union of India,* AIR 1974 Pat. 56.
3. *Nannapaneni Venkata Rao Co-op. Sugars Ltd., Zampani* v. *State Bank of India,* AIR 2003 AP 515 (DB) : 2003 (6) ALD 307 : 2003 (6) ALT 199 (DB).
4. *Subramaniam* v. *Thayappa,* AIR 1966 SC 1034 : (1961) 2 SCJ 191 : (1961) 3 SCR 663; **see also** *Gujarat Electricity Board* v. *S.A. Jains & Co.,* AIR 1972 Guj. 192; *Nathuram* v. *Nagarapalika,* 1979 All. LJ 1290.

not excluded by reason of there being no enforceable contract and that relief could be awarded under the section.[1]

Where the defendant owner of a property having authorised another to enter into a sale agreement and also receiving a part of the sale consideration along with such other person from the plaintiff purchaser cannot plead absence of privity of contract between himself and the plaintiff as the doctrine of unjust enrichment squarely applies requiring him to restore the unjust benefit received.[2]

In the *Aries Advertising Bureau* v. *C. T. Devraj,*[3] the respondent entering into a contract with the owner of a circus, undertook to pay the advertisement charges to the appellant advertiser. It was contended on behalf of the appellant that since the respondent agreed to receive the benefit of 30% of profits from the income derived by running of the circus, he had derived the benefit pursuant to the advertisement made by the appellant and therefore the respondent was bound to reimburse the appellant by operation of Sec. 70 of the Act. The Supreme Court held that the appellant had not done anything directly to the respondent and in view of the respondent who was a financier to run the circus not deriving any benefit pursuant to the advertisement by the appellant Sec. 70 is not attracted.

Basis and Essentials.—

Under Section 70—

(i) The benefit must have been *lawfully* conferred.

(ii) The act must be done by a person *not* intending to do it *gratuitously.*

(iii) The person for whom it is done must be really benefited by it.

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1. *Pallonjee & Sons* v. *Lonavala Municipality,* ILR (1937) Bom. 782: 39 Bom. LR 835 : (1937) Bom. 417; *Rawat Hardeo Singh* v. *State of Rajasthan,* AIR 1981 Raj. 280 : 1981 WLN 151; *Assar Ali Khan* v. *Baijnath Prasad,* AIR 1983 All. 197; *Bankey Behari Prasad* v. *Mohindra Prasad,* AIR 1940 Pat. 324, followed in view of *Mulam Chand* v. *State of U.P.,* AIR 1968 SC 1281, (1968) 3 SCR 214, (1968) 2 SCWR 397 : 1968 MPWR 633 : 1968 SCD 951; *Pilloo Dhanji Shaw Sidhwa* v. *Municipal Corporation,* (1970) 1 SCC 213: (1971) 1 SCJ 119 : AIR 1970 SC 1201; **See** *Jethanna D'souza* v. *Catherine D'souze,* AIR 1983 Kant. 14; **see also** *M/s. Malik Abdul Ahad Shah Jalil Ahmed Akhtar* v. *State,* AIR 1982 J&K 16; **see also** *State* v. *Mumtaz Hussain,* AIR 1979 All. 174 (Sale by auction of timber-No proof of acceptance of offer under Art. 299; suit for compensation for wrongful detention of part of timber not maintainable); *Kirorilal* v. *State of M.P.,* AIR 1977 Raj 101 : 1976 WLN 652 : 1977 Raj.LW 6.
2. *K S. Satyanarayana* v. *V.K. Narayana Rao,* AIR 1999 SC 2544, 2546 (DB) : (1999) 6 SCC 104 : 1999 (6) Supreme 227 : 1999 (4) Scale 286.
3. AIR 1995 SC 2251, 2252 : (1995) 3 SCC 250 : 1995 (2) JT 576 : 1995 (2) Scale 103 : 1995 (1) UJ 730 : 1995 (1) CCC 561 : 1995 (3) SCJ 120.

The justice basis of the obligation is not founded up on any contract or tort but upon a third category of law namely quasi contract or restitution.[1] The wide language of the section has elicited various judicial comments. In *Damodara* v. *Secretary of State for India,*[2] the Court said, "There may be difficulties in applying a rule stated in such wide terms as is that expressed in Section 70. According to the section, it is not essential that the act shall have been necessary in the sense that it has been done under circumstance of pressing emergency or even that it shall have been an act necessary to be done at some time for the preservation of property.... It is not limited to persons standing in particular relations to one another, and except in the requirement that the act shall be lawful, no condition is prescribed as to the circumstances under which it shall be done." In *Suchand* v. *Balaram,*[3] the Judges observed:

> "The terms (of the section) are unquestionably wide, but applied with discretion, they enable the courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract."

In a case falling under Section 70, the person doing something for another or delivering something to another cannot sue for the specific performance of the contract nor ask damages for the breach of the contract, for the simple reason that there is no contract between him and the other person. So where a claim is made under Section 70 the juristic has basis of the obligation is not founded on any contract or tort but upon a third category, namely, quasi-contract or restitution. An accounting by the plaintiff to the defendant for what he has received in the transaction from which is right to restitution arises is a condition of restitution from the defendant.[4] The real basis of liability under the section is the fact that the person for whom the work was done has accepted the work and has received the benefit thereunder. An agreement which is constitutionally void on the ground that the requisite formalities under Art. 299 (1) of the Constitution were not fulfilled may be enforced as a quasi-contractual obligation under Section 70 if its ingredients were satisfied.[5]

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1. *See Mulchand* v. *State of M.P.,* AIR 1968 SC 1218:(1968) 2 SCWR 397 : **See also** *Union of India* v. *Sita Ram Jaiswal,* AIR 1977 SC 329 : (1976) 4 SCC 505. **See *also*** *Assar Ali Khan* v. *Baijnath Prasad,* AIR 1940 Pat. 324 not followed).
2. (1894) 18 Mad. 88 : 4 MLJ 205.
3. (1911) 38 Cal.12 : 4 CLJ 566 : 2 IC 810; *Kangal Chandra Pal* v. *Gopi Nath Pal,* (1921) 24 CWN 1968 (Part owner of darpatni depositing decretal money and compensation to avert sale for rent due by co-sharer. Right to contribution exists); *Site Fakir* v. *Chand Bewa,* (1928) 32 CWN 1087: 108 IC 46 : (1928) Cal. 389.
4. *Mulchand* v. *State of M.P.,* AIR 1968 SC 1218 : 1968 (3) SCR 214; **see also** *Sunil Kumar Mohanty* v. *Orissa Agro etc. Corporation,* 1975 (1) CWR 310.
5. *Subramaniyam* v. *Thayappa,* AIR 1966 SC 1034; *State of W.B.* v. *B.K. Mondal,* AIR 1962 SC 779 : 1962 Suppl. (1) SCR 876; *Union of India* v. *J.K. Gas Plant,* AIR 1980 SC 1330 : 1980 (3) SCR 893 : 1980 (3) SCC 469; *ONGC* v. *S.S. Agarwala & Co.,* AIR 1984 Gau. 11; *Mir Abdul Jalil* v. *State of West Bengal,* AIR 1984 Cal. 200 : 1984 (88) Cal.WN. 739.

The section prevents unjust enrichment. It applies as much to individuals as to corporations.[1]

"Lawfully ".—The word "lawfully" qualifies only "does" and not "delivery". Delivery need not be made lawfully.[2] In *State of West Bengal* v. *B.K. Mondal & Sons,*[3] the Supreme Court interpreted the word "Lawfully" in Sec. 70 as follows: All that the word "Lawfully" in the context indicates is that after something is delivered or something is done by one person for another and that thing is accepted and enjoyed by the latter, a lawful relationship is born between the two which under the provisions of Sec. 70 gives rise to a compensation" This view was followed in *P.C. Wadhwa* v. *State of Punjab,*[4] "(a) Where a claim for compensation is made by one person against another under Sec. 70 the juristic basis of the obligation is not founded upon any contract or tort, but upon a third category of law, namely quasi contract or restitution. In view of the said principle a person whose contract (in this case a service contract) is void for non-compliance with Art. 299 (1) of the Constitution would be entitled to compensation under Sec. 70. It is evident from a reading of the Section that a lawful contract is not prerequisite for taking action under it. A party is entitled to take benefit of the section even if there is no contract between the parties or the contract between them is void. An insurance agent expressly restrained by law from acting without a license cannot be said to have acted lawfully and his claim for commission must fail.[5] In *Raghunath* v. *Lahanu,*[6] the Court said that in ascertaining whether an act is lawfully done within the meaning of the section, it must be ascertained whether the person so acting held such a position in relation to the other as directly to create, or by implication reasonably to justify, the inference that, by the act done for the other person, he was entitled to look for compensation for it to the person for whom it was done. Otherwise it will enable a person to officiously meddle with the affairs of another and render him liable for work done, which though advantageous in some measure, would perhaps not have been undertaken by him at all.[7] It is, therefore, necessary to see each case whether the person doing the act or making the payment, had some lawful interest in doing so.[8]

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1. *Panalal* v. *Dy. Commissioner, Bandara,* AIR 1973 SC 1174 : (1973) 1 SCC 639 : (no enforceable contract for non compliance with relevant statutory provisions benefit of contractor's building work derived from dispensary fund committee for whom construction was made taken over by municipality and later on by Government).
2. *Bengal Coal Co.* v. *Union of India,* AIR 1971 Cal. 219.
3. AIR 1962 SC 779 : 1962 Supp. (1) SCR 876.
4. AIR 1987 P&H 117, 121 : 1987 (91) Pun.LR 681.
5. *L.I.C.* v. *Madhava Rao,* AIR 1972 Mad. 112 : (1972) 1 MLJ 353.
6. (1931) 32 Bom. LR 1376 : (1931) Bom. 39 : 128 IC 907. **See also** *Chedilal* v. *Bhagwan,* (1888) 11 All. 234; *Punjabi* v. *Bhagwandas,* (1929) 53 Bom. 309 : 31 Bom. LR 88 : (1929) Bom 89 : 117 IC 518; *Nagendra Nath* v. *Jugal Kishore,* (1925) Cal. 1097 : 29 CWN 1082 : 90 IC 281 (Meaning of "lawfully" discussed); *Suchand* v. *Balaram,* (1911) 38 Cal. 1 : 12 CLJ 566 : 6 IC 810; *Jai Indra* v. *Mt. Dilraj Kuar,* (1921) Oudh 14 : 61 IC 278 ("Lawfully" is not mere surplusage).
7. *Shriram* v. *Harbaji,* 12 CPLR 4.
8. *Velayudhan* v. *Nallathambi,* (1928) Mad. 541 : 111 IC 690. **See also** *Jaleshar* v. *Mahadeo,* (1931) Oudh 242 : 132 IC 78.

The word "lawfully" implies that some lawful relationship should subsist between the person claiming compensation and the person against whom it is claimed. Such relationship arises not because of what has been done by the former but by reason of its acceptance and enjoyment by the latter.[1] The acceptance and enjoyment of the thing delivered or done which is the basis for compensation must be voluntary.

The act must be done *bona fide* and without any improper motive.[2] The existence of an interest is generally a test as to the lawful character of a payment but even if an interest[3] was not shown to exist, payments on account of another may be brought within the terms of the section.[4] So a person not "interested in the payment" so as to attract the provisions of Section 69 may be able to lay his claim under the present section.[5]

A payment is not lawful within the meaning of the section if it is made fraudulently with a view to create evidence of title.[6]

Again, an act or payment, contrary to the express direction of the party sought to be charged will not be lawful.[7] Similarly, a payment made to avert the sale of land, by a purchaser of the same under a fictitious and sham sale deed is not lawful.[8] But where a *bona fide* purchaser discharges encumbrances on property purchased, he can recover the amounts paid in case the sale is set aside.[9] A payment towards a decree by one who is a party to it is likewise "lawful" within the meaning of the section.[10]

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1. *Dobei Charan Sahu* v. *Official Liquidator,* AIR 1963 Orissa 220 : ILR (1963) Cut. 206 : **See also** *State of W.B.* v. *Mondal,* AIR 1962 SC 779 : (1962) Suppl. (1) SCR 876 ; *Khader Khan Sahi* v. *Doraiswami Chettiar,*AIR 1974 Mad. 371: (1974) 2 MLJ 270 : *Malik Abdul Ahad Shah Jalil Ahmed Akhtar* v. *State of J&K,* AIR 1982 J&K 16.
2. *Muthayya Chetty* v. *Narayana Chetty,* (1928) MWN 41 : 109 IC 101 : (1928) Mad. 317; **See** *Nathumal* v. *Sanitation Panchayat Committee, Brahmapuri,* (1935) Nag. 242.
3. **See** *Gopeswar* v. *Brojo Sundari,* (1922) 49 Cal. 470 : 25 CWN 1029 : 67 IC 40 : (1922) Cal. 353; *Panchkori* v. *Hari Das,* (1916) 21 CWN 394 : 34 IC 341 : 25 CLJ 325; *Hyderabad State Bank* v. *Ranganath,* AIR 1958 AP 605.
4. *Nagendranath* v. *Jugal Kishore,* (1925) Cal. 1097 : 29 CWN 1052; *Venkatakrishna* v. *Arunachala,* (1919) MWN 244 : 9 LW 435 : 51 IC 857; *Ajhodhyu* v. *Jamroo,* (1910) 14 CWN 699 : 6 IC 341.
5. *Smith* v. *Dinanath,* (1885) 12 Cal. 213.
6. *Desai Himatsingji* v. *Bhavabhai,* (1880) 4 Bom.643.
7. *Avudiappa* v. *Thillai Thandavaraya,* (1928) Mad. 320 : 27 LW 406 : 111 IC 513; *Panchkori* v. *Hari Das,* (1917) 21 CWN 394 : 25 CLJ 325 : 34 IC 341 (Person benefited protested at the first opportunity). *Doraipandi Konar* v. *Sundara,* AIR 1970 Mad. 291 : (1970) 1 MLJ 62 (Tenant effecting repairs amounting to renovation disregarding objection of landlord).
8. *Janki Prasad* v. *Baldeo,* (1908) 30 All.167 : 5 ALJ 163.
9. *Mollayya Padayachi* v. *Krishnaswami Iyer,* (1925) Mad 95 : 47 MLJ 622 ; *Piramu* v. *Serunatha,* (1925) Mad. 1175 : 66 IC 737.
10. *Serafat Ali* v. *Issan Ali,* (1918) 45 Cal. 691 : 22 CWN 347: 42 IC 30; *Kangal Chandra* v. *Gopinath,* (1920) 24 CWN 1068 (Payment by person not a party - Yet suit lies)

So too, the holder of a raiyati holding who deposits the decretal amount of a rent decree against the tenure holder is entitled to contribution under the section, as he had a lawful and present interest in making the payment.[1] Work done by the contractor for the Government on the oral instructions within the framework of the original contract it to be treated as extra work and the contractor is to be paid.[2]

In *Bhagwati* v. *Maiyan Murat*,[3] it was held by the Patna High Court that a joint judgment-debtor who, after an execution sale, deposits the decree amount and the statutory compensation to set aside the sale, is not entitled either under Sec. 69 or the present section to contribution in respect of the compensation, for the payment as to this neither lawful (probably because it was open to him to have deposited the amount before the auction and so avoided payment of the compensation) nor was it done 'for another person.'

"Does anything."—This has been held to include payments of money also,[4] Section 70 will not be attracted where the benefit to the defendant is due not to any act done by the plaintiff but is due to change in the import policy of Government.[5]

The party who has received the benefit cannot deny liability to pay compensation on the ground of absence of any request on his part [6] or want of consent [7] or absence of any pre-existing obligation on the part of the claimant to supply or serve.[8]

Where a contract agreeing to construct a road claimed additional charges over and above the contractual rates agreed to, on the ground that he had to incur the additional expenditure for the purpose of moving the material from the nearer quarry to farther quarry, the claim is not tenable since he is presumed to have taken into account all the aspects like work place, it surroundings and availability of the materials.[9]

Where the plaintiff in addition to works under the written agreement has also worked certain additional work on the instruction of subordinate

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1. *Abdul Aziz* v. *Rahimalla*, (1934) 38 CWN 554 : 152 IC 167 : (1934) Cal. 667.
2. *State of U.P.* v. *Chandra Gupta & Co.* AIR 1977 All. 28 1976 All.LJ. 426.
3. (1931) 10 Pat 528 : (1931) Pat. 394 : 34 IC 139.
4. *Nagendra Nath* v. *Jugal Kishore*, (1925) 29 CWN 1082 : 90 IC 281 : (1925) Cal 1097.
5. *Srinivas & Co.* v. *Inden Biselers*, AIR 1971 SC 2224 : (1971) 3 SCC 721.
6. *Union of India* v. *Kamal Kumar Goswami*, AIR 1974 Cal. 231 : 78 Cal. WN 154 : ILR (1973) 1 Cal. 421.
7. *Krishna Reddy* v. *Narayana Reddy*, (1974) 1 An. WR 89 (Co-owner executing necessary repairs to joint property).
8. *Madasami Nadar* v. *Virudhunagar Municipality*, (1977) 1 MLJ 257 : ILR (1977) 1 Mad. 261 : AIR 1977 Mad. 147.
9. *State of Karnataka* v. *M/s. Stellar Construction Co.*, AIR 2003 Kant. 6 (DB) : 2002 AIR Kant HCR 2732 : ILR (Karn) 2002 (3) (Karn) 4367.

officer of the defendant an instrumentality of Tamil Nadu in connection with holding of South Asian Federation Games at Chennai, the defendant having been the beneficiary of the works done by the plaintiff cannot disown the payment for the additional work.[1]

The petitioner who was carrying on the road work at State Highway also attended to the repairs of the nearby road, which got affected by floods resulting in disruption of the traffic as desired by the Supdt. Engineer, pending *post facto* approval, he cannot be denied payment when he has completed his work on the ground that there was no contract in the strict sense.[2]

"For another person."—The question has arisen whether an act done by a person for his own benefit, which has the effect of benefiting some other person also, may be said to be lawfully done for such other person, so as to give rise to a claim for compensation. The commonest instance is that of repair work done to an irrigation channel or tank, which benefits all the adjacent land-owners. Sec. 70 does not exclude cases of joint liability of joint beneficiaries who are jointly "enriched" in any way in an "unjust" manner at another's cost.[3] In *Damodara* v. *Secretary of State,*[4] the Government executed repairs to a tank, which served to irrigate lands held by their raiyats as also lands held by the defendants. The defendants were found to have enjoyed the benefit of the work done. Under the circumstances, they were held liable to contribute. In a later case *Meenakshisundara* v., *V.R.P. Veerappa,*[5] in a similar state of facts, with, however, this addition, that were held repair work was made, after informing the defendant, the defendant was held liable to contribute. But in *Avudayappa* v. *Thillai Tandavaraya,*[6] where repairs were made to a tank by the owner having lands under its *ayacut,* without reference to the owners of adjacent lands under the same *ayacut* who had offered to contribute if the work was done in consultation with them, the Court had no difficulty in holding that the plaintiff did not do the work "for" the defendant. In a Patna case, the Court observed that a person who claims compensation under Section 70 need not have acted from purely disinterested motives, because the very expression "not intending to do so gratuitously" suggests that there must be an element of self-interest also in the act performed by him.[7] In that case, a co-sharer of properties sold in execution, who had deposited the entire decree

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1. *Sports Development Authority of Tamil Nadu* v. *Tarapore & Co.,* 2007 (1) RAJ 51 (Mad).
2. *Ram Pravesh Prasad* v. *State of Bihar,* 2006 (2) CTLJ 409 (Pat).
3. *Noor Mohammed* v. *Mohammad Jiajuddin,* AIR 1992 MP 244,249 : 1991 MPLJ 503.
4. (1894) 18 Mad. 88 : 4 MLJ 205 ; *Kashinath* v. *Nawab Alam Ara,* (1934) Pat. 346 : 150 IC 1131.
5. (1926) MWN 4 : 92 IC 838 : (1927) Mad. 122
6. (1928) Mad. 320 : 27 LW 406 : 111 IC 513.
7. *Bhagwati* v. *Maiyan Murat* (1931) 10 Pat. 528 : (1931) Pat. 394 : 134 IC 139; *Dori Lal* v. *Patti Ram* (1911) 8 ALJ 622.

amount, was held to have acted for the defendant also, so as to be entitled to contribution. Similarly, a co-sharer of a *hat,* who, to save the licence from being cancelled, effected the improvements required by the authorities, was held entitled to recover a proper share of the expense.[1] Likewise, a joint owner of a tank who filled it up in compliance with a statutory notice from a Municipality was held entitled to contribution from the defendant.[2] So too, a zamindar primarily liable for water cess under the Irrigation Cess Act was held entitled to recover from the inamdar within the zamindari who actually used the water.[3] On the same principle, a mortgagee has been held entitled to recover payments for road and public work cesses in respect of which the liability was primarily on the mortgagor.[4]

But where the object of a payment is merely to benefit the plaintiff himself, the payment will not be 'for the defendant.[5] Where a person assessed to income tax alleges that he is not liable to pay because he has not received the particular item of income charged, but pays the assessment, he cannot be said to have paid it 'for' the person who according to him, is really chargeable.[6] In *Viswanath Vijayakumar* v. *Orr,*[7] the Madras High Court held that the section does not apply to cases where a person does an act for his own benefit and that act incidentally benefits his neighbour or any other person, and that an act cannot be described as done by one person for another, unless it can be shown that, but for the existence of the other's interest, it would not have been done.

"Another person."—These words will include a caste. Where the property belonging to a caste is attached, and one member of it pays the decree amount, he will be entitled to compensation.[8] The Lahore High Court has ruled that the present section does not apply to the case of a minor.[9] And a creditor lending money to an executor even for a purpose sanctioned by the will has been held to have no right of recourse against the estate,[10] his right

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1. *Jarao Kumari* v. *Basant Kumar,* (1908) 32 Cal. 374.
2. *Upendra Krishna* v. *Naba Krishna* (1921) 25 CWN 813 : 62 IC 615 : (1921) Cal. 93.
3. *Rajah of Venkatagiri* v. *Subbarayudu,* (1907) 30 Mad. 277 : 17 MLJ 145.
4. *Upendra Chandra* v. *Tara Prosanna,* (1903) 30 Cal. 794 : 7 CWN 609. **See also** *Raja Peary Mohan* v. *Narendra,* (1905) 32 Cal 582 ; (Fees paid to pleaders engaged by shebait for benefit of debutter estate).
5. *Tangya* v. *Trimbak,* (1916) 40 Bom. 646 : 18 Bom. LR 700 : 35 IC 794 ; *Ganapathy* v. *Sanna Sedu* (1930) Mad. 644 : 126 IC 733.
6. *Raghavn* v. *Alamelu,* (1907) 31 Mad. 35 : 3 MLT 111.
7. (1920) 45 IC 786 : **See also** *Md. Sadiq Ali* v. *Fakir Jahan,* (1934) Oudh 307 : 148 IC 1052.
8. *Bhicoobai* v. *Haribai* 1918 (42) Bom. 556 : 19 Bom. LR 650 : 42 IC 9.
9. *Shahbaz* v. *Bhangi,* (1931) Lah 344 : 135 IC 177.
10. *Manindra Chandra* v. *Sudhir Krishna* (1932) 59 Cal. 216 : (1931) 35 CWN 850 : 53 CLJ 589 : 136 IC 893 : (1932) Cal. 182.

put, at its highest, being only to be subrogated to the executor's right of indemnity against the estate when such right is established. The expression 'person' in the section includes a Corporation.[1]

(ii) **Not gratuitous.**—In such cases it is a question of fact whether he intended to do it gratuitously or not, as regards others who happen to be benefited.[2] In a Privy Council ruling, where a claim on foot of a promissory note failed on the ground of undue influence, and an alternative claim was sought to be rested on the present section, their Lordship observed that the question whether compensation should be awarded must depend on the intention of the plaintiff and held on the facts that he did not intend to act gratuitously.[3]

Where the goods supplied to the defendant were used and they were not intended to be supplied gratuitously, the plaintiff is entitled to be compensated.[4]

(iii) **"Enjoyed the benefit of it".**—From a bare reading of the section it is clear that even if there is no contract for the performance of certain work and if the plaintiff has done that work, without intending to do that work gratuitously, and the defendant has enjoyed the benefits thereof, then the defendant is bound to compensate the plaintiff in respect of such work.[5] The section only says that the party sought to be charged must have enjoyed the benefit of the act done by the plaintiff. It should be a result of the party's violation.[6] It does not require that he should be consulted before the act is done. The party claims compensation not because he has done something for the party against whom it is claimed but because what has been done by the former has been accepted enjoyed by the latter.[7]

Under a contract for sale and purchase of a vehicle where there was breach of contract on account of misrepresentation of Model of vehicle although the plaintiff buyer is entitled for the return of the advance paid by him by putting an end to the contract, however, he cannot unjustly enrich himself for

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1. *Zulaing* v. *Yemethin District Council,* (1932)10 Ran. 522 : 140 IC 737 : (1932) Ran. 176 ; *Pallonjee & Sons* v. *Lonavala Municipality,* ILR (1937) Bom. 782 : (1937) Bom. 417 : 39 Bom LR 835
2. *Raja of Pithapuram* v. *Secretary of State,* (1915) 16 MLT 375 : 25 IC 783 ; **see also** *Suraj* v. *Hashmi,* (1918) 40 All. 555 : 47 IC 903 ; *Nathu* v. *Balwant,* (1903) 27 Bom. 390; *Pokh Pal* v. *Lal Madho Ram,* (1930) 51 All. 897 : (1929) ALJ 1081 : 117 IC 107 : (1930) All. 302; *Ajudhia* v. *Bakar,* (1886) 5 All. 400; *Khader Khan* v. *Doraiswami* AIR 1974 Mad. 371 : 87 Mad. LW 517 : (1974) 2 Mad.LJ.270
3. *Palanivelu* v. *Neelavathi,* (1937) 1 MLJ 719 : 45 LW 355 : (1937) MWN 615 : 41 CWN 677 : 39 Bom. LR 720 : (1937) ALJ 575 : (1937) PC 50.
4. *State of Orissa* v. *Prathibha Prakash,* AIR 1995 Ori. 62, 64.
5. *Dinshaw & Dinshaw* v. *Indoswe Engineers Pvt. Ltd.,* AIR 1995 Bom. 180, 187.
6. *M.S. Devoraj* v. *Krishnamurthy,* AIR 1969 Mys. 350 : (1969) 2 Mys LJ 580 ; *Paidi Lakshmayya* v. *Indian Bank,* (1984) 56 Comp. Cas. 59.
7. *State of W.B.* v. *B.K. Mondal & Sons* AIR 1962 SC 779 : 1962 Suppl. (1) SCR 876.

having enjoyed the possession and used the vehicle for 36 days and he is therefore directed to pay Rs.100/- per day to the defendant for such possession and use of the vehicle.[1]

ACTUAL BENEFIT.—It is only actual benefit that will furnish a ground of action.[2] Where a[3] mortgagee of a tenure purchases is in execution of his own decree, he cannot recover amounts paid to satisfy rent decrees for a period anterior to his purchase. Such payment confers no benefit on the original tenant; the purchaser is simply discharging his own liability.[4]

Again, where some further acts have to be done before the defendant can reap the benefits of plaintiff's act, the defendant cannot be said to have enjoyed the benefit.[5]

The person sought to be held liable should be direct beneficiary: Where a bank granted a loan to A and obtained a decree and A died and in execution it was found that C was the real beneficiary of the loan, Section 70 would not apply and C cannot be held liable.[6] Amount paid by a municipality to a building owner to re-erect a building (after acquisition of a part of it for widening the road) in accordance with approved design is only an incentive without benefiting the municipality to any extent.[7]

Where Government supplied steel to a company for manufacturing gas plants and the stock was subsequently delivered by the company to a third party as per the instructions of Government given to the company, the Government was held to have enjoyed benefit from the transaction and could not escape liability to the company to pay the price of the steel so supplied to the third party.[8]

Where on the oral request of the Municipal Counsellor with the administrative approval of the Deputy Commissioner, a contractor carried out the work which was not intended to be gratuitous, the Municipal Committee being the beneficiary of the work cannot refuse to make payment

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1. *Pampara Philip* v. *Koorithottiyil Kinhimohammed,* AIR 2007 Ker. 69 : 2006 (3) Ker LJ 802 : 2006 (4) Ker LT 998.
2. *Union of India* v. *J.K. Gas Plant,* AIR 1980 SC 1330 : 1980 (3) SCR 893 : (1980) 3 SCC 469; *Union of India* v. *Sita Ram Jaiswal,* AIR 1977 SC 329 : 1977 (1) SCR 979 : (1976) 4 SCC 505.
3. *Smith* v. *Dinanath,* (1885) 12 Cal. 213 ('Does' includes payment of money also); *Shahzadi* v. *Beni Prasad* (1934) All. 390 : 154 IC 405.
4. *Ranglal Sahu* v. *Kali Shankar,* (1924) 2 Pat. 890 : 77 IC 73 : (1924) Pat. 235.
5. *Subramania* v. *Arunachala,* (1912) MWN 956 :16 IC 692.
6. *Paidi Lakshmayya* v. *Indian Bank Ltd.,* AIR 1982 Karn. 338 : (1982) 1 Karn. LJ 345.
7. *Administrator Municipality* v. *Shri Badi Chand,* 1979 Kash. LJ 413.
8. *Union of India* v. *J.K. Gas Plant,* AIR 1980 SC 1330 : 1980 (3) SCR 893 : (1980) 3 SCC 469.

and the plaintiff contractor is entitled to recover his dues as much as the work done by him. [1]

OPTION TO REFUSE.—The section does not require that the person enjoying the benefit must have had the option to decline it. But the rule of English Law is to the contrary. The result in Indian Law has been that there are two lines of cases, one holding on the strict reading of the section, that the party benefited need not have had an opportunity of accepting it, and the other following the English rule as being more in consonance with justice and equity. *Yogambal* v. *Naina Pillai*[2] and *Suchand* v. *Balaram*[3] may be taken as illustrations of the latter type. In the former case, Munro and Sankaran Nair, JJ., held that where no option is left to the party sought to be made liable, he cannot be said to have "enjoyed the benefit" within the meaning of Sec. 70. So far as the Madras High Court is concerned, the preponderance of authority is in favour of this view. It was reaffirmed in *Sampath Ayyangar* v. *Raja of Venkatagiri,*[4] by Madhavan Nair, J. There, the plaintiffs, the purchasers of two villages of the Kalahasti Zamindari had paid a proportionate share of the *peishcush* in respect of the zamindari and got a release of their property from attachment, and in a subsequent suit for *jodi* by the zamindar, claimed to deduct the payments made. It was held they were not entitled to do so, because, (though the payments were lawful) the person benefited had no opportunity to decline then. To the same effect is *Lakshmanan Chetti* v. *Arunachala,*[5] where Curgenven, J., applied the principle to a case of repair of a common tank by a co-sharer.

The other view is found in *Sri Chandra Deo* v. *Srinivasacharlu,*[6] where it was held that the section does not require that the defendant should have had an option to decline the benefit. And in a later case. *Saptharishi* v. *Secretary of State,*[7] it was observed that the courts in India should have regard to the section itself, without considering the restrictions imposed by the English case-law. A Patna case *Bhagwati Saran* v. *Maiyan Murat,*[8] inclines to the view expressed in

1. *Municipal Committee, Pundri* v. *Bajrang Rao Nagrath,* AIR 2006 P&H 142 : 2006 (1) PunLR 764 : 2006 (1) RecCivR 525.
2. (1910) 33 Mad. 15 : 19 MLJ 489 : 3 IC 110 ; **see** however *Sundara Iyer* v. *Anantapadmanaba Iyer,* (1923) 43 MLJ 271 : (1922) MWN 608 : 16 LW 231 : (1923) Mad. 64 : 70 IC 405.
3. (1911) 38 Cal. 1 : 6 IC 810.
4. (1931) Mad. 51 : 33 LW 284 : 129 IC 828.
5. (1931) MWN 1231 : 34 LW 859 : 135 IC 590 ; *Ghulam Ali* v. *Inayat Ali,* (1934) Lah. 95 : 141 IC 68 ; *Jethruse D'Souza* v. *Catwerine E.D'souze,* AIR 1983 Kant. 14; *Ramakrishna* v. *Vishnu Moorthi,* AIR 1957 Mad. 86.
6. (1914) 38 Mad. 235 : (1914) MWN 99 : 26 MLJ 43 : 20 IC 445; **see also** *Bhimasena Rao* v. *Narayan Rao,* (1927) Mad. 459 : 99 IC 845.
7. (1915) MWN 256 : 2 LW 329 : 28 MLJ 384. *Gopinath* v. *Raghu Banshkumar,* AIR 1949 Pat. 522.
8. (1931) Pat. 103 : 167 IC 42 ; *Bhagawati Sarn* v. *Maiyan Murat,* (1931) 10 Pat. 528 : 134 IC 139 : (1931) Pat. 394 ; (Cf) *Ramdas* v. *Ram Babu,* (1935) 16 PLT 646 : 158 IC 25; **see also** *Jog Narain* v *Badri Das,* 16 CLJ 156 : 13 IC 144 and *Dori Lal* v. *Patti Ram* (1911) 8 ALJ 622 : 10 IC 458.

the above two cases. In *Secretary of State* v. *Sarin & Co.*,[1] the Lahore High Court observed that the section must be interpreted according to its explicit terms and not in reference to the provisions of the English law, and that the section is much wider than the English law. In that case, the Secretary of State who had received from the plaintiff certain benefits under a contract, which proved to be invalid for want of authority in the person making it, was held liable to pay reasonable compensation under this section.

Restoration.—Restoration under Section 70 does not mean restoration of the goods to the supplier by delivering the same to him. An intimation by the party supplied to the supplier to take back the goods will suffice.[2]

Compensation.—Compensation under Section 70 would normally be the market value of the goods supplied or work done relying on which the goods are supplied or the work is done.[3] Interest on the compensation amount may be awarded under this section from the date of one month after supply of goods, for instance, till the date of institution of the suit.[4]

Quantum-Meruit.—The present section has been sometimes invoked in awarding relief on the principle of *quantum meruit.* A claim under *quantum meruit or quantum valebant* arises where work is done or goods are supplied, not in pursuance of any express or tacit contract, but under circumstances which would import in law an obligation to pay for the services or goods. It is therefore necessary that the obligee under a claim on *quantum meruit,* should have knowledge of the services rendered, and an option to accept or decline them. [497] As has been pointed out in a Bombay case,[5] the claim of *quantum meruit* can only arise upon a promise to be implied from a request by the defendant to the plaintiff to perform services for him or from the acceptance of such services as plaintiff rendered, so as to imply a promise to pay for the same.

The question has also arisen, whether this principle will apply, where there is express contract to do an entire work for a specified sum and while part of it is done, the contract itself is discharged for no fault of either party (*e.g.,*) contract for payment of a lump sum for erecting certain machinery, and

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1. (1930) 11 Lah. 375 : 120 IC 615 : (1930) Lah. 364 ; *State of Punjab* v. *H.D.Board Ltd.,* AIR 1960 Punjab 585 ; *Britania Building & Iron Co.* v. *State of Orissa,* AIR 1960 Orissa 117.
2. *Union of India* v. *Sita Ram Jaiswal,* AIR 1977 SC 329 : (1976) 4 SCC 505.
3. *Union of India* v. *Kamal Kumar Goswami,* AIR 1979 Cal. 231 : 78 Cal WN 154.
4. *Pilloo Dhunji Shaw Sidhwa* v. *Municipal Corporation,* AIR 1970 SC 1201 : (1970) 1 SCC 213 : (1971) 1 SCJ 119.
5. *Liladhar* v. *Mathuradas,* (1934) 58 Bom. 583 : 36 Bom. LR 119 : 150 IC 871 : (1934) Bom. 158.

a part of it which has been erected being destroyed by fire.[1] In such cases, the rule is as laid down in *Sumpter* v. *Hedges,*[2] that both parties are excused from further performance, but neither has a cause of action against the other, unless the circumstances are such as to justify a promise to pay *pro rata.*

The *quantum meruit* principle has been applied in the case of a building contract to enable the contractor to sue where the completion of the work has been prevented by the employer.[3] Similarly, where a Railway company had the benefit of the work of a contractor and the latter did not intend to do the work gratuitously, the contractor was held entitled, in the absence of settlement of the rates, to reasonable remuneration.[4] In case, where the claim was for wages for work done under an express contract, and that contract was found against, and no relief on the basis of *quantum meruit* had been prayed for, the Court held that there was no jurisdiction to grant any relief.[5] The Lahore High Court has applied the principle of this ruling.[6]

In case of mistake of fact of overcharging in a contract of carriage of goods by the Railways, the Railways are entitled to retain freight for carrying goods to actual distance on the principle of *quantum meruit.*[7]

CONTRACTS WITH CORPORATIONS.—In Indian Law, some of the cases decided on the principle of *quantum meruit* have arisen in connection with contracts by or with corporation, entered into without seal though such seal is required by the Act by which the corporations are constituted. Thus, in *Pallonjee & Sons* v. *Lonavala Municipality.*[8] Where a building contract was unenforceable by reason of failure to confirm to the provisions of the Bombay Municipal Boroughs Act, but the plaintiff had carried out all his obligations, the Bombay High Court held that Sec. 70 specifically met the case and that its applicability was not excluded by the fact that there was no enforceable contract. In *Mohammed Ebrahim Molla* v. *Commissioners for the Port of Chittagong,*[9] where a contract for the hire of a tug was not under seal as required by Sec. 29 of the Chittagong Port Act, the Court, while holding that the plaintiff could

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1. *Appleby* v. *Myers,* (1867) 2 CP 650.
2. (1898) 1 QB 673.
3. *Gopal Ukera* v. *B.N.Ry Co.,* (1932) 56 CLJ 285 : 143 IC 377 : (1933) Cal. 165.
4. *B.N. Ry.* v. *Ruttanji Ramji,* (1935) Cal. 347 : 156 IE 643.
5. *Sathiaval* v. *Sivaswamy,* (1933) MWN 126 : 37 LW 313 : 142 IC 683 : (1933) Mad. 344.
6. *Tej Raj* v. *Ram Lal,* ILR (1938) Lah 511 : (1938) Lah. 71 : 175 IC 314 : 39 PLR 1007 ; **see also** *Roopji* v. *Dyer Meaken* (1930) 52 All. 688 : 124 IC 35 : (1930) ALJ 673 : (1930) All 545; *Krishna Prasad* v. *Purnendu,* (1911) 16 CWN 753 : 15 CLJ 40 : 11 IC 820.
7. *Associated Cement Company Ltd.* v. *Union of India,* AIR 1998 MP 241 : 1998 (2) Civil LJ 656 : 1998 (1) MPLJ 33 : 1998 (3) Rec Civ R 329.
8. ILR (1937) Bom. 782 : (1937) Bom. 417 39 Bom.LR 835 : 171 IC 660.
9. (1927) 54 Cal. 189 : 103 IC 2 : (1927) Cal. 465.

not sue on the contract, held that he may succeed on a quantum *meruit*. The Rangoon High Court also held in *Zulaing* v. *Yamethin District Council*.[1] In similar circumstances, that under Sec. 70 of the Contract Act, the plaintiff was entitled to compensation of the *quantum meruit* principle. Similarly the Lahore High Court in *Municipal Committee, Lahore* v. *Miran Baksh*,[2] allowed compensation to a lessor whose lease was unenforceable for want of a registered document, as required by Sec. 47 of the Punjab Municipal Act. In the Madras High Court also it has been held in *Palaniswami Gounder* v. *E. & S. Co-operative Societies*,[3] that the invalidity of a contract as not fulfilling particular statutory requirements is no bar to a suit to recover money advanced under such contract, and that relief could be awarded under this section or on the basis of *quantum meruit*.

It may however be open to question whether the award of relief on a *quantum meruit* in such cases will not amount to an abrogation of the rule requiring particular formalities to be observed in the matter of contracts by or with corporations. A person cannot be allowed to do by indirect means what he is forbidden to do directly. This aspect of the matter has been dealt with in *Municipal Board, Lucknow* v. *Deb*,[4] where the Court points out that the general rule of giving relief on *quantum meruit* is subject to the requirements of any special law.

In English law, the rule is that where the statute lays down some formalities but is not mandatory in character, and a contract is made with a corporation in violation of such formalities, a claim on an implied contract to pay work done is sustainable.[5]

71. Responsibility of finder of goods.—A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee.

Finder of goods.—This section enunciates the responsibility of a finder of goods. A person who finds goods need not take them into his custody but if he does, he takes upon himself all the liabilities and responsibilities of a bailee. The degree of care expected of him is laid down in Sec. 151 of the Indian Contract Act. He cannot make use of the goods for his own purposes (Section 154) or mix them with his own (Secs. 155-157). The rights of a finder of goods are started in Sections 168-169. If, knowing or having means of knowing the rightful

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1. (1932) 10 Ran. 522 : 140 IC 737 : (1932) Ran. 15.
2. (1932) 13 Lah. 561 : 140 IC 621.
3. (1933) Mad. 145 : 145 IC 412.
4. (1932) 8 Luck 1 : (1932) Oudh 193 : 137 IC 574 : 9 OWN 461 (FB); **but see** *Gonda Municipality* v. *Bachchu*, AIR 1951 All. 736.
5. *Lawford* v. *Billericay Rural District Council*, (1903) 1 KB 773; *Douglas* v. *Rhal Urban District Council*, (1913) 2 Ch. 407 (**See also** under S. 65)

owner, or without using reasonable means to discover the owner, he appropriates the goods to his own use, he is guilty of criminal misappropriation under Section 403 of the Indian Penal Code.

72. Liability of person to whom money is paid, or thing delivered by mistake or under coercion.—A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it.

Illustrations

(a) *A* and *B* jointly owe 100 rupees to *C*. *A* alone pays the amount to *C*, and *B* not knowing this fact, pays 100 rupees over again to *C*. *C* is bound to repay the amount to *B*.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

Equitable Restitution.— The purpose of Section 72 is being to prevent unjust enrichment, it is based upon equitable principle that no person shall enrich himself at the expense of another.[1] This section gives legislative expression to the principle of equitable restitution. Under the English Law, "money, paid under mistake or ignorance of fact may be recovered back, where the supposed state of fact is such as to create a liability to pay the money, which in reality, is not due, but a payment made under the influence of a mistake which does not create a supposed legal obligation, and which therefore, as regards the motive of the party is voluntary, cannot be recovered back,"[2] **[593]** The principle of unjust enrichment on which money had of the plaintiff by the defendant is permitted to be recovered is : *first*, the defendant has been enriched, *secondly*, this enrichment is at the expense of the plaintiff; and *thirdly*; the retention of the enrichment be unjust.[3]

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1. *Bank of India* v. *T.R. Arora*, 2000 (3) 126 PLR (Delhi) 65.
2. *Leake on Contracts*, 8th Edn. (1931) p. 65.
3. *Mahabir Kishore* v. *State of M.P.*, AIR 1990 SC 313, 317 : (1989) 4 SCC 1: 1989 (3) SCR 596.

A decision of the Privy Council aptly illustrates the above propositions. In *Norwich Union Fire Insurance Society Ltd.* v. *Price* [1] a cargo of lemons had been insured against the usual sea perils. The steamer having sustained damage on the voyage, had to go into port for repairs. The lemons were sold forth with as being perishable. The insurers, being unaware of the fact, made full payment on the assumption that the cargo had been damaged by a peril insured against. Subsequently they sued for a refund and the Judicial Committee held that they were entitled to recover inasmuch as the facts that had been misconceived were essential to the creation of the liability.

Where a bank under mistake wrongly credited a foreign remittance in the account of the defendant, the money so credited is liable to be refunded as it amounts unjust enrichment.[2]

Where a sum of Rs. 50,000/- is by mistake credited to bank account of the defendant partnership firm by the plaintiff bank, the defendant cannot unjustly enrich on account of wrong entry made in the bank account and is liable to repay.[3]

Where the defendant withdrawn the money on different dates from his bank account which money was wrongfully credited into his account by the staff of plaintiff bank, the bank is entitled to recover such money together with an interest @ 6% from the date of instituting the suit.[4]

In *Lloyds Bank* v. *Administrator-General, Burma,*[5] the Rangoon High Court has pointed out that a person making payment under a mistake of fact, however ignorant or forgetful he may be, is entitled to recover, unless he has waived his claim or is estopped by reason of conduct, as where the payee has altered his position by parting with the money.

Where the defendant entering into an agreement with the plaintiff and has already excavated the soil and made bricks of such soil cannot disown payment on the ground that the contract was frustrated for want of orders of the Government permitting excavation and thus the contract is vitiated by misrepresentation and fraud by the plaintiff, since the defendant has enriched himself by excavating some amount of soil and making the bricks.[6]

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1. (1934) PC 171 : (1934) ALJ 609 : 40 LW 212 : 151 IC 548; (2) *Machado* v. *Gopala Iyer,* AIR 1963 Mad. 231; **see** *Muthusamy* v. *Savarimuthu,* AIR 1963 Mad. 249; *Union of India* v. *Jal Rustomji Modi,* AIR 1970 SC 1490 : 1970 UJ SC 415.
2. *Grindlays Bank P.I.c.* v. *Centre for Devl.of Instructional Technology,* AIR 1997 Del. 164, 169 : 1997 Bank LJ. 440 : 1997 (88) Com. Cas 782 : 1997 (65) DLT 936 : 1997 (40) DRJ 817 : 1997 (2) Bank LJ 301 : 1997 (2) Bank Cas. 232.
3. *Ameen Trading Co.* v. *Bank of Baroda,* 1994 (1) Civil LJ 886, 888 (Ker).
4. *Indian Bank* v. *Mocro Electronics,* AIR 2005 AP 328 : 2005 (4) ALT 612 : 2005 (3) Rec.CivR 770 (AP).
5. (1934) 12 Ran. 25 : (1934) 1 Ran. 66 ; referring to *Jones* v. *Waring,* (1926) AC 670 and *Kelly* v. *Solari,* (1841) 152 ER 24 : 60 RR 666.
6. *R. Rama Iyer* v. *P.K.Jacob,* AIR 2003 Ker. 259 (DB) : 2003 (2) Ker. LJ 821.

The defendant having consciously accepted the delivery of the machinery supplied by the plaintiff without referring for expert opinion to check its quality, the subsequent plea of the defendant that the machinery supplied was of substandard nature cannot be accepted and the suit for the recovery of the sale consideration is decreed.[1]

Where the Government or its instrumentalities pays excess salary to its employee by mistake, by virtue of relationship of master and servant, the master is deemed to have made specific representation to its employee, that he is entitled to the same and therefore not recoverable.[2]

The section however is not exhaustive, as it is confined-only to cases of mistake and coercion.[3]

Mistake of fact.—The mistake contemplated by the section need not be mutual. So, even where money is paid under a unilateral mistake of fact, it is recoverable. Thus where by mistake a debt is over paid, the excess can be recovered.[4] So, where money is paid by mistake to a wrong person, it can be recovered. In a case of payment to a person under a mistaken impression that he was the heir entitled to receiver payment, when the real heir's right was subsequently established, the person who received payment was directed to refund the amount to the real heir.[5] Money deposited in court in *usum jus habentis*, and withdrawn by a person not entitled to it, may be held to be received for the use of the person entitled to it.[6] Similarly money paid in excess owing to a mistake of fact can be recovered.[7]

COMPULSION OF LEGAL PROCESS.—In *Secretary of State* v. *Tatya Sahib*,[8] the Bombay High Court held that an action for money had and received does not lie under this section for recovery of money paid under compulsion of legal process, but found later not to have been really due. In this case, the

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1. *City Municipal Council* v. *S.A. Lateef & Co.*, AIR 2004 Kant 491 : 2004 AIRKant HCR 3032 : 2005 (2) CIV.LJ 155 : 2004 (6) Kant.LJ 103 : 2005 (1) CCC 98.
2. *Shankar Kumar* v. *State of Bihar*, 2006 (1) CTLJ 428 (Pat).
3. *Jugdeo Narain* v. *Rajah Singh*, (1888) 15 Cal. 656; *Narayanaswami* v. *Osuru*, (1901) 25 Mad. 548.
4. *Badrunnissa* v. *Muhamad Jan*, (1880) 2 All. 671.
5. *Anrudh Kumar* v. *Lachimi Chand*, (1928) 50 All 818 : 115 IC 114 ; 26 ALJ 753; (1928) All. 500; *Nobin Krishna* v. *Mon Mohun*, (1881) 7 Cal. 573; *Ram Kishen* v. *Rani Bhagwan*, (1906) 131 PR 1906 (Bonafide payments of rent to widow of deceased testator payment over again at suit of executors of deceased refund from widow ordered); *Nariamal* v. *Yusifally*, (1925) Sind 93 : 78 IC 794.
6. *Maddi Hussain* v. *Sukh Chand*, (1911) 33 All. 450 : 8 ALJ 230 : 10 IC 730.
7. *Re Ranchandras*, (1928) 29 Bom. LR 1167 : 104 IC 378.
8. (1932) 56 Bom.501 : (1932) Bom. 386 : 34 Bom. LR 791 : 140 IC 171 ; *Kishen Sahai* v. *Bakhtawar Singh*, (1898) 20 All. 237; *Marriott* v. *Hampton* (1797) 2 Sm. LC 386. **See also** *Vishwanath* v. *Jan Mohammed*, AIR 1982 Bom. 30 : ILR (1981) Bom. 1222; *Annamma* v. *Ouseph Tressiamma*, AIR 1975 Ker 185.

Government had acquired land in the possession of the defendant, and had been directed to pay compensation. The suit was later on instituted by Government on the ground that the claimant had no title to the land at the time of the acquisition proceedings, and that no compensation was therefore payable. The court held that the section could not apply to cases were payment was made under orders of court. In another case, where the Official Assignee of Rangoon paid into court without protest a sum of money under a garnishee order, it was held that he could not recover the amount on subsequently discovering that the amount was not really payable to the judgment debtor under the garnishee order.[1]

Where the respondent industrialist agreed to pay maximum demand charges for maximum demand of power to be availed from State Electricity Board, merely because the State Government in exercise of its statutory power directed the Board not to supply electricity to industries during specified hours, the collection of maximum demand charges by the Board cannot said to amount to unjust enrichment.[2]

The royalty paid by a mining lessee under Mines and Minerals (Regulation and Development) Act, 1957, to the State can be recovered from the consumer / purchaser, as the royalty so paid is considered to be the part of the price of the mining products.[3]

No refund of Water Tax can be allowed when it is not clear whether the tax payer has passed down the burden to the consumer merely because the rule under which a Municipal Corporation collected the water charge was struck down by the court not on the ground of want of competence but due to ambiguous drafting of provision.[4]

In a suit for recovery of the money paid to the defendant bank under a forged instrument by the plaintiff bank, the contention of the defendant bank that since the money sought to be recovered is one as paid under mistake, the claim has to be adjudged only in the context of Sec. 72 of the Act cannot be sustained.[5]

Where the suit for the refund of octroi duty paid is resisted by the defendant Municipal Corporation on the ground that the plaintiff company

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1. *Official Assignee, Rangoon* v. *Dadabhoy,* (1937) Ran. 234 : 171 IC 401.
2. *West Bengal State Electricity Board* v. *Siddharta Ferro Alloys Ltd.,* AIR 1997 Cal. 221, 231.
3. *South Eastern Coalfields Ltd.* v. *State of M.P.,* AIR 2003 SC 4482 : (2003) 8 SCC 648: 2003 (7) Supreme 539 : 2003 ILD 460.
4. *Municipal Corporation of Greater Bombay* v. *Bombay Tyres International Ltd.,* AIR 1998 SC 1629, 1630.
5. *United Bank of India* v. *Bank of Baroda,* AIR 1997 Mad. 23, 24 : 1997 (2) Bank LJ 145.

have recovered the duty so paid by them from their dealers and customers and refund allows the plaintiffs to unjustly enrich themselves, there must be evidence of such unjust enrichment.[1] Where the respondents after paying octroi duty have passed on the burden to the consumers and collected from the customers on the cloth purchased and sold by them, any order of refund would be an unjust enrichment.[2] Where Clause 9-A of Cement Control Order requiring the appellants who are cement manufacturers requiring them to contribute amount @ Rs.9/- per metric ton of their production into the cement regulation account was held to be ultra vires, allowing the appellants to seek refund of the money paid by them amounts to unjust enrichment when they have already passed on the burden to their customers.[3]

Where M/s. Maharashtra Distilleries Ltd. sought to recover money from the Municipal Corporation, Aurangabad, on the ground that it paid excess of octroi duty to the Corporation and proved that it has not passed on the additional octroi duty to its customers with documentary proof and which fact was not disputed by the Corporation, the claim of the respondent Municipal Corporation that refund of excess amount collected by it would amount to unjust enrichment is not tenable.[4]

Where the appellant producer of sugar sought to recover the refund of excess duty paid by him to the Commissioner of Excise, the respondent Commissioner of Excise is bound to refund the excess benefit to which he is not otherwise entitled provided the proof is submitted that the appellant has not passed on the burden to the consumers.[5]

Where the Government collects any tax or duty without any authority of law cannot retain the same to unjustly enrich itself and is liable to make restitution.[6] Where the levy of vend fee by the state on Industrial alcohol under the Act having been held unconstitutional, the retention of the fee already recovered on the ground that the judgment has only prospective effect amounts to unjust enrichment.[7]

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1. *Tata Engg. & Locomotive Co. Ltd.*, v. *Municipal Corporation, Thane,* AIR 1992 SC 645, 664 : 1992 AIR SCW 293.
2. *State of Rajasthan* v. *Novelty Stores,* AIR 1995 SC 1132.
3. *Shree Digvijay Cement Co. Ltd.* v. *Union of India,* AIR 2003 SC 767 : (2003) SCC 614 : 2003 (1) Supreme 114.
4. *Maharashtra Distilleries Ltd.* v. *Mpl. Corpn. Aurangabad,* AIR 2005 SC 760.
5. *Sahakari Khand Udyog Mandal Ltd.* v. *Commr., C.E. & C.,* AIR 2005 SC 1897 : (2005) 3 SCC 738.
6. *New India Industries Ltd.* v. *Union of India,* AIR 1990 Bom. 239 : 1990 Mah. LJ 15 (FB) : (1990) 1 Bom. CR 296.
7. *M/s. Somaiya Organics (India) Ltd.* v. *State of U.P.,* AIR 2001 SC 1723, 1735 (FB) : (2001) 5 SCC 519 : 2001 (3) Supreme 458 : 2001 (3) SLT 799 : 2001 (5) SRJ 383.

Where the respondent alleged to have paid customs duty, which he is not required to pay under the law, and sought refund allowing him the refund, amounts to unjust enrichment, when he has already passed on the burden to the third parties.[1]

The principle of unjust enrichment will be attracted where the importer claimed for the refund of additional customs duty paid by him, and it is immaterial whether the goods imported are used by the importer himself and the duty thereon passed on to the purchaser of the finished goods or that the imported goods are sold as such with the incidence of tax being passed on to the buyer rendering the importer incapable of seeking refund.[2]

Where the appellant Electricity Board failed to supply the electricity to the respondent agriculturist within the time specified despite the payment of the security deposit money by them, the appellant Electricity Board unjustly enriched themselves by retaining the security deposit money.[3]

Where the post office sold Kisan Vikas Patra to the appellant Co-operative Bank without informing Kisan Vikas Patra Rules under which Co-operative Banks are not permitted to buy Kisan Vikas Patra, denial of payment of interest accrued on the maturity of the Kisan Vikas Patra amounts to unjust enrichment on the part of the Government as well as its agencies.[4]

ONLY IF RESTITUTION POSSIBLE.—As the section is grounded on equitable restitution, it follows that the money paid by mistake will be recoverable only in cases where the rights of the receiver in relation to third parties are not prejudiced. Thus in *K.M.P.R.M. Firm* v. *Official Assignee, Madras,*[5] where there had been excess delivery of bales, in a sale of goods and the party to whom delivery had been made had, in his turn, sold the goods to third parties, it was held that the principle of the section could not be applied. But if it be a case of short delivery, as in *Ramiah* v. *Sadasiva,*[6] the party is liable, although his right of recourse against his vendor may have been lost owing to the insolvency of the vendor. Where an acceptor of a negotiable instrument omitted to give notice of a mistake to the drawer. It was held that he was not

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1. *Union of India* v. *Raj Industries,* (2000) 2 SCC 172 : 2000 (120) ELT 50.
2. *Union of India* v. *Solar Pesticide Pvt. Ltd.,* AIR 2000 SC 862, 868 : (2000) 2 SCC 705 : 2000 (2) SCJ 277 : 2000 (2) Supreme 353.
3. *Punjab Electricity Board Ltd.* v. *Zora Singh,* AIR 2006 SC 183 : 2005 (5) Supreme 660.
4. *Mahila Sewa Sahakari Bank Ltd.* v. *Chief Post Master,* AIR 2007 Guj 72 : 2007 (56) AIC 850 : 2007 (2) Guj LR 945 : 2007 (1) GCD 679.
5. (1923) 43 MLJ 142 : (1923) Mad. 17; **see also** *Solomon Jacob* v. *National Bank,* (1918) 42 Bom. 16 : 19 Bom. LR 789 : 42 IC 869. (Agent making over amount mistaken paid to the principal - Not recoverable). **See also** *Machado* v. *Gopala Iyer,* AIR 1963 Mad. 231.
6. (1925) 48 Mad. 925 : 49 MLJ 288 : 22 LW 341 : (1925) MWN 688 : (1925) Mad. 1255 : 91 IC 151.

entitled to recover.[1] The section has also been applied in cases of misdescription of properties in auction sales,[2] and wrong descriptions of accounts to which particular payments were made.[3] But a mere voluntary payment cannot be recovered.[4] Again, money paid under a mistake of fact with which the payee had nothing to do cannot be recovered.[5]

Expenditure incurred by one person to save another from expenses or loss.—Where residential plots are sold and the seller has incurred additional expenses on the development of the plots, the buyer cannot be permitted to enrich himself at the expense of the seller and is required to make restitution of benefits received, as unjust enrichment arises also where an expenditure save the others from expense or loss.[6]

NOT IF DUE TO NEGLIGENCE.—Where the mistake is attributable to the plaintiff's negligence, this section be invoked.[7]

Mistake of law.—Section 72 does not make any distinction between money paid under mistake of fact and money paid under mistake of law. As far as refund of money paid under mistake, this section does not make any distinction between a 'mistake of law' and 'mistake of fact'.[8] In *Shiba Prasad* v. *Srish Chandra,*[9] distinguishing between the provisions of Section 21 and this section, the Privy Council observed: "If a mistake of law has led to the formation of a contract, Section 21 enacts that that contracts is not for that reason voidable. If money is paid under that contract, it cannot be said that money was paid under mistake of law; it was paid because it was due under a valid contract, and if it had not been paid payment could have been enforced. Payment by mistake, in Section 72 must refer to a payment which was not legally due and which could not have been enforced: the 'mistake' is thinking that the money

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1. *Ragunath* v. *Imperial Bank,* (1926) 50 Bom. 49 : (1926) Bom. 66 : 27 Bom. LR 1229 : 91 IC 342.
2. *Uzir Ali* v. *Nasimannessa,* (1928) Cal. 865 : 116 IC 634.
3. *Ramaswami* v. *Narayanaswami,* (1925) Mad. 762 : 90 IC 906 : (1925) MWN 41; **see also** *Thomas Abraham* v. *National Tyre & Rubber Co. of India Ltd.,* AIR 1974 SC 602.
4. *Manilal* v. *Chandulal,* (1930) 32 Bom. LR 424 : 125 IC 907 : (1930) Bom. 430; *Tuticorin Municipal Council* v. *Ralli Bros,* (1934) Mad. 420 : 39 LW 660 : 150 IC 890 : 67 MLJ 566.
5. *China & Southern Bank* v. *Te Thoe Seng,* (1926) 3 Ran. 477 : 92 IC 233 : (1926) Ran. 14.
6. *Urban Improvement Co. Pvt. Ltd.* v. *Sardar Ujagar Singh,* AIR 1996 P&H 167, 174 : 1996 (1) Cur. LJ (CCR) 592 : 1996 HRR 337 : 1996 (1) Land. LR 505 : 1996 (112) Pun.LR 237 : 1996 (3) Rec. Civ R 13.
7. *Raghunath* v. *Imperial Bank,* (1926) 50 Bom. 49 : 27 Bom. LR 1229 : 91 IC 233 ; *Industrial Agency* v. *Mercantile Bank of India,* (1930) Lah. 852.
8. *Union of India* v. *Steel Authority of India Ltd.,* AIR 1997 Ori. 77, 84.
9. AIR 1949 PC 297 : (1949) 74 1A 244 : (1949) 2 MLJ 557.

paid was due when in fact it was not due. There is nothing inconsistent in enacting on the one hand that if parties enter into a contract under mistake in law that contract must stand and is enforceable, but on the other hand that if one party acting under mistake of law pays to another party money which is not due by contract or otherwise, that money must be repaid. Moreover if the agreement based on inconsistency with Section 21 were valid, a similar argument based on inconsistency with Section 22 would be valid and could lead to the conclusion that Section 72 does not apply even to a mistake of fact. The argument submitted to their Lordships was that Section 72 only applies if there is no subsisting contract between the person making the payment and the payee and that the Indian Contract Act does not deal with a case where there is a subsisting contract but the payment was not due under it. Once it is established that the payment in question was not due, it appears to their Lordships to be irrelevant to consider whether or not there was a contract between the parties under which some other sum was due: It may be well to add that their Lordship' Judgment does not imply, that every sum paid under mistake is recoverable no matter what the circumstances may be. There may in a particular case be circumstances which disentitled a plaintiff by estoppel or otherwise". In the case before the Privy Council excess royalties paid under a mining lease in the belief that they were due was allowed to be set off against royalties subsequently due treating them as money paid under mistake. In *Sales Tax Officer* v. *Kanhaiyalal,*[1] the Supreme Court held that when once it was found that the payment though it be of a tax has been made by the party labouring under a mistake of law, the payer is entitled to recover the amount and the other party is bound to return it. The fact that the amount paid had not been retained by the State but had been spent is immaterial. A suit for recovery of tax illegally collected is maintainable.[2] Payment of tax under a law, which later on was declared to be ultra vires, is not a payment under mistake of law within the meaning of Section 72.[3] In one case, A fraudulently sent forged money orders to B who was innocent of the fraud to be accepted on A's behalf. The Post Office made payments on them to B, from whom A collected the moneys and disappeared. Later A was caught and convicted. In a suit filed by Government against B it was held that the circumstances were such as to disentitle Government from recourse to B.[4] Where a company manufacturing cigarettes sought to recover the sum of Rs. 49,90,043.01 paid

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1. AIR 1959 SC 135 : 1959 SCJ 53 ; *Shivram Poddar* v. *I.T. Officer,* AIR 1964 SC 1905.
2. *Ballabhdas Mathuradas Lakhani* v. *Municipal Committee,* AIR 1970 SC 1002.
3. *Tilokchand Motichand* v. *Commissioner of Sales Tax,* AIR 1967 SC 540 ; *Trilokchand Motichand* v. *H.B. Munshi,* AIR 1970 SC 898 ; *D. Cawasji & Co.* v. *State of Mysore,* AIR 1969 Mys. 23.
4. *Nagorao* v. *Governor General,* AIR 1951 Nag. 372.

by it in excess of excise duty under mistake of law. It was held to be not entitled for refund in view of the company failing to establish that the excess of excise duty paid by it had not been passed on to its dealers and consumers.[1] When the plaintiff made excess payment in the form of special excise duty under mistake in connection with the purchase of tractor, he is entitled to recover the same.[2] An assessee who paid excise duty to State under mistake of law is entitled to seek refund provides he pleads and proves that he has not passed on the burden to others.[3]

However, where it is alleged by the respondent company that it paid excess duty under a mistake of law due to wrong interpretation of Sec. 4 (a) of the Central Excise and Salt Act, 1944, in the absence of evidence to establish that, it had not passed on the excess Excise duty to any other person is not entitled to the refund of the amount claimed.[4]

Where in a suit for recovery of the excess payment alleged to be made by the plaintiff company under mistake of law, it is not required to show that it had mistakenly believed itself liable to make the payment but it is sufficient if it can show that it would not have paid but for the mistake and such mistake was directly connected with excess payment.[5]

Coercion.—It has been laid down by the Privy Council in *Kanhaya Lal* v. *National Bank of India,*[6] that the term 'coercion' is here used in the ordinary sense, and that the definition in Section 15 does not control the meaning of the word in this section. In the above case, the plaintiff's property was attached in execution of a decree against a third party. The plaintiff paid the amount under protest and later on sued for recovery of it under this section. It was held that the money was paid under "coercion." The Judicial Committee disapproved of previous cases in which it had been held that the meaning of the word is controlled by the definition in Sec. 15. On the same reasoning money paid for income tax under a threat of attachment was held recoverable in *Forbes* v. *Secretary of State for India,*[7] Similarly a deposit made under Sec. 6 of the

1. *Union of India* v. *I.T.C. Ltd.,* AIR 1993 SC 2135, 2145 : 1993 SCC Supp. (4) 326.
2. *Board of Trustees of the Cochin Port Trust* v. *Ashok Leyland Ltd.,* AIR 1992 Ker. 1, 3 : 1991 (2) ILR (Ker).
3. *Mafatlal Industries Ltd.* v. *Union of India,* (1997) 5 SCC 615.
4. *Union of India* v. *T.T.C. Ltd.,* AIR 1993 SC 2135 : 1993 (4) JT 250.
5. *Nurdin & Peocock p/c* v. *D.B. Ramsden & Co., Ltd.,* [1999] 1 All ER 941.
6. (1913) 40 Cal. 598 (PC) : 15 Bom. LR 472 : 25 MLJ 104 : (1913) MWN 541 : 18 IC 949. **See also** *Ah Choon* v. *T.S. Firm,* (1927) 5 Ran. 653 : 106 IC 468 : (1928) Ran. 55; *Dulichand* v. *Ram Kishen,* (1881) 7 Cal. 648 (PC) : 8 1A 93 (Payment by purchaser to avert sale of property in wrongful execution of a satisfied decree), **see also** *Petlad Bulakhidas Mills Co. Ltd* v. *Union of India,* AIR 1970 Guj. 59 : 11 Guj.LR. 330; *T.G.M.Asadi & Sons* v. *Coffee Board,* AIR 1969 Mys. 230.
7. (1915) 42 Cal. 151 : 19 CWN 138 : 26 IC 893; *Jugdeo Narain* v. *Raja Singh,* (1888) 15 Cal. 656 (Money paid under compulsion to avert sale).

Bengal Rent Recovery Act was held an involuntary payment and recoverable under this Section.[1] Similarly in *Satyam* v. *Perraju,*[2] purchaser of certain property, prior to its attachment, deposited the amount under Or. 21, R. 89, C.P.C. and subsequently succeeded in establishing his right to the property. He was held entitled to recover the amount deposited, as the payment was an involuntary one made under coercion. In *Papu Reddi* v. *Pichu Aiyar,*[3] a later Bench of the Madras High Court in almost identical circumstances held to the same effect. An Allahabad case accords with this view.[4] The Bombay High Court however, appears to hold a contrary view.[5] The case of *Muthu Veerappa* v. *Ramaswamy*[6] may also be noticed, in which money paid under the inducement of withdrawing a non-compoundable offences was held recoverable under the section. In *Shakoor Gani* v. *Sabapathi,*[7] where a seller declined to deliver goods unless a certain amount (disputed by the buyer) was paid, and the buyer paid under protest, it was held not to be a voluntary payment. But in *Municipal Council, Tuticorin* v. *Ralli Bros,*[8] it has been held that payments made by an assessee to a municipality in pursuance of notice of demand with the usual threat of distraint in default will not be out of the category of voluntary payments, though both parties may have been under the erroneous belief that the demand was justifiable.

In *Kanhaya Lal* v. *National Bank of India,*[9] the Judicial Committee said that where the right to recover under this section is clearly established, is should not be whittled down by any equitable considerations.

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1. *Bhabendra Chandra* v. *Ajodhya Chatterjee,* (1934) Pat. 605
2. (1931) Mad. 753 : 34 LW 399.
3. (1938) 1 MLJ 829 : 47 LW 188 : (1938) MWN 164 : (1938) Mad. 493. **See also** *Fatima* v. *Mahomed Jan,* (1867) 12 MIA 65; *Vasant Rao* v. *Beharilal,* ILR (1938) Nag. 382 : 178 IC 101 : (1938) Nag. 225
4. *Suraj Deo* v. *Suraj Narain,* (1933) All. 953 : 147 IC 482
5. *Shangar Rao* v. *Vadilal,* (1933) 57 Bom. 601 : 35 Bom. LR 462 : (1933) Bom. 239
6. (1917) 40 Mad. 285 : 31 MLJ 264 : 34 IC 401; for converse case, **see** *Amjadennessa* v. *Rahim Buksh,* (1915) 42 Cal. 286 : 19 CWN 383 : 28 IC 713 : 21 CLJ 642; *Maung Chit Su* v. *Maung San,* (1928) 6 Ran. 238 : 111 IC 21 : (1928) Ran. 173 (money paid voluntarily and without pressure to compound an offence is not paid under coercion)
7. (1924) 47 Mad. 222 : 45 MLJ 749 : 18 LW 796 : 77 IC 70 : (1924) Mad. 236.
8. (1934) 67 MLJ 566 : 39 LW 660 : 150 IC 890 : (1934) Mad. 420 (held that the mistake if any was one of law)
9. (1923) 4 Lah. 284 : 28 CWN 682 : 40 CLJ 1 : 25 Bom. LR 1248 : 75 IC 7 : (1923) PC 114 : 45 MLJ 497 (PC).

CHAPTER VI

Of The Consequences Of Breach Of Contract

73. Compensation for loss or damage caused by breach of contract—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract:–When an obligation resembling those created by contract has been incurred and has not been-discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means, which existed of remedying the inconvenience caused by the non-performance of the contract, must be taken into account.

Illustrations

(a) *A* contracts to sell and deliver 50 maunds of saltpetre to *B*, at a certain price to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A*, by way of compensation, the sum, if any, by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

(b) *A* hires *B's* ship to go to Bombay, and there take on board on the first of January, a cargo which, *A* is to provide and to bring it to Calcutta, the freight to be paid when earned. *B's* ship does not go to Bombay, but *A*, has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. *A* avails himself of those opportunities, but is put to trouble and expense in doing so. *A* is entitled to receive compensation from *B* in respect of such trouble and expense.

(c) *A* contracts to buy of *B*, at a stated price, 50 maunds of rice, no time being fixed for delivery. *A* afterwards informs *B* that he will not accept the rice if tendered to him. *B* is entitled to receive from *A*, by way of compensation, the amount, if any, by which the contract price exceeds that which *B* can obtain for the rice at the time when *A* informs *B* that he will not accept it.

(d) *A* contracts to buy *B's* ship for 60,000 rupees, but breaks his promise. *A* must pay to *B* by way of compensation, the excess, if any, of the contract price over the price which *B* can obtain for the ship at the time of the breach of promise.

(e) *A*, the owner of a boat, contracts with *B* to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some unavoidable cause does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo the price of jute falls. The measure of the compensation payable to *B* by *A* is the difference between the price which *B* could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course and its market price at the time when it actually arrived.

(f) *A* contracts to repair *B's* house in a certain manner, and receives payment in advance. *A* repairs the house, but not according to contract. *B* is entitled to recover from *A* the cost of making the repairs conform to the contract.

(g) *A* contracts to let his ship to *B* for a year, from the first of January, for a certain price. Freights rise, and on the first January, the hire obtainable for the ship is higher than the contract price. *A* breaks his promise. He must pay to *B*, by way of compensation, a sum equal to the difference between the contract price and the price for which *B* could hire a similar ship for a year on and from the first of January.

(h) *A* contracts to supply *B* with a certain quantity of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron. *B* wrongfully refuses to receive the iron. *B* must pay to *A* by way of compensation, the difference between the contract price of the iron and the sum for which *A* could have obtained and delivered it.

(i) *A* delivers to *B*, a common carrier, a machine to be conveyed without delay to *A's* mill informing *B* that his mill is stopped for want of the machine. *B* unreasonably delays the delivery of the machine, and *A*, in consequence, loses a profitable contract with the Government. *A* is entitled to received from *B*, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) *A* having contracted with *B* to supply *B* with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C* for the purchase of 1,000 tons of iron at 80 rupees a ton, telling *C* that he does so for the purpose of performing his contract with *B*, *C* fails to perform his contract with *A*, who cannot procure other iron, and *B*, in

consequence, rescinds the contract. *C* must pay to *A* 20,000 rupees being the profit, which *A* would have made by the performance of his contract with *B*.

(k) *A* contracts with *B* to make and deliver to *B*, by a fixed day, for a specified price, a certain piece of machinery. *A* does not deliver the piece of machinery at the time specified and, in consequence of this, *B* is obliged to procure another at a higher price than that which he was to have paid to *A*, and is prevented from performing a contract with *B* had made which a third person at the time of his contract with *A* (but which had not been then communicated to *A*), and is compelled to make compensation for breach of that contract. *A* must pay to *B*, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by *B* for another, but not sum paid by *B* to the third person by way of compensation.

(l) *A*, a builder contracts to erect and finish a house by the first of January in order that *B* may give possession of it at that time to *C*, to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C*. *A* builds the house so badly that, before the first of January it falls down and has to be re-built by *B*, who in consequence loses the rent which he was to have received from *C*, and is obliged to make compensation to *C* for the breach of his contract. *A* must make compensation to *B* for the cost of re-building the house, for the rent lost, and for the compensation made to *C*.

(m) *A* sells certain merchandise to *B*, warranting it to be of a particular quality and *B*, in reliance upon this warranty, sells it to *C* with a similar warranty. The goods prove to be not according to the warranty, and *B* becomes liable to pay *C* a sum of money by way by compensation *B* is entitled to be reimbursed this sum by *A*.

(n) *A* contracts to pay a sum of money to *B* on a day specified. *A* does not pay the money on that day, *B*, in consequence of not receiving the money on that day is unable to pay his debts, and is totally ruined. *A* is not liable to make good to *B* anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) *A* contracts to deliver 50 maunds of saltpetre to *B* on the first of January at a certain price. *B* afterwards, before the first of January, contracts to sell the saltpetre to *C* at a price higher than the market price of the first of January. *A* breaks his promise. In estimating the compensation payable by *A* to *B*, the market price of the first of January, and not the profit, which would have arisen to *B* from the sale to *C*, is to be taken into account.

(p) *A* contracts, to sell and deliver 500 bales of cotton to *B* on a fixed day. *A* knows nothing of *B's* mode of conducting his business. *A* breaks his promise, and *B*, having no cotton, is obliged to close his mill. *A* is not responsible to *B* for the loss caused to *B* by the closing of the mills.

(q) *A* contracts to sell and deliver to *B*, on the first of January, certain clothe which *B* intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. *B* is entitled to receive from *A* by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) *A*, a ship-owner, contracts with *B* to convey him from Calcutta to Sydney in *A's* ship, sailing on the first of January, and *B* pays, to *A*, by way of deposit one-half of

his passage-money. The ship does not sail on the first of January, and *B* after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and in consequence, arriving too late in Sydney loses a sum of money. *A* is liable to repay to *B*, his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any of the passage-money paid for the second ship over that agreed upon for the first but not the sum of money which *B* lost by arriving in Sydney too late.

Damages.—The section deals with one of the remedies available for breach of contract, (*viz.*), damages. The principle underlying the award of damages in that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed. **[529]** The principle of damages is based on the representation being made by a party, which was believed in and acted upon by another so that he sustained a loss on the basis of the belief in the said representation. Where the plaintiff had not acted on the basis of any representation but had deliberately purchased the property with the knowledge of defect of the vendor's title, with a view to speculate on a litigation, the plaintiff could not be granted damages for violation of covenant for title.[1] The purpose of awarding damages on account of breach of contract being compensation for natural and probable consequences must commensurate with the injury sustained.[2] Under Section 73 a party to a contract can claim compensation from the other party who has broken the contract only if he proves that he has sustained loss or damage and that too only to the extent of such loss or damage suffered by him.[3] Where the application of Sec. 73 of the Contract Act has been excluded under an arbitration agreement between the parties who resorted to Arbitral Tribunal in connection with the breach of contract relating to supply of goods no interference of the court is called for unless the award is shown to be absurd and wholly unreasonable.[4] Where the goods imported from Hong Kong to

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1. *Bhagyathammal* v. *Dhanabhagyathammal,* AIR 1981 Mad. 303 : (1981) 2 MLJ 154.
2. *Chief Secretary, State of Gujarat, Gandhi Nagar* v. *Kothari and Associates,* 2004 (13) AIC (Sum) 7 (Guj).
3. *Special Officer* v. *Thirumalaiswami* (1973) 2 MLJ 361; *Union of India* v. *Raman Iron Foundry,* AIR 1974 SC 1265; *Mirza Javed Murtaza* v. *U.P. Financial Corporation,* AIR 1983 All. 234.
4. *Maharashtra State Electricity Board* v. *Sterilite Industries (India),* 2002 (1) Civil LJ 674 (SC).

Noida were found to be in damaged condition after the defendant No. 3 has cleared the goods from the Port, the defendant No. 1 insurance company is alone liable to compensate under the contract of insurance but not the defendant No. 3 whose job was only to clear the goods.[1] Even where there is an agreement between the parties to the contract to the effect that in the event of any dispute arising between them the matter shall not be referred to arbitration, a party to the contract in case of breach of contract cannot adjudicate as to who committed the breach.[2] Where the court below awarded damages in suit for breach of contract basing its adjudication on the clause of the agreement blindly, the approach adopted by the court is illegal and contrary to the principles of law laid down.[3] The first paragraph of Section 73 will be inapplicable where agreements are void for any reason whatsoever.[4] Where an agreement for sale has been broken due to the fault of both the parties, neither party is entitled claim damages from the other.[5] In England, the rule as to damages was stated in the leading case of *Hadley* v. *Baxendale* [6] and the present section follows the English rule.

Damages are usually of four kinds. (1) Ordinary or general damages, (2) Special damages, (3) Exemplary damages, (4) Nominal damages. Generally speaking, damages are given by way of compensation, and not with a view to punishment. They are therefore assessed mainly in terms of the actual loss caused by the breach. Sometimes damages are awarded for personal inconvenience or physical discomfort caused by a breach of contract.[7] But, save in the exceptional case of a breach of promise of marriage, no damages are awarded for mere disappointment or vexation of mind. Where an employee who was wrongfully dismissed was already awarded compensation by the Industrial Tribunal, his subsequent claim for damages on account of mental break down suffered owing to unfair dismissal is too remote.[8] It may also be mentioned that a breach of promise of marriage is almost the only instance in which exemplary damages are allowed. **[561]**

Where the claimant sought the services of the defendant a firm of Solicitors to prevent the taking away of her children from her custody by her

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1. *General Commerce Ltd.* v. *National Insurance Co. Ltd.*, AIR 2003 Delhi 419, 428 : 2003 (105) DLT 855.
2. *P.V. Paily* v. *State of Kerala*, AIR 2000 Ker. 268, 271 : 2000 (3) Arbi. LR 73 : 2000 (1) Ker. LJ 594 : 2000 (3) Ker. LT 343.
3. *Uma* v. *Malabar Cements Ltd.*, AIR 2003 Ker. 146 (DB) : 2003 (1) Ker LJ 363.
4. *Great Eastern Shipping Co. Ltd.* v. *Union of India*, AIR 1971 Cal. 150.
5. *Gopala Chettiar* v. *Giriappa Gowder*, AIR 1972 Mad. 36 : (1971) 2 MLJ 401.
6. (1854) 156 ER 145 : 96 RR 742.
7. *Sandeep Cement (P) Ltd.* v. *Union of India*, AIR 1990 Guj. 141.
8. *Johnshon* v. *Unisys Ltd.*, [1999] 2 All. ER CA 854.

husband who separated from her, the negligence of the defendants which facilitated the parting of the custody of the children by the claimant would make the defendant liable to compensate the claimant for the mental distress she has undergone.[1]

Where the defendant surgeon negligently performed sterilization operation on the wish of a disabled woman on account of her disability led to the consumption and birth of a child, the defendant surgeon is liable to pay damages to the plaintiff for bringing up of the child.[2]

Where the goods to be delivered by the railways at the destination are of scarce nature, award of compensation cannot be said as an adequate relief and in such cases delivery of the goods in kind is required to be made.[3]

Where the plaintiff agreeing to purchase cranes from the defendant has failed to pay the price for want of sufficient funds neither can claim damages for non-performance nor specific performance from the defendant.[4]

Where the appellant a contractor agreed to complete the construction work within a period of 18 months but could not do so, because of the delay on the part of the Employer Government in supplying cement for 15 to 26 months, the appellant is justified in not completing the work within the stipulated period and the claim of the Government against the appellant to compensate the extra cost said to have been incurred by it in getting the work completed cannot be maintained.[5]

Measure of damages.—Under the section a party suffering by a breach is entitled to compensation for loss or damages (i) which naturally arose in the usual course of things from such breach, (ii) which the parties knew to be likely to result from the breach.

In both cases, the damage must not be remote or indirect. In estimating the loss or damage the means, which existed of remedying the inconvenience caused by non-performance, must be taken into account. That is it is as if the law allows "a person with whom a contract has been broken the right to fulfil the contract for himself, as nearly as may be," provided he does not do this "unreasonably or oppressively as regards the other party or extravagantly."

Damages are awarded as a pecuniary compensation for the injury, which a party sustains as the result of a default, by the other party. The party

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1. *Hamilton Jones* v. *David & Snape (a firm)*, [2004] 1 All ER 657 (Ch D).
2. *Rees* v. *Darlington Memorial Hospital NHS Trust*, (2002) 2 All. ER 177.
3. *Hobbs* v. *L& S. W. Ry* (1875) 10 QB 111; *Le Blanche* v. *L&N.W Ry Co.*, (1876) 1 CPD 286.
4. *Baldev Steel Ltd.*, v. *Empire Dyeing & Mfg. Co. Ltd.*, AIR 2001 Delhi 391,398.
5. *K.C. Skaria* v. *State of Kerala*, AIR 2006 SC 811 : (2006) 2 SCC 285 : 2006 (1) Supreme 199 : 2006 (1) R.A.J 322.

seeking compensation must have done something to his prejudice in the performance of his part of the contract. So in a case where the plaintiff had no goods to deliver, it was held that he could suffer no injury by the defendant's breach, and could not therefore claim damages.[1] Where the plaintiff has agreed with the defendant Electricity Board Organisation, to make good any loss that may be caused on account of the involvement of the security guards provided by the plaintiff, the defendant organisation cannot recover any compensation for the alleged theft in the absence of lodging a criminal complaint with the police against the security guards and establishing that the theft was by reason of involvement of the security personnel.[2] Where the defendant purchaser agreeing to purchase rice bran under a tender contract has failed to lift the stock on the ground that the tender notice did not disclose the variety of rice bran is liable to compensate the plaintiff rice mill since it is the duty of the defendant to seek clarification from the plaintiff as to the variety of rice bran before entering into the contract.[3]

Where the import of goods were insured by the plaintiff company with the respondent insurance company to be carried from Hong Kong to Noida via Bombay Port were alleged to have been found in damaged condition, the suit for damages on the ground that the port trust failed to take care as a bailee cannot be sustained in the absence of a notice to that effect being served on the port trust and when the plaintiff company admitted that they were directly transported in lorries to the place of destination without de-stuffing the goods and also the clearing agent of the plaintiff having cleared the goods without filing any claim for loss or damage.[4] In a suit claiming damages for breach of contract of insurance relating to import of goods, the plaintiff is at liberty to proceed against the defendant No. 1 National Insurance Company alone and the suit is maintainable when the complaint filed by the plaintiff before the State Consumer Commission has been withdrawn and the same is not pending before the commission as on the date of the suit.[4]

Also for a plaintiff to succeed in a suit claiming for damages for breach of contract by the defendant, he must have actually suffered the loss, so that

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1. *Vithalsa Narayan* v. *Raoji Bhoy & Co.*, (1934) Nag. 129 : 151 IC 63; *Syed Israr Masood* v. *State of M.P.*, AIR 1981 SC 2010. (Auction sale of Forest Coupes Subsequent declaration of area therein as "reserved" contract substantially altered plaintiff could repudiate contract Held plaintiff could claim refund of first instalment of sale price but not damages; *Jagdish Prasad* v. *Fertilizer Corporation of India, Sindri*, AIR 1981 Pat. 58 : 1981 BLJR 241; *Utkal Automobiles* v. *Biraja Prasad Roy*, AIR 1976 Orissa 15 : ILR (1975) Cut. 440.
2. *Ex-Servicemen Security Bureau* v. *Tamil Nadu Electricity Board*, AIR 2003 NOC 13 (Mad).
3. *Tamil Nadu Civil Service Corporation* v. *Oswal Solven Extraction (Madras) Unit*, AIR 2002 Mad. 35,40.
4. *General Commerce Ltd.* v. *National Insurance Co. Ltd.*, AIR 2003 Delhi 419, 425 : 2003 (105) DLT 855.

so far as money could do he can be placed in the same position as if he has not suffered any loss. In the absence of any loss being suffered the plaintiff would be entitled only to nominal damages. Where a party has suffered a loss on account of the breach of the contract by the other party, is entitled to receive compensation for such loss, which would result or likely in the contemplation of the parties at the time when the contract is enter into.[1]

But where the respondent Government committed breach of contract be illegally rescinding the contract, the appellant contractor cannot be denied damages of Rs. 20, 000/- being 10% of Rs. 2 lacs which is the value of the contract merely on the ground of no evidence that the appellant has suffered actually loss to the extent of claim made by him.[2]

Where the auction was confirmed by accepting the bid of the plaintiff by which he obtained the right to collect usufructs from the trees in cashew plantations, repudiation of the terms of sale notification and failure to execute the agreements is not an excuse on the ground of cost going down and is liable for breach of contract.[3]

Where the plaintiff buyers of immoveable property under an agreement to sell was put in possession of part of property and one lakh of sale consideration out of total two lakhs still remained unpaid, the defendant seller cannot be made liable for damages for not having handed over the vacant possession of ground floor as there is no evidence to show that the loss caused to the plaintiff is higher than the profit derived by them on account of non payment of balance of consideration.[4]

In *Surrey Country Council* v. *Bredero Homes Ltd.*,[5] there was a contract between the plaintiff councils and the defendant for the sale and purchase of land for the construction of houses in accordance with the terms of planning permission and approved scheme. The defendant has built more number of houses than the number specified in the approved scheme. The plaintiffs filed a suit against the defendant for breach of contract and claimed damages. It was held that although the defendant was liable to each of the plaintiff council for breach of contract, the plaintiffs are entitled to recover only nominal damages as distinct from substantial damages, since they have not actually suffered any loss on account of breach of the defendant.

1. *Oil and Natural Gas Corpn. Ltd.* v. *SAW Pipes Ltd.*, AIR 2003 SC 2629, 2638 : (2003) 5 SCC 705 : 2003 (3) Supreme 449 : 2003 (2) Arbi. LR 5 (SC).
2. *Dwarka Das* v. *State of M.P.*, AIR 1999 SC 1031, 1033 (DB) : (1999) 3 SCC 500 : 1999 (1) Supreme 429 : 1999 (1) SCJ 538 : 1999 (2) CLT 26 (SC).
3. *Varghese* v. *Divisional Forest Officer*, AIR 2003 Ker. 197, 198 : 2003 (2) Bank Case 394 : ILR (Ker) 2003 (3) Ker 116.
4. *Ragunath Rai* v. *Jageshwar Prashad Sharma*, AIR 1999 Del. 383, 393 : 1999 (81) DLT 228 : 1999 (5) DRJ 751 : 1999 (3) Civil Court C 618 : 1999 (4) Rec. Civ. R 485 : 1999 (5) AD Del 254.
5. (1992) 3 All. E.R. 303

Plaintiff in order to succeed in a suit for damages for cancellation of a contract by defendant must prove that such cancellation was wrongful.[1]

Where a forwarding contract for the sale of 7755 standard grade of tins was entered into between the plaintiffs and the defendants during the period 25th July and 30th September, 1985 for delivery on 12th March, 1986, on account of breach by the defendant who refused to take delivery, the questions that arose were whether damages were to be assessed according to a hypothetical sale of tins on 12th March or whether it was permissible to take into consideration the price that could have been negotiated over a longer period, if so whether the fluctuations in price during that period were to be taken into account. It was held that the plaintiffs were entitled to damages based on the fair market or current price on the date of the breach for 7755 tonnes of tins but that price in turn would be based on both the price which would have been obtained by a sale of all the tins on 12th March and the price which would have been obtained by sales negotiated over a short period before or after that.[2]

Where the defendant who agreed to construct a godown at a cost of Rs. 9, 29, 379/- and abandoned the work after execution of part of the work the plaintiff suffering loss on account of breach is entitled to claim damages at the rate of 10% of Rs. 7, 92, 633/- in regard to the work abandoned for loss of profits.[3]

Where the defendant agreeing to supply Hard Chrome Plating Tank has committed the breach of contract by supplying defective material, the plaintiff is entitled to recover from the defendant the difference of the price to be paid by him to the defendant and second tenderer.[4]

Where the petitioner failed to lift the stock of tendu leaves owing to the delayed acceptance of the bid in the auction resulting in the damage to the stock, the action of the authorities to claim the difference of loss by holding re-auction cannot be maintained but have a right to forfeit the earnest money.[5]

Where the appellant is guilty of breach of contract by failing to deliver the units of UTI after having received consideration of Rs. 102,65,12,500/- from the respondent is liable to refund the money received by him to the respondent together with interest at the rate of lending rate from the date of payment till

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1. *G.L. Kilikar* v. *State of Kerala,* AIR 1971 SC 1196 : 1971 UJ (SC) 704 : (1971) 3 SCC 751.
2. *Shearson Lehman Hutton Inc.* v. *Maclaine Watson & Co. Ltd.,* 1990 All. ER 723.
3. *C.T. Xavier* v. *Joseph,* AIR 1995 Ker. 140, 149.
4. *G.S.R.T.C., Ahmedabad* v. *Kay Orr Bros, Madras,* AIR 2000 Guj. 313, 316 : 2000 (3) Guj.LR 2378 : 2000 (3) Guj. LH 253.
5. *Santosh Kumar Chopda* v. *State of M.P.,* 2003 (2) Civil LJ 378 (MP).

the date of filing of the suit in addition to pendente lite and future interest calculated at the rate of 17.5% per annum.[1]

The general rule is that the damages for breach of contract have to be assessed at the date of breach but this rule does not require to be ignored in the subsequent events, which occur before the actual assessment of damages.[2]

Setting off loss — Where the seller of an immoveable property alleged to have suffered loss on account of revocation of the purchaser, he cannot be allowed to set off the loss as against the consideration paid by the purchaser, in the absence of proof of readiness and preparedness to perform the agreement as per its terms.[3]

ASCERTAINMENT OF DAMAGES.—In *Frederick Thomas Kingsley* v. *Secretary of State,*[4] the court laid down the principles with regard to the ascertainment of damages.

> "Though every breach of duty arising out of a contract gives rise to an action for damages without proof of actual damage, the amount of damages recoverable is, as a general rule, governed by the extent of the actual damages sustained in consequence of the defendant's act. In cases admitting of proof of such damages, the amount must be established with reasonable certainty. But this does not mean that absolute certainty is required nor, in all cases, is there a necessity for direct evidence as to the amount. Damages are not uncertain for the reason that the loss sustained is incapable of precise measurement. Certainty to a reasonable extent is necessary and the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men, the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof. It must further be remembered that in the extreme case where the defendant has, by his wrong, put it out of the plaintiff's power to prove the quantum of damages exactly, the presumption is against the defendant and the burden is upon him to reduce the amount from the highest possible

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1. *State Bank of Saurashtra* v. *Punjab National Bank,* AIR 2001 SC 2412 : (2001) 5 SCC 751 : 2001 (4) Supreme 42 : 2001 (6) SRJ 433 : 2001 (4) Scale 102.
2. *Golden Strait Corp* v. *Nippon Yusen Kubishika Kaisha,* [2007] 3 All ER 1 (HL).
3. *P.L.Pinto* v. *F.F. Menzes,* AIR 2001 Karn. 141, 145.
4. (1923) Cal. 49 : 36 CLJ 271 : 72 IC 270; *Mathuresh* v. *Bai Dahi,* (1902) 4 Bom. LR 818; *Mohan Lal* v. *Chunilal,* (1902) 4 Bom. LR 814; *Timblo Irmads Ltd.* v. *Sequeira,* AIR 1977 SC 734. (The plaintiff agreed to provide facilities for loading. The plaintiff committed breach of its obligation. Its claim for demurrage or damages on the ground of delay in loading was negatived, **see also** *American Pipe* Co. v. *State of U.P.,* AIR 1983 Cal. 186.

estimate. Only such approximation to certainty is required as would satisfy the mind of a prudent and impartial person. In actions for breach of contract where there has undoubtedly been an infringement of a right, nominal damages are recoverable even though no actual damages can be proved."[1]

A person seeking damages is required to specifically plead, the manner in which damages suffered by him and justify his claim for award of damages.[2]

In cases where damages are claimed for breach of contract, it is settled law that the court at the first instance must decide that the defendant is liable and then it must proceed to assess what the liability is, and till such determination, no liability is settled on the defendant.[3]

Where a building construction contract has been entered into between the defendant contractor and the plaintiff employer for the benefit of third party, if such third party was intended by the parties to the contract to have the direct cause of action in the event of breach, the plaintiff employer cannot get the right to claim the substantial damages which he did not suffer.[4]

Where the contract between the plaintiff a civil construction contractor and the defendant was terminated without assigning any reason and plaintiff claimed compensation for the work done and estimated loss of profit for the work unfinished, the claim of the defendant can be maintained.[5]

Where the defendant who placed an order with the plaintiff for the supply of Relay Control Panels but subsequently backed out of the contract raising disputes on flimsy grounds because the order which he had for the State Electricity Board for the supply of the same had been cancelled, the plaintiff on account of breach of contract on the part of the defendant is entitled to the decree for recovery of money with interest.[6]

Where the Indian Institute of Petroleum which is the constituent laboratory of the appellant Council of Scientific and Industrial Research, agreed to provide technical know-how in connection with setting up of project for

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1. *Madhya Pradesh Industries Ltd.* v. *Rai Bahadur Shriram Durga Prasad Ltd,* AIR 1971 SC 1983 : 1971 Mah.LJ. 952 : 1971 MPLJ 1002.
2. *State of Orissa* v. *Pratibha Prakash Bhawan,* AIR 2005 Ori 58.
3. *State of Meghalaya* v. *Joinmanick Nosmel Giri,* AIR 1995 Gau. 23, 30 : 1996 Co-op. TJ 422.
4. *Panatown Ltd* v. *Alfred McAlpine Construction Ltd.,* (2000) 4 All. ER 97 (HL).
5. *Tata Iron and Steel Company Ltd.* v. *C.R. Mukherjee,* AIR 2004 Jhar. 137 (NOC).
6. *International General Electric (India) Ltd.* v. *Haradhan Sasmalm,* AIR 2005 Cal 308 : 2005 (2) Cal. HN 400.

conversion of Menthone to Menthol, the award of compensation by arbitrator for loss suffered by the respondent company to a tune of 90 lakhs on the ground of breach of contract by the appellant is proper.[1]

Time for calculation—But where the contract is entered into as a result of misrepresentation and the contract is repudiated on discovering such misrepresentation, damages to be recovered are the difference, between the purchase price and its value at the time the misrepresentation was discovered and not the difference price and its actual value at the time of purchase. In *Naughton* v. *O'Callaghan,*[2] the plaintiff bought a colt for 26000 guineas and incurred expenditure on its training for races. The colt was unplaced in all race events in which it participated. The plaintiff discovered misrepresentation having been made at the time of its purchase as to the pedigree of the colt and claimed damages. It was held that though an article purchased as a result of a misrepresentation could have been sold immediately for the same price but by the time the misrepresentation was discovered its value had fallen by reason of defect in it and therefore the appropriate measure of damages could be the difference between the purchase price and its value at the time of misrepresentation but not the difference between the purchase price and its actual value at the time of purchase.

(i) Sale of goods.—Failure to deliver—Where the contract was to sell and purchase 7500 tons of manganese ore or specified quantity and the seller was permitted to supply the agreed quantity in instalments, it was held that the contract was one and indivisible, that each supply in instalment was not a separate contract, that the supply by the seller of only 2510 tons in accordance with contract cannot be considered as compliance with the contract and the buyer was entitled to reject the quantity supplied. As Illustration (a) shows, in case of breach by the seller, the buyer is entitled to receive from the seller the sum by which the contract price falls short of the price for which the buyer might have obtained goods of like quality at the time of delivery. In *Hajee Ismail & Sons* v. *Wilson & Co.,*[3] there was a C.I.F. contract for delivery of molasses at Madras. The seller failed to deliver. It appeared from the evidence that the goods could not be got in the Madras market and that they were exported from Java to Calcutta or Madras in about the same time. The Court,

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1. *Council of Scientific and Industrial Research* v. *Goodman Drug House (P) Ltd.,* AIR 2007 Uttar 58 : 2007 (2) ALLWC 1956
2. (1990) 3 All.E.R. 191.
3. (1918) 41 Mad. 709 : 45 IC 942 : (1918) MWN 399; *Venkatesa* v. *Parthasarathy,* (1913) 1 MWN 772 : 181 IC 986 (Goods delivered not equal to sample—Measure of damages is the difference on the date of delivery between the market rate of goods actually delivered and the market rate of goods contracted for); *Ganga Ram* v *Hari Ram,* (1927) Lah. 909 : 102 IC 628; *Asmatullah* v. *Behari Lal,* (1923) Lah. 177 : 68 IC 912; *Narain Das* v. *Kidar Nath,* (1928) Lah. 817 : 116 IC 551.

applying the Illustration (a) held that the mode of computing the price for which the plaintiff might have obtained the goods at Madras was to find out the amount for which an exporter would have shipped the goods from Java to Madras, so as to reach Madras on the date fixed for delivery.

It is well settled that under a contract for the sale of goods, the measure of damages is the difference between the contract price and the market price on the date of breach.[1] This principle has been re-affirmed by the Privy Council in *Keshavlal* v. *Dewan Chand*.[2] The contract price is no measure of damages to be awarded.[3] In the absence of a market at place of delivery, market price of nearest place or price, prevailing in controlling market is to be considered.[4] In regard to breach of contract to purchase Pakistani Jute the export price fixed by the Pakistan Government need not be taken into consideration.[5] Where no time is under the contract of sale for the acceptance of the goods, the measure of damages is *prima facie* the difference between the contract price and the market price on the date or refusal by the buyer to accept the goods.[6] In contracts of affreightment and carriage, the market price, which prevails at the place of destination where the damage is caused, is the measure of damages.[7] In C.I.F. contracts, the date of breach is ordinarily the date on which the documents would have to be tendered.[8]

Where the plaintiff sold the goods, which were damaged on account of fire, the claim of difference between insured price of cotton seeds and that

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1. *Jamal* v. *Moolla Dawood Sons & Co.*, (1916) AC 175 : 43 Cal. 493 (PC); **see** *Jugmohndas* v. *Nusserwanji*, (1902) 26 Bom. 744 : 4 Bom. LR 504 (Non delivery of goods — Goods not available in market, market price determined by reference to plaintiffs contracts during the period); *Rattan Lal* v. *Bishen Sahai*, (1928) 10 Lah. 143 : (1928) Lah. 834 : 110 IC 241; *Sital Prasad* v. *Ranjit*, (1931) ALJ 390 : 136 IC 158 : (1931) All. 583; *Toyo Menka Kaisha* v. *Chabildas*, (1922) 24 Bom. LR 149 : 69 IC 29 : (1922) Bom. 203 (Forward contract Measure is difference between contract rate and rate at due date); *Abdulali* v. *Gokuldas*, (1927) Sind 49 : 97 IC 269; *Arjunsa* v. *Mohanlal*, (1937) Nag. 345 : 172 IC 812 : (Cf.) *Millet* v. *Van Heek*, (1921) 2 KB 369; *American Pipe Co.* v. *State of U.P.*, AIR 1983 Cal. 186.
2. (1923) 47 Bom. 563 : 25 Bom. LR 854 : (1923) MWN 583 : 27 CWN 974 : (1923) PC 105 : 45 MLJ 630 : 74 IC 396; *Domingo* v. *De Souza*, (1928) 50 All. 695 : 26 ALJ 627 : 115 IC 616 : (1928) All. 481 (Measure of damages in sale of shares is the same); *Ramchandra* v. *Vasanji*, (1921) 45 Bom. 129 : (1921) Bom. 203. **See also** *State of Bihar* v. *P.K. Jain*, AIR 1981 Pat. 280 : 1981 Pat. LJR 290 : *Union of India v. West Punjab Factories*, AIR 1966 SC 395 : (1966) 1 SCJ 350 : (1966) 2 An. LT 269 : *Desai & Bros* v. *Coorg & Mysore Coffee Co. Ltd.*, (1975) 2 Karn. LJ 46.
3. AIR 1966 SC 395, supra.
4. *Bango Steel Furniture (P) Ltd.* v. *Union of India*, AIR 1967 SC 378 : (1967) 2 SCJ 647 : (1967) 1 SCR 633.
5. *Naihati Jute Mills Ltd.* v. *Khyaliram Jagannath*, AIR 1968 SC 522 : (1968) 1 SCWR 680.
6. *Ambalavana Chettiar & Co. Ltd.* v. *Express Newspapers Ltd.* (1968) 2 SCJ 259 : (1968) 2 MLJ 34 : AIR 1968 SC 741.
7. *Union of India v. A. Venkataih*, AIR 1975 Mad. 119 : (1974) 2 MLJ 371.
8. *Steel Bros.* v. *Dayal Khatoo & Co.*, (1924) 47 Bom. 924 : 25 Bom. LR 1063 : 87 IC 67 : (1924) Bom. 247; *E.A. Zippel v. Kapur & Co.* (1932) Sind 9 : 139 IC 114; *Union of India* v. *Jolly Steel Industries*, AIR 1977 SC 734; *State* v. *Jain*, AIR 1981 Pat. 280; *Gangappa* v. *Jetty & Co.*, AIR 1972 SC 699 : 1972 UJ (SC) 539 : (1972) (4) Civil App.J. 101 (SC) : (1973) 3 SCC 406.

fetched at the auction is liable to be recovered from the defendant insurance company.[1]

Where the defendant has raised an objection as to the maintainability of the suit for the damages filed by the plaintiff for not delivering the consignment to the buyer in time, on the ground that the dispute is solely between the plaintiff and the consignee who as refused to take delivery, the objection cannot be sustained since the choice is that of the plaintiff to suit against whom its claim can succeed.[2]

The damages should be calculated as on the date of breach and any subsequent change of circumstances tending to increase or decrease of the price cannot be taken note of. Even if on account of subsequent change in the circumstances a work undertaken was materially altered due to events outside the contemplation of parties, the express terms of the contract cannot be ignored. Nor can a party to the contract claim compensation at rates different from the stipulated rates on the basis of *quantum meruit*. This can be done only if the contract is frustrated.[3] In *Jamal* v. *Moolla Dawood*,[4] where a contract for sale and purchase of shares was broken by the buyer and the vendor sued for damages, the defendant sought to prove that the vendor had not sustained damages because price rose subsequent to the breach. It was held that this was an irrelevant consideration and that damages must be ascertained as on the date of breach.

Where there are two contracts and a party commits by one act breach of both, the fact that as the result of the wrongful act, a benefit may have accrued to him in connection with the other contract, is a fact for which no credit can be claimed by the defaulting party.[5]

Where the goods contracted for are not available in the market, the price is fixed with reference to the cost of the nearest substitute.[6] Where such a substitute is not available, then, according to the ruling in *Cooverjee* v.

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1. *Harsud Co-op. Mktg. Socy. Ltd.* v. *United India F & G Ins. Co. Ltd.*, AIR 1992 Bom. 341.
2. *Ramnath Exports Pvt. Ltd.* v. *Chairman, Air India*, AIR 2003 Del. 461: 2003 (3) Bank Cas. 374.
3. *State of Rajasthan* v. *Motiram*, AIR 1973 Raj. 223 : 1973 WLN 132 : 1973 Raj.LW 339.
4. (1916) AC 175 : (1916) 43 Cal. 493 : (1915) PC 48 : 14 ALJ 89 : 18 Bom. LR 315 : 23 CLJ 137 : 20 CWN 105 : 30 MLJ 73 : 3 LW 181 : 31 IC 949; *Bank of Morvi* v. *Baerlein*, (1924) 48 Bom. 374 : 26 Bom. LR 155 : 79 IC 1012 : (1924) Bom. 325 : (Cf.) *A.L.S.V. Chetty* v. *Maung Kyinke*, (1922) 64 IC 60; *Wali Md. Shaloo* v. *Khaja Ismailha Trading Co.*, (1933) Sind 247.
5. *Diwan Chand Kirparan* v. *Wield & Co.*, (1925) 28 Bom.LR 1488 : 88 IC 54 : (1925) MWN 459 : (1925) PC 150; *Venkatanarayana* v. *Lakshmi Punnayya*, (1928) Mad. 1232 : 115 IC 342; *Kidar Nath* v. *Shimbhu Nath*, (1927) 8 Lah. 198 : 99 IC 812 : (1927) Lah. 176.
6. (Cf.) *Wertheim* v. *Chicoutimi Pulp Co.*, (1911) AC 301; *Ellinger* v. *Armstrong*, (1874) 9 QB 473; *Hinde* v. *Liddell*, (1875) 10 QB 265; *In re Vic Mill Ltd.*, (1913) 1 Ch. 465; *Aryavart Overseas (P) Ltd.* v. *Kay Aar Biscuits (P) Ltd.*, AIR 1983 NOC 14 (Delhi).

Rajendranath[1] (following the English case of *Borries* v. *Hutchinson).*[2] the damages will be fixed with reference to the price of the goods at the place where they may be purchased. In the case of goods specially made to order, the Lahore High Court has held that, if they are not marketable, the price of the goods is the measure of damages.[3]

Where the market value fluctuates in the course of the day fixed for delivery, damages may be awarded with reference to the highest rate prevailing.[4]

The Delhi High Court,[5] takes the view that in the event of non-delivery by seller, the purchaser need not buy equivalent goods before claiming damages. The facts are these :

On 15th January 1972 the petitioner, Union of India entered into a contract of purchase of stores with the respondent, Commercial Metal Corporation (the Corporation). The stores to be supplied to the Union were leaded bronze ingots: 200000 metric tons of these ingots were to be delivered. The Corporation supplied 163,020 metric tons. They failed to supply 36980 metric tons. The last date for delivery was 31st January 1973. The delivery period was extended from time to time. Finally the Union of India cancelled the contract on 15th February 1975.

The petitioner purchased undelivered stores of 36980 metric tons from market at a cost of Rs. 8, 06, 805-25 of which contract value was Rs. 4, 78, 546-39. The petitioner who suffered a loss of Rs. 3, 28, 258-86 on account of repurchase sought to recover damages.

The Delhi High Court held:

> "In case of non delivery by the seller the measure of damages is the difference between the market price and the contract price. The market price on the date following the breach is that yardstick by which the buyer's claim for damages is evaluated and quantified. The market value is taken because it is presumed to be the true value of the goods to the purchaser. If he

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1. (1909) 36 Cal. 617 : 2 IC 831. (In this case, the goods were marketable only in England and so damages were fixed with ref : to their selling price in England, less cost of getting them there).
2. (1865) 14 ER 518 : 114 RR 563.
3. *Gear & Co.* v. *French Cigarettes,*(1931) Lah. 742; *Kidar Nath* v. *Shimbhu Nath,* (1927) 8 Lah. 198 : (1927) Lah, 176 : 99 IC 812. **See also** *Surjan Mal* v. *Gian Chand,* (1921) Lah. 39 : 59 IC 877; *Bank of India* v. *Chinoy,* AIR 1950 PC 90.
4. *Krishna Jute Mills* v. *Innes,* (1911) 21 MLJ 182 : (1911) 1 MWN 17 : 9 IC 104 : 9 MLT 174.
5. *Union of India* v. *Commercial Metal Corporation,* AIR 1982 Delhi 267 : 1982 Rajdhani LR 163 : ILR (1981) 2 Delhi 775.

does not get his goods he should receive by way of damages enough to enable him to buy identical goods in the open market".

"The decisive element is the date of breach and the market price prevailing on that date. But not the fact that the buyer actually went into the market and got similar goods and suffered loss thereby. The law does not penalise the buyers in action. Even if the buyer does not go into the market he is entitled to damages all the same if he can show that the market had risen on the date of the breach".

"The object of an award of damages for breach of contract is to place the plaintiff so far as money can do it, in the same situation with respect to damages, as if the contract had been performed. He is thus enabled to recover damages in respect of the loss of gains of which he has been deprived by the breach. He is thus entitled to sue for the loss of particular benefit, which he expected to receive, by the contract, which had been broken. This is the benefit which the buyer expects from the promised performance."

Where a party induced to buy shares of a company by making fraudulent misrepresentation, damages being the difference between price paid and price of shares in open market, but not the difference between the price paid and the probable price are to be awarded.[1]

Where price is paid in advance against goods to the supplier then on termination of the contract by the purchaser, the seller cannot claim to forfeit the money paid as advance price because such advance payment of price is in the nature of a trust or quasi-trust earmarked for the purpose of price for the goods to be supplied and when there is failure to supply the advance cannot be forfeited or diverted for other purposes on the ground of an alleged breach on the part of the buyer.[2]

Where on breach of contract by the seller the buyer sued for refund of the advance paid by him and the contract did not provide for payment of interest on the advance, the Supreme Court held that award of interest was in the discretion of the court and that inasmuch as the buyer was in the instant case waiting for an opportunity to breach the contract,[3] interest on advance should be disallowed.

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1. *Smith New Court Securities Ltd.* v. *Scrimage Our Vickers (Asset Management) Ltd.*, (1994) All. ER 255.
2. *Colles Cranes of India Ltd.* v. *Speedeo Spares Corporation*, AIR 1970 Cal. 321.
3. *Madhya Pradesh Industries Ltd.* v. *Rai Bhadur Shiram Prasad Ltd.*, AIR 1971 SC 1983 : (1972) 3 SCC 180 : 1971 UJ 682.

Where damage is caused to a building or chattel on account of breach of contract, two methods of applying the general common law principle that where a party sustained a loss by reason of breach of contract, he should so far as money could achieve it be placed in the same situation with regards to damages as if the contract is performed, and to assess the difference in value or cost of restoration. The difference in value method would be ideal where damages arise because the building or chattel do not measure upto the contracted specification unless the building or chattel has some unique quality and cannot be replaced.[1]

The above judgment has since been reversed by the House of Lords in Appeal while accepting that damages may be awarded for the "Loss of amenity" suffered, disapproved the view of the Court of Appeal in measuring damages and supported the trial Judge award not appealed of £ 2500, as sufficient by way of substantial damages for " loss of amenity " because the purpose of the contract was "the provision of pleasurable amenity".[2]

PROOF OF READINESS—As has been pointed out by the Judicial Committee, it is incumbent on a purchaser suing in damages for breach of contract to show readiness and willingness to carry out his part of the obligation.[3] Where no evidence is adduced by the defendant, the onus is easily discharged, and it is not necessary to prove an actual tender of the purchase money.[4]

In a suit for specific performance of the contract, before the vendor could successfully plead equitable set off of loss suffered by him on account of revocation of the agreement of sale by the vendee it is necessary to establish that the vendor was fully ready and prepared to perform his part of contract as per the terms of the agreement.[5]

EXTENSION OF TIME FOR PERFORMANCE—A unilateral extension of time is not possible and damages for breach cannot be claimed at a rate said to be prevailing at such subsequent date.[6] If the date of delivery is extended by consent the market rate at the end of the period will be the crucial date for fixing damages.[7] In one Madras case (*Appana) Venkatasubba Rao* v. *Ripley & Co.*,[8] where an extension of time had been granted, it was held that it was

1. *Ruxely Electronics & Construction Ltd.* v. *Forsyth,* (1994) 3 All. ER 801 (CA).
2. *Ruxely Electronics & Construction Ltd.* v. *Forsyth,* (1995) 3 All. ER 268 : 1996 AC 344.
3. *Tan Ah Boon* v. *State of Johore,* (1936) PC 236 : 163 IC 417 : 44 LW 21.
4. *Abdullah Bey Chedid* v. *Tenenbaum,* (1933) ALJ 1570 : 149 IC 816 : (1934) PC 91; *Brijmohan* v. *Chandrabhaga Bai,* (1939) Nag. 173.
5. *R.L. Pinto* v. *F.F.Menzes,* AIR 2001 Kant 141, 145 (DB).
6. *Matanhella Brothers* v. *Sri Mahabir Industries (P) Ltd.,* AIR 1970 Pat. 91.
7. *Gear & Co.* v. *French Cigarettes Co. Ltd.,* (1931) Lah. 742; *Mohanlal* v. *Gyaniram,* (1935) Nag. 111 : 31 NLR 250 : 155 IC 778.
8. (1930) MWN 163 : (1930) Mad. 624 : 125 IC 225.

not open to the parties to fall back on the date originally fixed. But, it is not open to the buyer to extend the time for his own purposes. Where a contract provided for delivery of cotton within sixty days and the buyer did not demand delivery till a long time afterwards and then sued for damages as at the letter date, it was held that the damages must be assessed only with reference to the market rate at the end of the stipulated period of sixty days.[1]

Where a contractor having accepted the extension of time for the performance of the contract after the original period, alleged fundamental breach of condition on the part of the State Government by not handing over the whole site of construction, is deemed to have been waived by him and the contention is not tenable.[2]

ANTICIPATORY BREACH.—If in the case of contract fixing a time for delivery, there is an anticipatory breach of contract, and the buyer does not rescind it, the measure of damages is the difference between the contract price and the price of the subject-matter on the last day for delivery.[3] In *Manindra Chandra* v. *Aswini Kumar,*[4] it was pointed out that since, in the case of anticipatory breach, the injury is the destruction of the contract regarded as an article of property, the measure of damages is the value of such property at the time of its destruction; but since the value of a contract will ordinarily be determined by the benefit which its performance would confer, the exact measure of damages upon anticipatory breach, is in the ordinary case, precisely the same as it would be if the repudiation were not accepted as a breach and the injured party sued for non-performance after the time fixed for performance. Thus, the damages are to be assessed according to the cost of performance, not at the time of breach but at the time of performance.

Where in a case of anticipatory breach, the party entitled to rescind makes his election at a later date, damages will be assessed with reference to such date.[5]

Where a contractor claimed damages as expected profit out of contract which was rescinded by the Government on the ground that the contractor will not be able to complete the construction work within the time frame, the

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1. *Muthayya* v. *Lekku,* (1912) 37 Mad. 412 : 22 MLJ 413 : (1912) MWN 436 : 14 IC 256; *Mohanlal* v. *Gyanirtam,* (1935) Nag. 111 : 31 NLR 250 : 155 IC 778; (Cf.) *Re Voss,* (1873) 16 Eq. 155.
2. *P.C. Rajput* v. *State,* AIR 1990 MP 107, 116.
3. *Mackertich* v. *Nobo Kumar,* (1903) 30 Cal. 477 : 7 CWN 431; *Maung Po Kyaw* v. *San Tago,* (1933) Ran. 25 : 150 IC 760.
4. (1921) 48 Cal. 427 : 27 CWN 297 : 60 IC 337 : (1921) Cal, 185. **But *see*** *Ramgopal* v. *Dhanji Jodhavji,* (1928) 55 IA 299 : 55 Cal. 1048 : 111 IC 480 : (1928) PC 200 : 23 LW 55 : 32 CWN 1171 : 55 MLJ 248 : 30 Bom, LR 1389 : (1928) MWN 924 : 48 CLJ 567.
5. *Imamali* v. *Rani Priyawati Devi,* ILR (1938) Nag. 31 : 171 IC 533 : (1937) Nag. 289.

contractors' claim cannot be disallowed for the reason that there was no proof that he suffered actual loss to the extent of the claim.[1]

TIME FOR DELIVERY NOT FIXED.—In cases where the contract fixes no time for delivery, then (as performance has generally to be within a reasonable time) the measure of damages will be the difference between the contract rate and the market price at the end of a reasonable period.[2] If, in such a case, notice has subsequently been given demanding delivery before a fixed date, the market rate on the date fixed will be taken into account.[3]

In *Cie Commercial Sucres et Danrels* v. *Czarnikow Ltd.*[4] the buyer agreed to purchase from sellers 12000 metric tons of sugar subject to the rules of Refined Sugar Association of London (RSA Rules). Rule 14 (1) and (2) of RSA rules provided that the seller shall have the sugar ready to be delivered to the buyer at any time during contract period after giving the seller reasonable notice. On 15th May 1986 the buyer gave notice that between 29 and 31st May, 1986 their vessels would arrive at the agreed port to lift the consignment. When there was default the buyers terminated the contract and purchase replacement cargo from third parties and sued the defaulting seller for the difference of price between the contract price and the market price on 3rd June 1986 on which they purchased replacement. The House of Lords held that on true construction of Rule 14 (1) of RSA Rules the sellers were under an additional obligation to have sugar called for by the buyers in accordance with the contract terms to begin loading without delay or interruption as soon as the vessel was ready and the sellers by failing to make delivery are liable for damages claimed by the buyer.

Where there was undue delay in delivery of consignment dispatch by the defendant to the plaintiff and could not reach within a reasonable and minimum period resulting in loss to the plaintiff, the plea of the defendant that he has air lifted the consignment to show the urgency is not a ground to relieve him from compensating the plaintiff for the loss suffered.[5]

DELIVERY IN INSTALMENTS.—In the case of an anticipatory breach of contract involving deliveries in several instalments, the true measure of damages would be the sum total of the differences between the market rates at the appointed times for delivery, and the contract price.[6]

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1. *Dwarka Das* v. *State of M.P.*, AIR 1999 SC 1031, 1034 (DB) : (1999) 3 SCC 500 : 1999 (1) Supreme 429 : 1999 (1) SCJ 538 : 1999 (1) R.A.J. 466.
2. *Mansuk Das* v. *Rangayya*, (1876) 1 NHCR 162.
3. *Gauri Datt* v. *Nanik Ram*, (1916) 14 ALJ 597 : 35 IC 203.
4. (1990) 3 All.E.R. 641.
5. *Ramnath Exports Private Ltd.* v. *Chairman, Air India*, 2006 (2) CTLJ 94 (Del) (SN).
6. *Bilasiram* v. *Gubbay*, (1916) 43 Cal. 305 : 20 CWN 240 : 33 IC 1. **See also** *Cohen* v. *Cassim Nana*, (1876) 1 Cal. 264; (Cf) *Brown* v. *Muller*, (1872) 7 Ex 319; *Roper* v. *Johnson*, (1873) 8 CP 167.

MINIMUM DELIVERY FIXED.—In the case of a contract to deliver a quantity of coal "amounting to 2,500 to 3,500 tons or thereabouts" the damages were assessed, on the minimum mentioned.[1]

BREACH OF WARRANTY.—In the case of breach of warranty of quality given at the time of a contract of sale by sample, of unascertained goods, the measure of damages in the difference between the value of goods as supplied and the market value of goods of the guaranteed quality at the date of breach.[2]

Section 59 of the Sale of Goods Acts deals with the remedies available on a breach of warranty.

Where the plaintiff was deprived of earning a profit of Rs.25, 000/- under agreement to run touring talkies belonging to the defendant who got the licence to run the talkies cancelled, the decree obtained by the plaintiff against the defendant for breach for Rs.10, 000/- is justified.[3]

EFFECT ON CONTRACT OF RE-SALE BY BUYER.—The general rule laid by the Privy Council in *Muhammad Habibullah* v. *Bird & Co.*[4] is that the law does not take into account in estimating damages, anything that is accidental as between the plaintiff and defendant, (*e.g.*) an intermediate contract entered into with a third party for the purchase or sale of goods. But the matter may be different if the seller knew of the buyer's contract with a third party.[5]

Where a plaintiffs entered into a contract with the defendants for purchase of house-hold property with an intention of reselling to a sub-purchaser at higher profit, the defendant can be made liable for loss of profits on account of their breach only if they are put on notice of the purpose and intent of the plaintiff in entering into the contract with him.[6]

CHAIN CONTRACTS.—In *Hope Prudhomme* v. *Hamel and Horley Ltd.*[7] the Judicial Committee ruled in reference to the produce market that where there is a chain of sellers and buyers, the damages as ascertained between the

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1. *Cursetji Khambatta* v. *Crowder,* (1894) 18 Bom 299
2. *Simson* v. *Jagannatha Rao,* (1914) 1 LW 268 : 23 IC 949. **See also** *Srirangam Chetty* v *Sabapathy Chetty & Co.,* (1913) MWN 895 : 21 IC 573; *Bansi Lal Ram Rattan* v *Ram Chand,* (1930) Lah 843 (Section is applicable to breach of warranty).
3. *K.B.Machaish* v. *Ajjittira S. Mandanna,* AIR 1997 Kam 194, 195 : 1997 (1) Kant. LJ 438.
4. (1922) 43 All. 257 : (1922) PC 178 : 24 Bom. LR 687 : 63 IC 589 : 14 LW 350. **See also** *Erroll Mackey* v. *Maharajadhiraj Kameshwar,* (1932) 11 Pat. 600 : 56 CLJ 135 : 36 CWN 1024 : 63 MLJ 270 : 35 LW 373 : 34 Bom. LR 1596 : (1932) MWN 982 : 138 IC 658 : (1932) PC 196.
5. *Santdas* v *Nidhun Singh,* (1921) Sind 98 : 66 IC 267. **See also** the English cases *Thol* v. *Henderson,* (1981) 8 QBD 457; *Aguis* v. *Colliery Co.,* (1899) 1 QB 413; *Hammond* v *Bussey,* (1887) 20 QBD 79.
6. *Seven Seas Properties Ltd.* v. *Al-Essa & Anr.,* 1993 All. ER 577.
7. (1925) 49 Mad. 1 : 30 CWN 794 : 88 IC 307 : (1925) PC 161.

last buyer and seller will ordinarily form the measure of damages to be recorded all long the chain.

Failure to accept.—Where in a contract for sale of goods, the purchaser commits default, the rule is the same. If there is a market available for the sale of goods, the measure of damages will be the difference between the contract rate and the market rate obtaining at the date fixed for delivery.[1] In *Erroll Mackey* v. *Maharajadhiraj Kameshwar,*[2] the Judicial Committee pointed out that in case of breach of contract of sale of goods, if there was an available market for the goods at the date of breach, the damages must be based on the difference between the market price and the contract price; a contract of resale by the buyer is irrelevant to the consideration of the question, for if there was a market, the law presumes that the buyer can minimise his damages by procuring substituted goods in the market. Therefore the difference in price, if the market price exceeds the contract price is the sole damage in general the sole damage recoverable. Where for a long time after breach there is no market available for the goods, and the goods are then resold, the seller is entitled to the difference between the contract price and that realised on resale;[3] for where goods are sent to the buyer but are refused, and the seller gives notice to the buyer of resale, the price realised is really the market price at the time of resale.[4] The vendor should not make unreasonable delay in reselling.[5]

But, the right to resell must be carefully exercised. Courts generally construe the resale clause very strictly against the vendor; and a vendor cannot by merely precipitating a resale claim the difference between the contract price and the price realised on resale.[6]

Contributory negligence and claim for damages in contract.—Where damages are claimed in contract for breach of contract by the plaintiff, the defence raised by the defendant that the loss occasioned on account of

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1. *Megraj* v. *Durga,* (1927) 54 Cal. 97 : (1927) Cal. 291 : 44 CLJ 364 : 99 IC 244; *Narasingirji* v. *Budan Saheb,* (1924) 26 Bom. LR 523 : 80 IC 430 : (1924) Bom. 390; *Union of India* v. *Kesar Singh,* AIR 1978 J&K 102; *Trustees, Calcutta Port* v. *Dhanraj Mal,* AIR 1978 Cal. 369.
2. (1932) 11 Pat. 600 : 36 CWN 1024 : (1932) MWN 982 : 56 CLJ 135 : 36 LW 373 : 34 Bom. LR 1596 : 138 IC 658 : (1932) PC 196 : 63 MLJ 270 (PC).
3. *E.A. Zippel* v. *Kapur & Co.,* (1932) Sind 9; *Ramalingam* v. *Gokuldoss,* (1926) 51 MLJ 243 : (1926) Mad. 1021 : 97 IC 871.
4. *Doraisami* v. *Subbanna,* (1927) MWN 549 : 105 IC 613 : (1927) Mad. 880. **See also** *Mehar Chand* v. *Jugal Kishore,* (1926) 85 IC 317 : 6 LLJ 415; *Raghu Mal* v. *Ram Sarup,* (1935) 16 Lah. 358 : 37 PLR 525 : 159 IC 480 : (1935) Lah. 593. **See** however *Hoe Chan* v. *Baboo Chota Lal,* (1939) Ran. 139; *Mohan Lal* v. *Chuni Lal,* (1902) 4 Bom. LR 814.
5. *Harichand* v. *Gosho Kabushiku,* (1925) 49 Bom. 25 : 26 Bom. LR 921 : 86 IC 521 : (1925) Bom. 28; *Raghu Mal* v. *Ram Sarup,* (1935) 16 Lah. 358 : 37 PLR 525 : 159 IC 480 : (1935) Cal. 593.
6. *Nanak Chand* v. *Panna Lal,* (1930) Lah. 389.

contributory negligence can be of no avail. When a claim for damages is based on strict contractual obligation and liability arises out of contractual obligation, the doctrine of contributory negligence, which is applicable to tortious liability, has no application.[1]

Where the respondent accepting the tender of the appellant's tender for the supply of street light brackets is alleged to be responsible for the delay in the supply by not furnishing the complete work details and on such allegation being disproved through evidence by the respondent, no negligence lies on the part of the respondent making liable for damages.[2]

Where a clause in the agreement provided that the defendant exporter shall compensate the plaintiff a Government undertaking exporting marine products in case of rejection of the consignment of sea food by the foreign buyer, the plaintiff cannot take advantage of the said clause when the damage to the sea food occasioned due to the malfunctioning of the container in the ship.[3]

(ii) Sale of immoveable property.—The language of the section is general, and can equally apply to contracts for sale of immovable property.[4] In *Ranchod* v. *Manmohandas,*[5] it was pointed out that "as Section 73 imposes no exception on the ordinary law as to damages, whatever the subject-matter of the contract, in cases of breach of contract for sale of immovable property, through inability on the vendor's part to make a good title, the damages must be assessed in the usual way, unless it can be shown that the parties expressly or impliedly contracted that this should not render the vendor liable to damages." The above statement has been affirmed in a number of later cases in Lahore, Calcutta and Madras.[6] Ordinarily, therefore, the measure of damages will be the difference between the contract price and the market value at the date of breach.[7]

In *Nabinchandra* v. *Krishnabaroni Dasi,*[8] there was a breach of a contract for sale of immovable property. Subsequent to the breach, the property was

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1. *Barclays Bank Plc.* v. *Fairclough Building Limited,* (1995) 1 All. ER 289.
2. *Prem Lata* v. *M.C.D.,* AIR 2003 Delhi 211, 212 (DB):2003(103) DLT 715:2003 (2) Pun LR 1.
3. *M.M.P.C. Limited* v. *S. Mohamed Gani,* AIR 2002 Mad. 378.
4. *Motilal* v. *Seth Jamnadas,* (1936) Nag. 4 : (1935) 18 NLJ 313 : 162 IC 944.
5. (1907) 32 Bom. 165 : 9 Bom. LR 1087; *Sakharam* v. *Joiram,* (1933) Nag. 263; *Abdul Ali* v. *Gokuldas,* (1927) Sind 49 : 97 IC 269.
6. *Abdul Latif* v. *Ladha Ram,* (1925) 5 Lah. 527 : 85 IC 421 : (1925) Lah. 262; *Jai Kishen* v. *Arya Priti Nidhi Sabha,* (1921) 1 Lah. 380 : 58 IC 757 : (1921) Lah. 357; *Nabinchandra* v. *Krishnabaroni Dasi,* (1911) 38 Cal. 458; *Adikesavan* v. *Gurunatha,* (1918) 40 Mad. 338 : 32 MLJ 180 : (1917) MWN 171 : 5 LW 425 : 39 IC 358 (FB) (Manager of joint Hindu family liable personally on breach of contract to sell immovable property). **See also** *Radha Kishan* v. *Sankar Das,* (1927) Lah. 252 : 100 IC 422; *Ram Singh* v. *Sajan Damji,* (1927) Sind 120 : 101 IC 704; *Ma Hnin Ye* v. *Chew Whee,* (1925) Ran. 261 : 90 IC 635.
7. *Akhatar Beg* v. *Haq Nawaz,* (1924) Lah. 709 : 78 IC 87.
8. (1911) 38 Cal. 458 : 15 CWN 420 : 9 IC 525.

acquired under the Land Acquisition Act and the amount of compensation given was far above the contract price. In a suit by the purchaser for breach of contract to sell the measure of damages was fixed, was the difference between the contract price and the compensation amount, exclusive of the statutory allowance of fifteen per cent.

Where a purchaser of immovable property is dispossessed owing to lack of title in the vendor, he can claim as damages the difference between the price he paid and any enhanced value at the time of eviction.[1] But as pointed out in *Harilal* v. *Mulchand,*[2] in cases where the plaintiff is in possession, though the title is defective, the rule is to give him only compensation for such defective title. Such compensation will ofcourse vary with the circumstances of each case. No hard and fast rule can be laid down.[3] It was further held that the rule of law laid down in the English cases of *Bain* v. *Fothergill,*[4] and *Flureau* v. *Thornhill,*[5] have no application to India. It may be that, in some cases, (*e.g.*), where there is no fraud, the court may not award any damages though there may be technically a breach.[6] Where the vendee is put to partial loss because of defective title, he will be entitled to recover any amount he may have had to pay together with interest.[7] Where, however, the vendor is guilty of wilful default, in the matter of making out a marketable title, the court may award damages on the usual basis.[8] On the question as to when the covenant for title must be deemed to be broken and whether the mere passing of a decree adverse to the vendee will be sufficient to enable him to sue or actual dispossession is necessary, see the under mentioned cases.[9]

EARNEST MONEY.—Generally speaking, in a contract for sale of immovable property, the deposit of earnest money is a guarantee for

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1. *Ramayya* v. *Kotayya,* (1930) MWN 195 : 32 LW 138 : (1930) Mad. 748; *Bapu Shivaji* v. *Kashiram Hanumantrao,* (1929) 31 Bom. LR 658 : 119 IC 659 : (1929) Bom. 361; *Parmanand* v. *Ghulam Hussain,* (1929) Lah. 416 : 116 IC 449; *Nagardas* v. *Ahmed Khan,* (1895) 21 Bom. 175; *Kalyani Amma/* v. *Ezhumlai Nattar,* (1969) 81 MLW 272 : (1969) 1 MLJ 76 (Purchaser giving up possession under compulsion by reason of extinction of vendor's title).
2. (1928) 52 Bom. 883 : 113 IC 27 : 30 Bom. LR 1149 : (1928) Bom. 427.
3. *Zingraji* v. *Nagosa,* (1927) Nag. 370 : 99 IC 313; *Motilal* v. *Seth Jamnadas,* (1935) 18 NLJ 313 : 162 IC 944 : (1936) Nag. 4.
4. (1874) 7 HL 158.
5. (1776) 96 ER 635.
6. *Dhanrajgirji Narsingirji* v. *Tata Sons Ltd.,* (1925) 49 Bom. 1 : 26 Bom. LR 858 : 92 IC 225.
7. *Bishambar Nath* v. *Jag Prasad,* (1933) All. 455 : (1933) ALJ 963 : 146 IC 804.
8. *Vallabhdas* v. *Nagar Das,* (1922) 23 Bom. LR 1213 : 92 IC 143.
9. *Bhagwati Prasad* v. *Badri Prasad,* (1936) Oudh 141; *Multan Mal* v. *Budhumal,* (1921) 45 Bom. 955 : 23 Bom. LR 325 : (1921) Bom. 252; *Muhammad Siddiq* v. *Muhammad Nuh,* (1930) 52 All. 604 : (1930) ALJ 653 : (1930) All. 771 : 124 IC 185; *Kasi Rao* v. *Zabu,* (1932) Nag. 5 : 136 IC 225; *Meerakanni* v. *Periya Karuppan,* (1934) 67 MLJ 647 : 57 Mad. 1016 : 15 IC 920 : (1934) Mad. 687.

performance of the contract by the vendee, and when the transaction is completed, it becomes part of the purchase money. But if by default of the vendee, the transaction falls through, the money is forfeited.[1] Thus deposit of earnest money serves dual purposes firstly it goes in part payment of purchase money at the first instance and secondly, but basically it is intended to be security for performance of the contract. [2]

Generally earnest money forms a small proportion or ratio to the consideration to be passed by one to the other under a contract of sale. Where the amount paid bears a very great proportion to the totality of the consideration and was treated and nomenclatured as advance it cannot be treated automatically as earnest money.[3] Without any reference to any actual damage the amount cannot be forfeited. Proof of actual damage is a *sine qua non* to seek damages.

There is no specific provision in the Act for recovery of earnest money in case of breach by the vendor, but the court will usually provide for this, in fixing the damages.[4] Where the defendant after receiving earnest money under an agreement to sell land entered into an agreement with another person and received an advance of Rs. 5,000/-, he is guilty of breach of agreement.[5]

It is, however, a question of fact, in each case, whether a particular sum paid in advance, should be treated as earnest money, (*i.e.*), security for due fulfilment of the contract.[6]

Liability of tenant.—The rule that when the tenant fails to deliver up possession of the premises to the landlord on the expiry of the lease he is

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1. **See** *Dinanath* v. *Malvi Modi,* (1930) 32 Bom. LR 272 : (1930) Bom. 213; *Fazle Ahmed* v. *Rajendranath,* (1926) Cal. 339 : 90 IC 795; *Verman & Co.* v. *Gopal Das,* (1923) Lah. 363 : 76 IC 733; *Subbayyar* v. *Munisami,* (1926) 50 Mad. 161 : 21 LW 726 : 98 IC 516 : (1926) Mad. 1133 : 51 MLJ 613; *Nadiar Chand* v. *Satish Chandra,* (1927) Cal. 964 : 105 IC 612 (Party in default cannot claim return of deposit); *Ram Chand* v. *Central Flour Mills,* (1935) 36 PLR 506 : (1935) Lah. 192 : 155 IC 728; *Katherine Stiffles* v. *Martin,* (1935) 39 CWN 174; *Roshan Lal* v. *Delhi Cloth and General Mills,* (1911) 33 All. 166 : 7 IC 794.
2. *Narendra Kumar Nakhat* v. *Nandi Hasbi Textile Mills Ltd.,* AIR 1997 Karn. 185, 187 : ILR 1997 Kar. 1 : 1997 (1) Kant. LJ 755 : 1997 (2) Civ. LJ 278.
3. *Marimuthu Gounder* v. *Ramaswamy Gounder,* 1 (1979) 1 MLJ 343; Cf *Letitia Castelino* v. *Jeroime D. Silva,* (1971) 2 Mys. 28. (Nomenclature not run of the matter; payment on date of agreement indicative of security for due performance of contract).
4. *Pyare Lal* v. *Meena Mal Bal Kishen Das,* (1927) All. 621 : 25 ALJ 811 : 102 IC 766. **See also** *Karsandas* v. *Chhotalal,* (1924) 48 Bom. 259 : 77 IC 275 : (1924) Bom. 119 (On breach by vendor, buyer can recover the deposit). *Chaudary Rambabu* v. *Dalip Kumar,* AIR 1981 MP 158.
5. *Waryam Singh* v. *Gurnam Singh,* AIR 1992 P&H 153, 155.
6. *Desu Rattamma* v. *Kakarapathi Krishnamurthi,* (1928) 54 MLJ 40 : 27 LW 639 :106 IC 482 : (1928) Mad. 326; *Kanhaiya Lal* v. *Lakshmi Chand,* (1933) Nag. 223 : 143 IC 192; *Premji* v. *Garlixle & Co.,* (1925) Sind 254 : 90 IC 573.

liable to pay damages at the rate of double the rent was based on English statutes and is inapplicable in India. In the absence of statutory provision to the contrary the only liability of a trespasser or a person in wrongful possession of the property is for payment of the mesne profits to the lawful owner or the person lawfully entitled to possession, In case the property is one controlled by Rent Control Act the landlord can get only the rent fixed with such increase as is permissible under the Act.[1]

(iii) **Payment of money—INTEREST AS DAMAGES**—With regard to breaches of contract for payment of money, the rule in English law before the Law Reforms (Miscellaneous Provisions) Act, 1934 was that interest cannot be allowed at common law by way of damages for wrongful detention of a debt.[2] However, Lord Tenterden's Act,[3] has by Section 28 provided for the award of interest in particular cases. This was bodily adopted in the Indian statute book by the Interest Act of 1839. It is provided by this enactment that the Court may allow interest on ascertained sums payable under written instruments from the time when the amounts become payable or from the date of written demand for interest. In an early case before the Privy Council,[4] prior to the passing of the Indian Contract Act, it was laid down in consonance with the rule of English common law that, in the absence of mercantile usage, interest cannot be imported into a contract, which contained no stipulation to that effect.

With the passing of the Indian Contract Act, considerable divergence of judicial opinion arose as to whether in view of illustration (n) to Sec. 73; interest can be awarded as damages where it is not recoverable under the Interest Act. The Calcutta High Court held that it could be.[5] Later cases of other courts endorsed the view without however founding on Sec. 73 (n), that in the fact of the wrongful detention of money itself there is proof of the extent of plaintiff's damages, and that the advantage that the plaintiff would have had if the money had not been detained, is, stated in terms of money, interest at the current rate for the period of detention.[6] But in *Kamalammal* v. *Perru Meera Levvai,*[7]

1. *Hindustan Steel (P) Ltd.* v. *Usha Rani Gupta,* AIR 1969 Delhi 59; *Harbilas* v. *Roshan Lal,* AIR 1983 P&H 256.
2. *London, Chatham & Dover Ry.* v. *S.E.Ry.,* (1893) AC 429.
3. 3 and 4 William IV, Ch. 42.
4. *Juggomohan Ghose* v. *Kaisree Chand,* (1862) 9 MIA 256.
5. *Khetra Mohan* v. *Aswini Kumar,* (1917) 22 CWN 488 : 45 IC 667; **see** *Navnitdas* v. *Mancharsa,* (1934) Nag. 78.
6. *G.I.P. Ry. Co.* v. *Jugal Kishore,* (1930) All. 132 : (1930) ALJ 297 : 121 IC 828; *Kishanlal* v. *Bapu,* (1926) Nag. 363 : 94 IC 971; *Ajodya Prasad* v. *Shivaprasad,* (1927) Nag. 18 : 97 IC 1019; *Abdullah* v. *Alla Diya,* (1927) 8 Lah. 310 : 100 IC 846 : (1927) Lah. 333; *Ramnath* v. *Hiralal,* (1926) Cal. 755 : 93 IC 647; *Muthuswamy . Veeraswamy,* (1936) 70 MLJ 433 : 43 LW 514 : (1936) MWN 572 : 163 IC 251 : (1936) Mad. 486.
7. (1897) 20 Mad. 481 : 7 MLJ 263; *Anrudh Kumar* v. *Lachhmi Chand,* (1928) 50 All. 818 : 26 ALJ 753 : 115 IC 114 : (1928) All. 500 (III). *(n)* is not exhaustive); *Saiyid Ismail* v. *Saiyid Mehdi,* (1924) 46 All. 97 : 22 ALJ 833 : 80 IC 63 : (1924) All. 881: (1924) 46 All. 97 : 22 ALJ 833.

it was held by the Madras High Court that interest cannot be recovered under Section 73, Illustration (n), where it was not recoverable under the Interest Act. The court said that to award interest in such a case, will be to abrogate the Interest Act. The construction put upon the section is therefore that interest cannot be claimed for unlawful detention of money unless there is an express or implied agreement or usage, or compliance with the Interest Act. This view was re-affirmed by a later Full Bench in *Kandappa* v. *Muthuswami.*[1] That was a suit to recover money advanced towards a contract for supply of goods and the Full Bench held that the party who had made the advance was not entitled to interest from the date of advance as the contract did not provide for it, and no demand had been made before suit. The Bombay and Patna High Courts have taken the same view.[2] The Lahore High Court followed the Madras view in one case,[3] but other cases of the same Court were inclined to take a broader view on the basis of compensation for wrongful detention.[4] The Allahabad High Court in *Abdul Jalil* v. *Mahomed Abdul Salam,*[5] held that, apart from the Interest Act and Sec. 73 Ill.(*n*), interest may be awarded on general grounds of equity, but the decisions were conflicting.[6]

The matter however is set at rest by the ruling of the Judicial Committee in *B. N. Ry. Co.* v. *Ruttanji Ramji,*[7] in which the view of the majority of the High Courts has been affirmed. Their Lordships have pointed out that Sec. 73 is only declaratory of the Common Law as to damages and that illustration (*n*) does not modify the language of the section or confer on a creditor a right to recover interest upon a debt due to him when he is not entitled to such interest under any provision of law. So in the absence of an express or implied contract to pay interest or a usage of trade, interest can be claimed only under the Interest Act. With reference to the proviso in Section 1 of the Interest Act, their

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1. (1927) 50 Mad. 94 : 99 IC 609 : 24 LW 782 : (1926) MWN 990 : (1926) Mad. 99 : 51 MLJ 765 (FB). **See also** *Raja Ram Doss* v. *Gajapathi Krishna Chandra,* (1933) 65 MLJ 620 : (1933) MWN 498 : 38 LW 420 : (1933) Mad. 729 : 145 IC 721; *Nanchappa* v. *Vatasari,* (1930) MWN 438 : 31 LW 655 : (1930) Mad. 727; *Arjunsa* v. *Mohanlal,* (1937) Nag. 345 : 172 IC 812.
2. (1923) 25 Bom. LR 837 : (1924) Bom. 131 : 87 IC 122; *Pattinson* v. *Bindhya Debi,* (1933) 12 Pat. 216 : 146 IC 56 : (1933) Pat. 196.
3. *Kirpal Singh* v. *Jiwan Mal,* (1927) 8 Lah. 524 : 101 IC 644 : (1927) Lah. 287.
4. *Piare Mohan* v. *Gopal Lal,* (1935) Lah. 552 : 158 IC 156; *Gujranwala Municipal Committee* v. *Charanji Lal,* (1935) Lah. 685 : 160 IC 574; *Sham Singh* v. *Nanak,* (1932) 136 IC 719; *Municipal Committee, Gujranwala* v. *Prabhu Dial,* (1933) Lah. 556 : 146 IC 154.
5. (1932) ALJ 733 : 139 IC 158 : (1932) All. 505. **See also** *Anrudh Kumar* v. *Lachhmi Chand,* (1928) 50 All. 818 : 26 ALJ 753 : 115 IC 114 : (1928) All. 500.
6. *Lalman* v. *Chintamani,* (1918) 41 All. 254; *Jwala Prasad* v. *Hoti Lal,* (1924) 46 All. 625; *Saiyid Ismail Hasan* v. *Saiyid Mehdi,* (1924) 46 All. 897 : 22 ALJ 833 : 80 IC 63 : (1924) All. 881; *Shakoor & Co.* v. *Finlay Fleming & Co.,* (1923) 1 Ran. 339 : 79 IC 291 : (1923) Ran. 265.
7. ILR (1938) 2 Cal. 72 : (1938) ALJ 169 : 19 Pat. LT 125 : 47 LW 281 : (1938) OWN 261 : 40 Bom. LR 746 : 42 CWN 985 : 67 CLJ 153 : (1938) MWN 646 : 173 IC 15 : (1938) 1 MLJ 640 : (1938) PC 67. **See also** *Cantonment Board* v. *Chhajumal,* 1968 MPLJ 425.

Lordships proceeded to observe that it applies to cases in which the Court of Equity exercises jurisdiction to allow interest.[1]

Where the cheques presented by the plaintiff were withheld and delayed payment by the drawer's bank, the plaintiff cannot claim any damages for the loss of interest from the defendant drawer's bank as there was no privity of contract between the plaintiff and the defendant bank.[2]

Where the defendant has made a bid at an auction for the right to collect and remove residual of tree growth and fire wood and before the confirmation of his bid the material was destroyed by fire, the defendant bidder cannot be made liable for the damages as no concluded contract came into existence.[3]

It may be noted in this connection that the Indian Sale of Goods Act, 1930 has in Section 61 (2) made express provision for the award of interest in case of breach of contract for sale of goods.

(iv) Service Contracts.—BREACH BY MASTER.—Where the contract of service gives rise to the relation of master and servant governed by the terms of appointment in the absence of special circumstances, the party complaining of wrongful termination of the contract will be relegated to a suit for compensation and the court will not exercise its jurisdiction to issue a high prerogative writ compelling the master to retain the services of the servant whom the master does not wish to retain in service.[4] The legal position of a government servant, however, is more one of status than of contract. The hallmark of status is the attachment to a legal relationship of rights and duties imposed by public law and not by mere agreement. There is no vested contractual right for the government servant.[5] Where a service contract is broken by the employer, the measure of damages is obtained by considering the usual rate of wages for the employment contracted for and what time would be lost before similar employment could be obtained by the servant.[6] Where the service is for a fixed term, the measure of damages in case of wrongful dismissal, will be the salary for the remainder of the term of service.[7] Where a

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1. **See** *Maine and New Brunswick & Co.* v. *Hart*, (1929) AC 631; *Thawardas* v. *Union of India*, AIR 1955 SC 468 : 1955 (2) SCR 48; *Firm Madanlal Roshanlal* v. *Hukum Chand Mills*, AIR 1967 SC 1030 : 1967 (1) SCR 105 : 1964 (3) SCR 165; *Krishan Kumar Madhok* v. *Union of India*, AIR 1982 Delhi 332 : 1982 Rajdhani.LR 337; *Union of India* v. *A.L. Rallia Ram*, AIR 1963 SC 1685; *De-Smet (India) P. Ltd.* v. *B. P. Industrial Corporation*, AIR 1980 All. 253.
2. *Vysya Bank Ltd. v. A.P. State Agro Industries Development Corpn. Ltd.*, AIR 2004 AP 10 (DB) : (2003) 11 ILD 273 (AP) : 2003 (4) CCC 296 (AP) : 2003 (4) Civil LJ 839 (AP) : 2003 (5) ALD 410 (DB).
3. *A. Mohammed Basheer* v. *State of Kerala*, 2003 (4) Civil LJ 480 (SC) : 2003 (5) Supreme 55 : (2003) 9 ILD 69 (SC).
4. *Bool Chand* v. *Chancellor Kurukshetra University*, AIR 1968 SC 292 : (1968) 2 SCJ 171 : 1968 (1) SCR 434.
5. *Kishanlal Tandon* v *Union of India*, (1968) 1 SCJ 746 : (1968) 1 SCR 185 : AIR 1967 SC 1889.
6. *Sree Minakshi Mills* v. *Anantarama Ayyar*, (1930) 31 LW 153 : 122 IC 507 : 1930 Mad. 654.
7. *Sundaram Chettiar* v. *Chockalingam*, (1938) 1 MLJ 857 : 47 LW 803 : (1938) MWN 653; *Jacob Elias* v. *Dossa Kalian*, (1913) 15 IC 757; *Hiranandini* v. *Bharat*, AIR 1969 Bom 373 : 1969 Lab. IC 1329.

person is engaged by the month and the agreement is silent as to notice, the contract is terminable on reasonable notice. One month's notice has been held reasonable in the case of a teacher.[1] Where there was no mention about any period of service or age of superannuation in letter of appointment, the service is for an indefinite period terminable by reasonable notice on either side. Three months' notice would be reasonable.[2]

In *Abraham Reuben* v. *Karachi Municipality*,[3] it has been held that in a case of dismissal by the master, the damages cannot include compensation for the manner of the dismissal, for the servant's injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult to obtain fresh employment. The English case of *Addis* v. *Gramophone Co.*,[4] was followed in the above case.

BREACH BY SERVANT.—Where a person employed by the month absents himself without notice, he forfeits his pay for the whole month, and the employer will be entitled to damages for extra labour, which he might have been forced to employ.[5]

But where the employment is by the year and the servant wrongfully leaves the service in the middle of the year, it has been held that the servant is entitled to salary for the actual period of service deducting, of course, any damages that the employer might have suffered.[6] Where even after breach by the servant the master does not exercise his option to terminate the employment, the contract continues binding on both parties, subject of the master's right to claim damages against the servant for breach of contract.[7]

Damage for loss of publicity and screen credit—A new head of damages as for loss of publicity has gained prominence in some recent cases. Where an actor is engaged in a principal role in a movie television or theatrical production and the producer commits a breach of contract, and the actor is deprived of the role, damages are liable to be awarded for loss of publicity.

But where the interest of the plaintiff bringing the suit for loss of publicity is only to gain by way of reputation or good will and not the

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1. *Thein Pe* v. *De Souza*, (1929) Ran.167 : 7 Ran. 303 : 119 IC 740.
2. *Aparna Kumar Dasgupta* v *United Industrial Bank, India Ltd.*, 79 Lab. SC 50 (Cal).
3. (1929) Sind 69 : 113 IC 387.
4. (1909) AC 488.
5. *Ethari* v. *Bellamy*, (1938) Ran. 207 : 176 IC 526; *Amar Singh* v. *Gopal Singh*, (1931) Lah. 133 (2) : 132 IC 577 (2); *Cuddalore Municipal Council* v. *Panchapagesa*, (1922) Mad. 102 : (1922) MWN 153 : 69 IC 767 : 15 LW 362; **See also** *Raih Bros.* v. *Ambikaprasad*, (1913) 35 All. 132 : 11 ALJ 194 : 18 IC 699; *Dhumee* v. *Sevenoaks*, (1886) 13 Cal. 80.
6. *Chokkalinga* v. *Mahomed*, (1912) 23 MLJ 680 : 17 IC 894 : (1912) MWN 1212.
7. *Hanley* v. *Pease*, (1915) 1 KB 698; *Sundaram Chettiar* v. *Chockalingam*, (1938) 1 MLJ 857 : 47 LW 803 : (1938) MWN 653.

monetary aspect, award of damages cannot be said to be complete and adequate relief.[1]

(v) Contract of Marriage.—In *Abdul Razak* v. *Mahomed Hussain,*[2] it was held that the peculiar principle of the English law in awarding exemplary damages has no application to a case where a Mahomedan father breaks a contract to give his daughter in marriage and that only ordinary damages could be recovered. The Lahore High Court has held that a breach of contract of betrothal gives a cause of action to the aggrieved party to sue persons who have broken the contract or have brought about its breach.[3]

Where the plaintiff agreeing to give his daughter in marriage spent money in connection with betrothal ceremony is entitled to recover the expenditure incurred by him for the betrothal ceremony when there was a breach of marriage settlement by the defendant.[4]

But where the defendant promising to marry the plaintiff subjected her to physical union resulting in her pregnancy, the damages to be awarded will differ on various counts, such as physical union, indignity chances of marriage becoming dim and social stigma etc. [5]

Remoteness of damage.—At to this, see Illustrations (*i*), (*j*) and (*k*). As the section itself indicates, compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. For instance, the loss of profits on a contract of which the defendant had no kind of notice will be clearly remote. Mental agony caused by the Development Authority to the subscribers on account of breach of promise by failing to allot the developed plots would not entitle the subscribers for damage in view of it being too remote.[6] The position may however be different where the defendant knows that the plaintiff stands to lose the benefit of a contract with a third party, by reason of default, by the defendant. In the leading English case, *Hadley* v. *Baxendale,* it was laid down that if the special circumstances under which the contract was made, were communicated by one party to the other, and thus

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1. *Suresh Jindal* v. *R. Rizsoli Corriere Della Sera Prodzioni T. V. S.p.a.,* AIR 1991 SC 2092, 2095 : 1991 Supp. 2 SCC 3.
2. (1918) 42 Bom. 499 : 19 Bom. LR 164 : 38 IC 771. **But see** *Rose Fernandes* v. *Joseph Gonsalves,* (1924) 48 Bom. 673.
3. *Santu* v. *Hur Dei,* (1934) Lah. 544 : 152 IC 913 : 35 PLR 480 (The Court however expressed itself against the maintainability of such a suit but felt bound by precedent).
4. *Tulshiram Maroti Kohad* v. *Roopchand Laxman Ninawe,* AIR 2006 Bom 183 : 2006 AIHC 153 (NOC) (Bom) : 2006 (3) AIRBomR 327 : 2006 (4) CivLJ 540 (Bom) : 2006 (2) MahLJ 647.
5. *Laxminarayan* v. *Sumithra Bai,* AIR 1995 MP 86.
6. *Ghaziabad Development Authority* v. *Union of India,* AIR 2000 SC 2003, 2005 (DB) : (2000) 6 SCC 113 : 2000 (4) Supreme 373 : 2000 (2) CLT 259 (SC) : 2000 (3) Arb. LR 170 : 2000 (7) JT 256.

known to both of them, the damages resulting from the breach of such a contract would be based on the injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated. But if there be no such knowledge of the special circumstances, special damages cannot be claimed. In *Indian General Navigation and Railway Co.* v. *Eastern Assam Co. Ltd.*,[1] it was said that the aggravations of the normal consequences are not to be taken into account in the assessment of damages except so far as the circumstances to which they are due were the ordinary probable circumstances which might be expected to attend or follow upon the breach of the obligation. This, however, is subject to the exception that, if the party breaking the contract had entered into it in contemplation of special circumstances which would affect the consequences of a breach and accepted those circumstances as conditions under which the contract was to be performed, he is liable for any special loss which may have resulted. **[553]**

Thus in *Madras Railway Co.* v. *Govinda Ram*,[2] where a tailor consigned a sewing machine and cloth to the defendant company for carriage to a certain place where a festival was to be held, and the goods were delivered late with the result that the tailor lost the profit which he had expected to make from the brisk sales during the festival, it was held that, as the company had no notice of the special object which the plaintiff had in view, the plaintiff was not entitled to damages for loss of profits. In a later case, *Fazal Ilahi* v. *East Indian Ry. Co.*,[3] where a person sent a parcel of cracker from Cawnpore to Allahabad for a festival, and owing to the defendant's delay the parcel was not delivered till after the season had passed, and the plaintiff sued for damages, including the profits that he would have earned, the court awarded only the difference between the contract price and that realised on sale. In a suit for damages for the loss of profits against the railways on account of non-delivery of consignment, the plaintiff could be entitled to damages due to loss of business if he had made known to the railways when the consignment was booked that such loss is likely to result from the breach of it.[4] In *Narain Das* v. *Purohit Basant Lal*,[5] a vendee who had agreed to pay off the vendor's creditors, but delayed payment, not knowing of a private arrangement between the vendor his creditor for remission of a part of the debt on payment within a specified period, was held not liable to the vendor for the amount of the expected remission. In *Maksood Alam* v. *Bandhu Sahu*,[6] the plaintiffs who were

1. (1921) 47 Cal. 1027 : 33 CLJ 72 : IC 14 : (1921) Cal. 315; *Lachia Setty & Sons Ltd.* v. *Coffee Board, Bangalore*, AIR 1981 SC 162 (The principle of mitigation of loss does not give any right to the party who is in breach, but it is a concept to be borne in mind by the Court while awarding damages).
2. (1898) 21 Mad. 172.
3. (1921) 43 All. 623 : 64 IC 868 : 19 ALJ 654 : (1922) All. 324.
4. *Union of India* v *Hari Mohan Ghosh*, AIR 1990 Guj. 14.
5. (1913) 18 IC 449.
6. (1938) Pat. 561 : 177 IC 263; **see also** *Chakrapani* v. *Venkataraju*, (1938) Mad. 958 : 48 LW 436 : (1938) MWN 982 : (1938) 2 MLJ 769.

manufacturing bricks on plot of land were restrained from continuing the work by an order under Sec. 144, Cr. P.C. made at the instance of the defendants. While the proceedings were pending the bricks and fuel stored on the spot were damaged or destroyed by a heavy fall of rain. In an action for damages on this account, it was held that the damage due to the rain was too remote.

Where the damages are claimed by the plaintiff on the ground that it suffered loss in production because of the breach of contract by the defendant by not supplying the material, the damages claimed being too remote cannot be awarded.[1]

Where a contract entered into between the plaintiff and the defendant by which the defendant was to supply furniture to the plaintiff, damages claimed by the defendant against the plaintiff for loss of profit on the ground that the defendant did not accord approval in spite of rectifying the defects in furniture notified by the plaintiff cannot be awarded.[2]

The Bombay High Court [3] has considered the claim arising out of Hire Purchase agreements on the basis of the quality of vehicles purchased on hire purchase basis.

Damages for the loss of future profits can be awarded where the foreseeability of damages arising in consequences of breach of contract is possible.

In *Jackson* v. *Royal Bank of Scotland plc,*[4] where the claimant had a business contract with one Economic Bag and their transactions were carried out through the defendant bank, and the Economy Bag terminated its future business with the claimant as a result of disclosure of confidential price information by the defendant bank by mistake resulting in the loss of future profits to the claimant, the House of Lords allowing the appeal of the claimant held that such damages can be claimed.

Mitigating Loss.—As already stated, the first principle on which damages in cases of breach of contract are calculated is that as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to place as far as money can do it, in as good a situation as if the contract had been performed, but this principle is qualified by a second, which imposes on the plaintiff a duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damages which is

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1. *Sarvaraya Textiles Ltd., Kakinada* v. *M/s N. Rajagopal & Co. Coimbatore,* AIR 2005 NOC (AP) : 2005 AIHC 3372 (AP).
2. *International Building & Furnishing Company (Cal) Pvt. Ltd.* v. *Indian Oil Corporation Ltd.,* 2006 (2) CTLJ 287 (Del).
3. *Murlidhar Chiranjilal* v. *Harischandra Dwarkadas,* AIR 1962 SC 366 : (1962) 1 SCR 653 : 1962 (1) SCJ 462; *Tata Eengineering & Locomotive Co. Ltd.* v. *Bharat Mining Corporation,* AIR 1980 Bom. 168.
4. [2005] 2 All ER 71 (HL)

due to his neglect to take such steps. These two principles also follow from the law as laid down in Section 73 read with the Explanation thereto.[1] In *Jamal* v. *Moolla Dawood*,[2] the Judicial Committee observed that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum, which is due to his own neglect.[3] Where the plaintiff claimed damages on the ground that he suffered loss in production owing to the failure of the defendant in supplying the goods, he cannot be awarded damages unless it is established that he has made necessary efforts in the mitigation of damages.[4] Where the second defendant principal repudiated the contract purporting to be entered into on his behalf by his agent in breach of warranty of authority relating to the purchase of a race horse, the plaintiff seller having kept the horse without disposing it and the horse having put down on account of contracting peritonitis, the claim for damages against the agent cannot be allowed since the seller's decision not to dispose off the horse and its subsequent death are not independent of the breach of authority.[5] Thus in a case of sale of goods, if the vendee refuses to take delivery, the vendor should wait a reasonable time and then resell the goods. If he makes unreasonable delay, and loses much because of a falling market, he can recover only the difference between the contract rate and the rate on the date of breach.[6] In *Ramgopal* v. *Dhanji*,[7] in the case of an anticipatory breach of a contract by a mill-owner to gin cotton for a cotton merchant during a period of six months the latter was held entitled to recover damages from the mill-owner for his estimated loss of profit. It was further held that it was not incumbent on him to buy and tender cotton for ginning, which the other side had already announced he would not gin for him. He cannot increase his damages by his own default or his own wrong. The rule as to mitigation of damages only requires a reasonable course of action must be taken and does not require the plaintiff to do anything unreasonable or of a speculative nature.[8] The seller is required to act as a reasonable man and take reasonable steps to minimise the loss.[9]

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1. *Murlidhar Chiranjilal* v. *Harischandra Dwarkadas*, AIR 1962 SC 366 : (1962) 1 SCR 653 : 1962 (1) SCJ 462; *Tata Eengineering & Locomotive Co. Ltd.* v. *Bharat Mining Corporation*, AIR 1980 Bom. 168.
2. (1916) AC 175 : 43 Cal. 493 : (1915) PC 48. **See also** *Finlay* v *Kirk*, (1929) 1 KB 400.
3. *Karim Bux* v. *Debi*, (1933) ALJ 670 : (1933) All. 511. **See** *Ghulam Hyder* v. *Iqbal*, (1939) Lah. 118; *Timblo Irmaos Ltd.* v. *J.A.M. Sequeira*, AIR 1977 SC 734 : 1977 (2) SCR 451 : (1977) 3 SCC 474; *M. Nanjappa* v. *Karnataka State Transport Appellate Tribunal & Ors.*, AIR 1975 Kant. 238.
4. *Sarvaraya Textiles Ltd., Kakinada* v. *N. Rajagopal & Co., Coimbatore*, 2005 AIHC 3372 (AP) : AIR 2005 NOC (AP) 571 : 2005 (3) ALD 636 : 2005 (4) ALT 405.
5. *Nimmo* v. *Habton Farms*, (2003) 1 All. ER 1136.
6. *Harichand* v. *Ghasho*, (1925) 49 Bom. 25 : 26 Bom. LR 921 : 86 IC 521 : (1925) Bom. 28; *Chidambara Nadar* v. *Vadivelu Nadar*, (1936) Mad. 47 : 159 IC 1031 : 43 LW 208 : (1935) MWN 1233.
7. (1928) 55 Cal. 1048 : 55 MLJ 248 : 32 CWN 1117 : 30 Bom. LR 1389 : (1928) MWN 924 : 28 LW 55 : 111 IC 480 : (1928) PC 200.
8. *W.C. Binns* v. *W&T Avery*, (1934) 61 Cal. 548 : 38 CWN 908 : 152 IC 117 : (1934) Cal. 778; *Thawar Das* v. *Union of India*, AIR 1955 SC 468 : 1955 SCJ 445 : 1955 (2) SCR 48.
9. *Jagmohandas Uurijinandas* v. *Nusserwanji Jehangir Khambatta*, (1902) ILR 26 Bom. 244.

Where a person receiving deferred benefits under occupational pension scheme has transferred to a personal pension plan of the Mutual Life Assurance Society on the negligent and wrong advise of the financial advisor and received shares on the demutualisation of the Assurance Society, the financial advisor for the purpose of compensating the loss suffered by the said person cannot insist to credit the value of the shares to him.[1]

Where the conduct of the plaintiff shows only a desire to take advantage of the breach, he will be entitled only in nominal damages. In a case where goods consigned had been lost in transit, the conduct of the plaintiff in not cooperating with the consignees in the matter of identifying certain goods, which had been recovered, was taken into account in fixing damages.[2]

CONTRACTS OF SERVICE.—The principle that a person must do what he can to mitigate damages applies to a contract of service. While it is true that a person cannot claim as damages any sum, which is due to his own neglect, he is under no obligation to injure himself or his character, business or property to reduce the damages payable by the wrong-doer. The question what is reasonable for a plaintiff to do in mitigation of damages is not a question of law but one of fact in the circumstances of each particular case, the burden of proof being on the defendant.[3] Section 73 does not require to get relief by way of damages the employee must prove that other jobs were not available. The onus is on the employer to show that the employee ought reasonably to have taken certain mitigating steps. The employee is not bound to take up just any and every employment that may be available to him. He is not expected to accept an employment in a lower status nor will he be expected to accept employment in a different part of the country or in a different type of work.[4]

Damages for breach of agreement to serve the State.— Where a student executed a bond in favour of State Government agreeing to serve the State Government after prosecuting his studies in Electrical Engineering Course in U.S.A. at the expense of the Government and committed breach by not returning to India is liable to pay compensation to the Government.[5]

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1. *Naedler Financial Services Ltd.* v. *Taber,* (2002) 3 All. ER 501.
2. **See** *Arjun Das* v. *Secretary of State,* (1925) Cal. 737 : 85 IC 786; *Weld & Co.,* v. *Harcharan Das,* (1921) Lah. 316 : 4 LLJ 317.
3. *Sundaram Chettiar* v. *Chockalinga,* (1938) MLJ 857 : 47 LW 803 : (1938) MWN 653; *Birendra Nath* v. *F.C.I.,* AIR 1978 Cal. 362; *Push Ram* v. *Modern Construction Co. (P) Ltd.,* AIR 1981 Raj. 47 : 1980 WLN 508. (Contract for specified period—Breach—suit for damages for unexpired period maintanable).
4. *K.G. Hiranandani* v. *Bharat, Barrel & Drum Mfg. Co. (P) Ltd.,* AIR 1969 Bom. 373 : 1969 Lab. IC 1324.
5. *M. Sham Singh* v. *State of Mysore,* AIR 1972 SC 2440, 2443; (1973) 2 SCC 303 : 1973 UJ 322.

74. Compensation for breach of contract where penalty stipulated for.—[1][When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception.—When any person enters into any bailbond recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the [Central Government][2-3] or of any [State Government][4-5] gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations

(a) *A* contracts with *B* to pay *B* Rs. 1,000 if he fails to pay *B* Rs. 500 on a given day. *A* fails to pay *B* Rs. 500 on that day. *B* is entitled to recover from *A* such compensation, not exceeding Rs. 1,000 as the Court considers reasonable.

(b) *A* contracts with *B* that, if *A* practises, as a surgeon within Calcutta, he will pay *B* Rs. 5,000. *A* practises as a

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1. These paragraph were substituted for the first paragraph of S. 4 of the Indian Contract Act (Amendment Act, 1899 (VI of 1899).

2-3. These words were substituted for the words "Government of India" by the Government of India (Adaptation of Indian Laws) Order, 1937.

4-5. These words were substituted for the words "Local Government", Ibid.

surgeon in Calcutta. *B* is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.

(c) *A* gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) *A* gives *B* a bond for the repayment of Rs. 1,000 with interest at 12 per cent at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and *B* is only entitled to recover from *A* such compensation as the Court considers reasonable.

[1][(e) *A*, who owes money to *B*, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and *B* is only entitled to reasonable compensation in case of breach.]

[2][(f) *A* undertakes to repay *B* a loan of Rs. 1,000 by five equal monthly instalments with a stipulation, that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) *A* borrows Rs. 100 from *B* and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall becomes due. This is a stipulation by way of penalty.]

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1. The illustration (a) and (e) were inserted by S. 4(2) of the Indian Contract Act Amendment Act, 1899 (VI of 1899)).
2. Illustration (f) and (g) were inserted by S. 4 (2) of the Indian Contract Act (Amendment Act, 1899 (VI of 1899)).

Legislative Changes.—By Act VI of 1899, words "Or if the contract contains any other stipulation by way of penalty" were added after the words, "in case of such branch," and the words "Or as the case may be, the penalty stipulated for" at the end of the first paragraph. The Explanation and Illustrations (*d*) to (*g*) were also added by the same Act.

The object of the Legislature in framing the original section was to abrogate the distinction obtaining in English law between liquidated damages and penalty, as illustrated in *Kamble* v. *Farren,*[1] and other cases. But on a strict construction of the section as it then stood, it was held in some cases [2] that the section could not apply except where a certain sum was named in the contract; for instance, it was held inapplicable in cases where the contract provided for interest on default, whether retrospectively from the date of the loan or prospectively after default. It was with a view to remedy this that the words above mentioned were added to the section by the Amending Act of 1899. As amended, the section will embrace all cases in which persons should be relived from the strict letter of their bonds for the reason that the provision is of a penal character. The section as amended has the effect of getting rid of all subtle technicalities in the application of the equitable principle regulating the duty of the court to relieve against penalties.[3]

It is not correct that a person who commits a breach of contract incurs any pecuniary liability or that the other party who complains of the breach has any amount due to him from the former. The only right, which he has, is to go a court and recover damages. Damages are the compensation, which the court of law gives to a party for the injury he has sustained. He does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the court. So no pecuniary liability arises till the court has determined that the party complaining of the breach is entitled to damages. In assessing damages the court is not ascertaining a pecuniary liability, which already existed. The court in the first instance must decide that the defendant is liable and then proceed to assess what that liability is. A claim for damages for breach of contract is, therefore, not a claim for a sum properly due and payable.[4] Where the defendant has agreed to transport the consignment of rice of the plaintiff and the vehicle carrying the consignment having been met with accident and the consignment looted, the plaintiff is entitled for a reasonable compensation although the agreement between them provided that the defendant shall pay compensation of three times of the issue of price which amounts to penalty.[5]

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1. (1823) 130 ER 1234 : 31 RR 366; *Fateh Chand* v. *Balkishan,* AIR 1963 SC 1405 : 1964 (1) SCJ 187 : 1964 (1) SCR 515.
2. *Baij Nath* v. *Shah Ali,* (1887) 14 Cal. 248.
3. *Venkatramiah* v. *Subramania,* (1917) 37 IC 799.
4. *Union of India* v. *Raman Iron Foundary,* AIR 1974 SC 1265 : (1974) 2 SCC 231.
5. *Pranab Kumar Saha* v. *Food Corporation of India,* 2002 (4) Civil LJ 590 (Gau).

Although the clause in the contract may amount to penalty, the plaintiff can enforce it, but not beyond the amount of his actual loss'. In *Jobson* v. *Johnson,*[1] the defendants agreed with the plaintiffs for the purchase of 62, 566 shares in a foot ball club for a price of £ 3, 51, 688 payable by initial payment of £ 40,000 and six half yearly instalments of £ 51, 948. The agreement contained a clause to the effect that if the defendant defaulted on the payment of the second or any subsequent instalment he was requested to transfer the shares back to the plaintiffs. When the defendant defaulted after paying £ 1,40,000 the plaintiff sought to enforce the clause for the retransfer of shares. It was held that there was no distinction between penalty, which required payment money, and penalty the retransfer of property since in each case the consequences of contractual term being identified as a penalty clause. Further it was held that the clause in the contract cannot be struck down merely because it is penalty clause but its enforcement cannot, be beyond the amount of plaintiff's loss.

A party who suffered a loss on account of breach of contract is entitled to recover damages only to the extent of the actual loss suffered by him although the agreement provides for a fixed sum of liquidated damages to be awarded in the event of breach of contract.[2]

Section 74 eliminates the somewhat elaborate refinements made at English Common Law in distinguishing between stipulation providing for payment of liquidated damages and stipulation in the nature of penalties. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties; a stipulation in a contract *in terrorem* is a penalty and the court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. Where there is contract between the parties providing specific provision for payment of penalty on account of breach of contract Sec. 74 of Contract Act authorise the plaintiff to demand penalty but however when the matter comes to court, the claim based on the agreement would not be allowed, unless the court satisfies that the amount claimed is reasonable.[3] The Indian Legislature has cut across the web of rules and presumptions under the English Common Law by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach and stipulations by way of penalty. According to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely, the outside limit. It makes no difference that the claim is for liquidated damages. It stands on the same footing as a claim for

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1. (1989) All. E.R. 621.
2. *F.A.C.T. Engineering Works* v. *Kerala Industries,* 2002 (1) Civil LJ 681 (DB) (Ker).
3. *Parasram Agarwal* v. *Food Corporation of India,* AIR 1994 Ori. 290, 292.

unliquidated damages.[1] The section applies not only to cases where the aggrieved party claims relief as plaintiff but also to cases where upon breach of the contract the amount received under it is sought to be forfeited.[2] A penalty covers but does not assess the damage and section 74 authorises the court to award compensation not exceeding the amount of penalty stipulated for.[3]

Section 74, which is of general application to all contracts, is not attracted to the case of amounts due on negotiable instruments for the reason that the Negotiable Instruments Act itself contains a specific provision in regard to the same in Section 117.[4]

Scope.—With regard to the explanation to the section, it has been held in *Devendra Nath* v. *Sambhu Nath*,[5] that, though it was added only in 1899, yet, as it only explains and illustrates the section as it had been already, it is applicable to contracts entered into before 1899.

The Judicial Committee have held that the effect of Section 74 is to disentitle a party to recover *simpliciter* the sum fixed in the contract, whether penalty or liquidated damages, and that the plaintiff must prove the damages suffered by him.[6] Section 74 speaks of the measure of damages in two classes, firstly where the contract says that an amount has to be paid in case of a breach and secondly where the contract provides for any other stipulation by way of penalty. In the second class of cases, the measure of damages is reasonable compensation not exceeding penalty stipulated for.[7]

The following features of the section may be noted :—

1. When a sum is named in the contract as payable on breach, such a provision is deemed to be by way of penalty. This is clear from the juxtaposition of the words "Any other stipulation."[8]

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1. *Fateh Chand* v. *Balkishan Das*, AIR 1963 SC 1405 : 1964 (1) SCJ 187 : 1964 (1) SCR 515; *State of Orissa* v. *Calcutta Co. Ltd.*, AIR 1981 Ori. 206.
2. *Fateh Chand* v. *Balkishan Das*, overruling, AIR 1952 Bom. 310 and 24 MLJ 388 (FB).
3. *Savamalai Estates Ltd.* v. *Kannayan*, (1978) 1 MLJ 424 : 91 LW 225.
4. *Tirupagari Tayaramma* v. *Ramanjaneya Merchantile Co.*, AIR 1977 AP 205.
5. (1925) 3 Pat. 657 : 84 IC 677; *Thakur Tajeswar* v. *Lakhan*, (1923) 2 Pat. 296 : 83 IC 290 : (1923) Pat. 231.
6. *Bhai Panna Singh* v. *Bhai Arjun Singh*, (1929) PC 179 : 117 IC 485 : (1929) ALJ 791 : 31 Bom. LR 909 : 33 CWN 949 : (1929) MWN 658 : 30 LW 281 : 57 MLJ 323 (PC); Cf. *Banku Bihari* v. *Galstaun*, (1922) 27 CWN 77 : 21 ALJ 9 : 69 IC 163 : 1922 PC 339 : 47 MLJ 145 (PC); *Kanhaya Lal* v. *Bishen Das*, (1934) Lah. 59 : 149 IC 1119; *Surendra Nath* v. *Lohit Chandra*, AIR 1975 Gau. 58; *New India Assurance Co. Ltd.* v. *Food Corporation of India*, (1983) 96 LW 116 (SN).
7. *Dharamchand Soni* v. *Sunil Ranjan Chakrabarty*, AIR 1987 Cal. 323; *State of Orissa* v. *Calcutta Co. Ltd.*, AIR 1981 Ori. 206.
8. See *Krishna Shetti* v. *Gilbert Pinto*, (1919) 42 Mad. 654 : 9 LW 431 : 50 IC 898. (*Quaere* whether the term penalty in the section extends beyond stipulation intended to secure payments of money).

2. Under no circumstances, will compensation in excess of the named amount, be given.

3. In all cases where the contract contains a penal provision against default, some compensation must be given, irrespective of whether damages has been actually suffered or not.[1]

4. The question whether a clause in a contract is penal has to be decided on the terms and circumstances at the time of making the contract and not at the time of breach.[2]

5. Under Section 74, the party claiming compensation need not prove that he has actually suffered any loss or damages. He is entitled to claim reasonable compensation solely because breach of contract has been committed by the other party and the parties have agreed to pay a particular sum whether called damage or penalty in the event of breach, the only restriction imposed by the law being that the reasonable compensation to be assessed or computed by the court cannot exceed the amount imposed by the parties.[3] Although the court has wide discretionary power to decide, what is reasonable compensation in the matter of assessment of damages but the decree awarding damages by the court can in no case exceed the amount previously agreed upon by the parties.[4]

For claiming damages, there must be proof as to extent of loss or damages under the agreement. The penal clause when based on pre-estimate or whims and surmises of parties is unenforceable.[5] In a suit for the recovery of damages of Rs. 11 lakhs together with an interest @ 24% per annum which is said to have been caused on account of breach of contract by the defendant vessel, no action lies unless there is a proof to show that the charter was by demise whereby the disponent owner was giventhe position and control of the vessel.[6]

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1. For a masterly exposition of the scheme of the section, **see** *Muthu Krishna* v. *Sankaralinga,* (1912) 36 Mad. 229 : 18 IC 417 : 24 MLJ 135; *Habibun* v. *Baldeo,* (1934) Pat. 16 (Reasonable compensation question of fact not to be agitated in second appeal); *Khunni Lal* v. *Kalimuddin,* (1911) 10 IC 572; *Ramnath Zutshi* v. *The Secretary of State,* (1912) 13 IC 46 (No necessity to prove actual loss suffered); *Syam Peary* v. *Eastern Mortgage and Agency Co.,* (1917) 40 IC 865; *Meyappa Chetty* v. *Nachammal,* (1929) Mad. 783; *Munna Lal* v. *Rahamatullah,* (1937) ALJ 1385; *Satyanarayan Amolak Chand* v. *Vithal Narayan,* AIR 1959 Bom. 452.
2. *Nanjibhai Karsanji* v. *Ramkishan Sunderlalji,* 1976 MPLJ 650.
3. *Special Officer* v. *Thirumalaiswamy,* (1973) 2 MLJ 361; *Anand Constn. Works* v. *State of Bihar,* AIR 1973 Cal. 550.
4. *Macbrite Engineers* v. *Tamil Nadu Sugar Corpn. Ltd.,* AIR 2002 Mad 429 (DB) : 2002 (3) Arbi. LR 368 : 2003 (1) Civil LJ 71 : 2002 (2) Mad. LJ 636 : 2003 (1) Mad. LW 420.
5. *General Manager Taluka Agricultural Produce Co-op. Marketing Ltd.* v. *Arbitrator, Dy. Registrar of Co-op. Societies, Raichur District & Ors.,* AIR 1998 Karn. 354 : ILR 1998 Kar. 2946 : 1998 (3) Kant. LJ 527.
6. *Epoch Enterrepots* v. *M.V. Won Fu,* AIR 2003 SC 24, 32 : 2002 (7) Supreme 415 : 2002 (3) Arb. LR 683 (SC).

Analysis of section.—In a Calcutta case,[1] Ameer Ali, J, observes: "To my mind, the following is the intention of the Legislature (1), the plaintiff must prove his damage in a general sense (2). The contract made by the parties estimating their damages is in itself evidence. (3) If there is no other evidence of damages, I can conceive of certain cases where this evidence alone will be considered sufficient, nor do I think that the Judicial Committee intended by anything said in *Panna Singh* v. *Firm Bhai Arjun Singh*,[2] to exclude such a possibility. (4) The sum named is not conclusive evidence, that is to say, if there is other evidence or circumstances showing that is was excessive, the court will not consider itself bound by it. (5) If on the other hand the other evidence and circumstances indicate that the damages equals or may equal or is likely to exceed the amount named the court will abide by it. (6) Lastly, where other evidence shows that the sum named is unreasonable, the plaintiff will have to prove his damages irrespective of the figure."

Applicability—Decrees.—All the High Courts except the Patna High court[3] are agreed that the provisions of Sec. 74 are applicable to decrees of court made by consent of parties or on compromise and that the court have, even as executing courts, power to relieve the parties from stipulations, by way of penalty contained in such decrees.[4] Although a consent decree has all the force of a decree *in invitem*, so far as its binding character is concerned, it does not stand on a footing higher than a contract, so far as its legal character is concerned. As observed by Sir Lawrence Jenkins, J.,[5] a contract of parties is nonetheless a contract because there is superadded to it the command of the judge; it is still a contract of the parties. If the matter had rested in agreement, the court could have relieved, as the right to relief will be an incident of the agreement, and it can make no difference that the agreement was recorded and a decree passed in accordance therewith. The court in passing the decree has come to no conclusion of its own and has merely accepted the compromise.

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1. *Mahadeo Prasad* v. *Siemens (India) Ltd.*, (1934) 60 Cal. 1379 : 149 IC 858 : (1934) Cal. 285; *Pasalpudi Brahmayya* v. *Teegala Gangaraju*, AIR 1963 AP 310; *Pravadayat* v. *Ramkumar*, AIR 1956 Cal. 41.
2. (1929) 117 IC 485 : 1929 PC 179.
3. *Jitendranath* v. *Mt. Jasoda*, (1926) Pat. 122 : 92 IC 617. **See** *Deepchand Mini* v. *Ticamchand Mini*, AIR 1974 Cal. 222 : 1974 (78) CWN 478.
4. *Jaya Rao* v. *Venkatanarayana*, (1925) Mad. 264 : 80 IC 925; *Jamir Fakir* v. *Ram Lal*, (1917) 32 IC 697; *Mohiuddin* v. *Kushmiro Bibi*, (1933) 55 All. 334 : (1933) ALJ 132 : 142 IC 419 : (1933) All. 252 (FB); *Surendra Nath* v. *Secy. of State*, (1920) Cal. 716 : 57 IC 643; *Balambhat* v. *Vinayak*, (1911) 35 Bom. 239; *Krishna Bai* v. *Hari Gobind*, (1907) 31 Bom. 15; *Nand Rani* v. *Durga Dass*, (1924) 2 Pat. 906 : 82 IC 505; *Ganesh Chandra* v. *Chatandramohan*, (1925) Cal. 199 : 84 IC 730 (Separate suit wherein this plea was raised); *Jwala Ram* v. *Mathura Das*, (1931) Lah. 696 : 132 IC 580; *Ayub Fatima* v. *Jhao Lal*, (1934) 9 Luck 387; **see** further *Krishnamurthi* v. *Appanna*, (1976) 2 An. WR 103; *Bahadur Singh Gaindsingh Gupta* v. *Gulab Devi Onkar Prasad*, 1975 MPLJ 470.
5. *Kusadhaj Bhakta* v. *Broja Mohan*, (1916) 43 Cal. 217 : 19 CWN 1228 : 31 IC 13; *Wentworth* v. *Bullen*, (1829) 109 ER 313.

It has accordingly been observed that Sec. 74, viewed in its proper perspective, does not involve any interference with the decree when applied to a compromise on which the decree is passed.[1]

The general rule that the court has no power to vary the terms of a compromise decree without the consent of the parties to it is subject to certain exceptions. One such exception is that a court of equity can relieve against a forfeiture clause inserted *in terrorem* by extending the time for payment of money without the consent of the decree-holder provided that time is not of the essence of the contracts.[2]

Even though a decree is based on a compromise or an agreement between the parties it does invite the exercise of adjudicatory powers and conclusively determines the rights of the parties with regard to the controversy. Such consent decree in terms of Sec. 2 of C.P.C. remains as decree as a result of adjudication by the court, and Sec. 74 has no application.[3]

The question of penalty arises usually where the decree provides for payment of a large sum in default of payment of a smaller sum named as payable by a certain date.

In *Chunna Mal* v. *Hanuman Baksh,*[4] Jai Lal, J., held after an examination of the case law that the true test for deciding whether the provision for payment of a larger sum on default by the judgment-debtor is or is not a penal clause, depends on whether the larger sum was due to the decree-holder at the time of the compromise decree, and whether the decree-holder is simply withdrawing a concession made or attempting to get more than is due to him. In a later case of the same High Court, this test was a applied, and a decree-holder who had stipulated for a lease of property in lieu of a certain amount, and in default for execution for the whole amount, was allowed to proceed with the execution of the decree, on the ground that he was only withdrawing a concession made by the compromise decree.[5]

Similarly it has been pointed out in a ruling of the Madras High Court, that the test to decide whether a default clause in a compromise decree is a penalty is to see whether it is a liability imposed on the defendant to pay the decree-holder something more than he would be entitled to under the decree.[6]

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1. Per Niamatullah, J., in *Mohiuddin* v. *Kushmiro Bibi,* (1935) 55 All. 334. **But see** *Dayaram Gidumal* v. *Nabibux,* (1929) Sind 98 : 116 IC 557, referring to *Ex parte* Burden, (1881) 16 Ch. D 675.
2. *Deepchand Mini* v. *Ticamchand Mini,* AIR 1974 Cal. 222 : 78 Cal. WN 478.
3. *Punjab Wollen Textile Firm* v. *Bank of India,* AIR 1992 P&H 158, 161 : 1992 (1) ILR (P&H) 437.
4. (1927) Lah. 659 : 103 IC 805; *Mitha* v. *Remal Das,* (1937) Lah. 828; *Rama* v. *Saptha,* AIR 1943 Mad. 598.
5. *Jhanda Singh* v. *Piara Singh,* (1932) Lah. 642 : 140 IC 225.
6. *Subbayya* v. *Peddayya,* (1937) Mad. 234 : 169 IC 345 : 44 LW 832; **see also** *Ex-parte Burden,* (1881) 16 Ch.D. 675; *Kishen Prasad* v. *Kunj Behari,* (1926) All. 278.

The same principles have been affirmed by the Bombay and Nagpur High Courts.[1]

APPLICATION OF THE TEST—The *modus operandi* for elucidating facts necessary to apply the test above mentioned is that if no information can be obtained either from the compromise or the decree the parties can be allowed to produce evidence as to the extent of the defendant's liability, but if the compromise and the decree are clear, no other evidence is permissible to construe them.[2] In *Subbayya* v. *Peddayya,*[3] though there was no decree in terms for the larger amount claimed, the court held on the language of the decree that there was an agreement to pay the full amount as claimed if the defendant did not fulfil the condition on which the concession of a reduced sum had been made. In an earlier Madras case, the court remanded the matter for inquiry as to whether the larger sum was actually due to the decree-holder.[4] It may be observed that in English law the reservation of a right to have a full payment of money actually due on an existing contract, should there be a failure to pay a smaller sum on a day certain, is not a penalty.[5]

Another class of cases in which the plea is advanced relates to decrees providing for payment of the decretal amount in instalments with a superadded clause that in case of default of one instalment, the entire balances shall become payable. Though the reports contain rate instances of relief by courts in such case,[6] it is undoubted law that such a stipulation is not penal; for the word penalty can be used only if failure to comply with a condition puts the defaulter in a worse position than he would have been if there had been no agreement at all and make him liable to pay a larger sum than that for which he would have been liable.[7]

Forfeiture of deposit.—[See also comments on Section 73: Earnest money.] It cannot be laid down as an invariable rule that forfeiture of earnest money under a contract of sale of property-movable or immovable does not fall under Section 74. Forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty but if forfeiture is of the nature of a penalty Section 74 would apply.[8]

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1. *Burjorji* v. *Madhav Lal,* (1934) 58 Bom. 610 : 36 Bom. LR 798 : 152 IC 574 : (1934) Bom. 370; *Hiralal* v. *Durga Bai,* (1937) Nag. 413. **See also** *Dayaram Gidumal* v. *Nabibux,* (1929) Sind 98 : 23 SLR 375 : 116 IC 577. **But see** *Ahmed Bux* v. *Balchand,* (1938) Sind 185 : 177 IC 925.
2. *Chunna Mal* v. *Hanuman,* (1927) Lah. 659 : 103 IC 805; In *Burjorji* v. *Mahdav Lal,* (1934) 58 Bom. 610 (the compromise agreement provided for the defendants submitting to decree for the suit amount, and the Court inferred that was the original extent of liability).
3. (1937) Mad. 234 : 169 IC 345 : 44 LW 832.
4. **See** *Achayemma* v. *Papamma,* (1909) 2 IC 850; In *Chunna Mal* v. *Hanuman,* (1927) Lah. 659 : 103 IC 805 the Court made a similar remand.
5. *Thompson* v. *Hudson,* (1869) 4 HL 1; *Ford* v. *Chesterfield,* (1854) 52 ER 416.
6. **See** for instance *Narsimha Gopal* v. *Balvant,* (1922) 46 Bom. 463 : (1922) Bom. 170 : 64 IC 570.
7. *Ko Kyan Swe* v. *U. Ba,* (1935) Ran. 341 : 159 IC 801.
8. *Maula Bux* v. *Union of India,* AIR 1970 SC 1955 : (1970) 2 SCJ 249 : 1970 (l) SCR 929 : (1969) 2 SCC 554.

Since the stipulation for forfeiture of earnest money is part of a contract, which is valid, and enforceable it cannot be enforced where the contract is void on account of parties being under mutual mistake as to a matter essential to the agreement.[1]

Unless a concluded contract comes into existence according to the provisions of Indian Contract Act no forfeiture of earnest money is possible.[2]

Where the conditions of a tender provided for deposit of earnest money @ 10% and the validity of the offer was for a period of 45 days from the date of tender and no changes to be made during that period, withdrawal of the offer by the appellant before that period on the ground that the final sale results were not declared within 30 days as per the terms of the tender, is not permissible and the respondent is entitled to forfeit the earnest money.[3]

Where the petitioner revoked his offer before opening of the tender and also after the expiry of validity period of bid, he is entitled to seek refund of earnest money paid by him unless it is prohibited under tender conditions.[4]

Where the agreement permitted the appellant purchaser of a flat to cancel the allotment and seek the refund of money paid by him, the respondent seller in the event of breach of contract on the part of the appellant purchaser is entitled to forfeit the earnest money paid by the appellant.[5]

The purchaser of goods committing breach of contract cannot be prevented from seeking the refund of advance paid by him when the contract does not provide the forfeiture clause.[6]

However, where there was a loan agreement by which petitioner lender has agreed to finance for the purchase of vehicle by the respondent borrower, the forfeiture clause in the agreement authorising the creditor to forfeit the amount already paid on default of payment of subsequent installments was held by the court as bad in law and the amount paid must be accounted and credited into the account of the borrower and the creditor's right is only to the extent of recovery of balance of amount.[7] Where the plaintiff contractor has

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1. *Tarsem Singh* v. *Sukhminder Singh*, AIR 1998 SC 1400, 1404 : 1998 (1) Supreme 275.
2. *Yogesh Mehta* v. *Custodian appointed under the Special Court*, 2007 (1) CTLJ 84 (SC).
3. *State of Maharastra* v. *A.P.Paper Mills Ltd.*, AIR 2006 SC 1788 : (2006) 4 SCC 209 : 2006 (3) Supreme 309 : 2006 (1) CTLJ 284 (SC).
4. *N.K.Giriraja Shetty* v. *N.K.Parthasarathy Setty*, AIR 2006 Kant 180 : 2006 AIHC 1720 (Karn) : 2006 (3) AIR Karn R 136 : 2006 (3) KantLJ 1.
5. *Saurabh Prakash* v. *DLF Universal Ltd.*, 2007 (1) CTLJ 71 (SC).
6. *Baldev Steel Ltd.*, v. *Empire Dyeing & Mfg. Co. Ltd.*, AIR 2001 Delhi 391,398 : 2001 (92) DLT 471.
7. *Tarun Bhargava* v. *State of Haryana*, AIR 2003 P&H 98, 112 : 2003 (1) Civ. CR 758 (P&H) : 2003 (2) Arbi LR 645 : ILR (P&H) 2003 (1) 26.

stopped the work relating to construction of a road on the ground of non-payment of additional charges over and above the contractual rates, forfeiture of the payment to the plaintiff by the defendant is proper in view of the breach of contract committed by the plaintiff by not resuming the work.[1] In an auction of a plot by the respondent Delhi Development Authority where the appellant being the highest successful bidder and paid an earnest money of Rs. 7,33,750/- and when the tender granted in favour of the appellant was found to be contrary to the terms and conditions of the auction, the D.D.A. is entitled to forfeit the earnest money on the ground that holding a fresh auction would involve extra expenditure.[2]

Whether the amount paid at the time of contract of sale was treated as advance or deposit or earnest money. Section 74 will be attracted. Notwithstanding the clause for the forfeiture of the said amount the party in breach will be entitled only to a reasonable compensation subject to the maximum amount mentioned in the agreement of sale.[3] A Bombay decision is of the view that Section 74 deals with the case of recovery of compensation for breach of contract and not a case in which money has been paid by way of earnest.[4] Deposit is in the nature of a guarantee for the due performance of the contract, and where the contract falls through, owing to the fault of the party making the deposit; the aggrieved party is entitled to retain it. Where the State Government, which had taken a security deposit for the execution of a work within a certain time, had itself committed a breach of the contract the security deposit of the contractor could not be forfeited.[5] Where the appellant contractor, having entered into a mining lease contract relating to extraction of sand and is said to have failed to do so due to certain omissions and commissions of the State Authorities, the respondents state cannot forfeit the security amount on the ground that the appellant has agreed to such contract with open eyes.[6] However where a work contract provides a clause entitling the Government to rescind the contract and forfeit the security money deposited by the contractor in the event of breach, the contractor abandoning the work renders himself liable to pay compensation amounting to the whole of security deposit.[7] Failure to deposit the balance of auction bid money within stipulated period would not result in the forfeiture of one fourth of bid money

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1. *State of Karnataka* v. *M/s. Stellar Construction Co.*, AIR 2003 Kant. 6 (18) (DB) : 2002 AIR Kant HCR 2732 : 2003 (1) Arbi LR 40 : 2002 (5) Kam. LJ 475.
2. *G. Ram* v. *Delhi Development Authority*, AIR 2003 Delhi 120, 125 (DB) : 2002 (98) DLT 850 : 2002 (64) DRJ 140.
3. *Natesa Mudaliar* v. *Sulochana Ammal*, (1981) 2 MLJ 215; **see also** *Dharam Chand Soni* v. *Sunil Ranjan Chakrabarty*, AIR 1981 Cal. 323 : 83 Cal. WN 858 ; *Meenakshinada Dikshitar* v. *Murugesa Nadar*, (1969) 1 MLJ 474.
4. *Dinanath Camodhar* v. *Malvi Mody*, (1930) Bom. 213 : 32 Bom. LR 272.
5. *Hind Construction Contractors* v. *State of Maharashtra*, AIR 1979 SC 720 : (1979) 2 SCC 70 : (1979) 2 SCR 1147.
6. *Jai Durga Finvest Pvt. Ltd.* v. *State of Haryana*, AIR 2004 SC 1484.
7. *State of Gujarat* v. *Dahyabhai Zaverbhai*, AIR 1997 SC 2701 : (1997) 9 SCC 34.

unless the terms of the contract are sufficiently explicit and made known to the other party and also in the absence of evidence to show that deposited bid money was by way of earnest money to guarantee the fulfilment of the term of the contract.[1] What is known, as a deposit must possess a twofold character.[2] It must be a part payment, and next, it must be of the nature of money 'staked,' i.e., given as guarantee of performance. As has been repeatedly pointed out, deposit or earnest money is part of the purchase price when the transaction goes forward: it is forfeited if the transaction falls through by reason of the fault or failure of the vendee.[3] Therefore, forfeiture of earnest money by a defaulting purchaser is not a penalty;[4] but a provision for payment of a lump sum in addition will be penal.[5] It must, of course, be remembered that whether a particular payment is a deposit strictly so called, depends on the intention of the parties. In certain cases, the purchaser may, to oblige the vendor, pay some of the purchase money in advance. It cannot therefore be laid down as

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1. 1997 (3) Supreme 238 : 1997 (1) Arb.LR 626 : 1997 (2) CLT 121 (SC); *Bhanwarlal* v. *Babulal,* AIR 1992 MP 6, 12.
2. *Varadarajaperumal* v. *Muniappa,* (1929) 57 MLJ 785 : 30 LW 503 : (1929) Mad. 817; *Natesa* v. *Appavu,* (1915) 38 Mad. 178 : 24 MLJ 488 (FB) (Specific clause for forfeiture); *Variety Body Builders* v. *Union of India,* AIR 1973 Guj. 256; **but see** *Fateh Chand* v. *Balkishan Das,* AIR 1963 SC 1405 : (1963) (1) SCWR 755 : (1964) (1) SCA 174 : (1964) 1 An. WR (SC) 60 : (1964) 1 MLJ (SC) 60 : (1964) 1 SCJ 187 : 1964 (l) SCR 515 : ILR 38 Mad. 178 overruled); *Gurbax Singh* v. *Begum Rafiya,* AIR 1979 MP 66 : 1979 MPLJ 96; *Meena Krishna* v. *Murusesa Nadar,* (1969) 1 MLJ 474; *Marimuthu* v. *Ramaswamy,* AIR 1979 Mad. 189 : (1979) 1 MLJ 343; *De-smet (India) P. Ltd.* v. *B.R. Industrial Corpn.,* AIR 1980 All. 253; *Maula Bux* v. *Union of India,* AIR 1970 SC 1955 : 1970 (1) SCR 929 : (1969) 2 SCC 554; *Sri Hanuman Cotton Mills* v. *Tata Air Craft Ltd.,* AIR 1970 SC 1986 : (1970) 2 SCJ 420 : (1970) 2 SCA ; *Bali Ram* v. *Bhupendra Nath,* AIR 1978 Cal. 559; *Union of India* v. *K.N. Rao,* AIR 1976 SC 626; *Chunilal Mehta* v. *S.C.S. & Co. Ltd.,* 65 Bom. LR 287 : 1963 MPLJ 449 : 1963 SCR 549 : (1961-62) FJR 478 : 1962 (C) LLJ 656 : AIR 1962 SC 1314; *Union of India* v. *Rampur Distillery and Chemical Co. Ltd.,* (1973) 1 SCWR 383 : 1973 MPLR 125 : AIR 1973 SC 1098; *Saidunnessa* v. *Calcutta, Vyapar Pratisthan,* AIR 1978 Cal. 280; *Kumaraswami* v. *Arunachalla,* (1927) 52 MLJ 84 : (1927) MWN 51 : (1927) Mad. 328 : 99 IC 629. **See also** *Howe* v. *Smith,* (1884) 27 Ch.D. 89, the leading English case and *Sprague* v. *Booth,* (1909) AC 576.
3. *Chiranjit* v. *Har Swarup,* (1926) 50 MLJ 629 : (1926) MWN 145 : 24 ALJ 248 : 23 LW 172 : (1926) PC 1 : 94 IC 782; *Subramania* v. *Arjuna,* (1917) 37 IC 377 (In estimating damages, the amount forfeited may be taken into account); *Katherine Stiffies* v. *Martin,* (1935) 39 CWN 174; *Ramchand* v. *Central Flour Mills,* (1935) Lah. 192 : 155 IC 728.
4. *Natesa* v. *Appava,* (1915) 38 Mad. 178 : 24 MLJ 488 (FB); *Venkatachari* v. *Ramalinga Thevan,* [1918] MWN 197 : 7 LW 404 : 45 IC 417 : *Vellore Taluk Board* v. *Gopalaswamy,* [1913] MWN 1025 : 21 IC 759; *Orr* v. *Chinna Yeggappa Chetty,* [1915] MWN 249 : 28 IC 318 (Quantum of deposit is an immaterial element); *Abbas Ali* v. *Kodhusao,* [1929] Nag. 30 : 114 IC 461 (FB); *Vipper* v. *Sewat Ram,* [1927] Lah. 721 : 101 IC 686; *Ganga Baksh* v. *Chinggi Lal,* [1926] All. 469 : 93 IC 950; *Singer Sewing Machine Co.* v. *Maung Tin,* [1923] Ran. 47 IC 96; **see also** *Captain S.M. Ansari* v. *Dr. V. Subba Rao* (1975) 2 APLJ 136; *Ambunhi* v. *Sharada Amma,* 1974 Ker. LT 471; *Bhramarbar Sahu* v. *Narasan Prasad Das,* 1974 (1) CWR 104.
5. *Panna Singh* v. *Arjun Singh,* (1929) 31 Bom. LR 909 : 33 CWN 949 : 117 IC 485 : [1929] PC 179.

an inflexible rule, that every case of pre-payment is a security for due performance.[1] For instance, the courts may find that the amount of the deposit or payment in advance is so great in comparison with the amount payable under the contract that the parties cannot have intended it as a mere security for performance but rather as a punishment for non-performance and in such cases, the Court will not permit the party to keep the entire deposit.[2] Thus the reasonableness of the amount may be one of the determining factors.[3] The reasonableness of the quantum of damages agreed upon is a matter for examination only by the court.[4] These principles were applied in a Madras case where the Court held that the clause for forfeiture of Rs. 1,500 advance in respect of a sale for Rs. 3,000 was in the nature of a penalty,[5] in the absence of an express stipulation as to what is to be done with the money deposited, the term most naturally to be implied, having regard to the nature and incidents of a deposit, is that on repudiation of the contract by the buyer, the amount shall be forfeited to the seller.[6] Where the plaintiff deposited a sum of Rs. 1,01,000/- for booking commercial complex space and asked for the refund of it, the defendant in the absence of any clause entitling to forfeit the deposit, is under an obligation to refund with interest.[7]

Where an agreement provided for forfeiture of earnest money of Rs. 50, 000/- paid to the respondent who agreed to sell his land to the appellant, merely because the respondent failed to carry out the instructions of the appellant to obtain the courts permission under Sec. 8 of Hindu Minority and Guardianship Act which is not necessary in the circumstances of the case, the respondent cannot be denied of his right of forfeiture.[8]

Where the plaintiff buyer has paid an earnest money and part of consideration money to the defendant seller who as agreed to execute a sale

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1. *Seethanna* v. *Yasikalappa,* (1926) MWN 64 : 91 IC 765 : (1926) Mad. 117 : 22 LW 634; *Satyanarayanamurti* v. *Erikalappa,* (1926) MWN 282 : (1926) Mad. 410 : 91 IC 962 : 23 LW 396 : 50 MLJ 150; *Atulchandra* v. *Saratchandra,* (1920) 59 IC 215 : 24 CWN 967; *Kanhaiya Lal* v. *Lakshmi Chand,* (1933) Nag. 223 : 143 IC 192.
2. *Natesa* v. *Appavu,* (1915) 38 Mad. 178 : 24 MLJ 488; *Manian Patter* v. *Madras Railway Co.,* (1906) 29 Mad. 118; **see also** *Exparte Hulse,* (1873) 8 Ch. Ap. 1022 (Sale for Rs. 4,000—Forfeiture clause re. advance of Rs. 2,000—Penalty); *Sprague* v. *Booth,* (1909) AC 576 (Purchase money ten millions—Advance Rs. 250,000—No penalty); *Mayson* v. *Clouet,* (1924) AC 980 (Rs. 250,000—Advance Rs. 25,000—No penalty).
3. *Orr* v. *Yegappa,* (1915) MWN 249 : 28 IC 318; *Anand Construction Works* v. *State of Bihar,* AIR 1973 Cal. 550.
4. *Venkoba* v. *Sanjivappa,* (1937) Mad. 681 : 46 LW 839 : (1937) MWN 313.
5. *Varadaraja* v. *Muniappa,* (1929) 57 MLJ 785 : 30 LW 503 : (1929) Mad. 817; **see also** *Gopalaratna* v. *Rajaratna,* (1938) Mad. 246 : (1937) MWN 1288 : 173 IC 955 (Quaere, whether it is a "principle of law", that the deposit must be regarded as security for fulfilment of the contract).
6. *State of Gujarat* v. *M.K. Patel & Co.,* AIR 1985 Guj. 179.
7. *Motilal Banarsi Dass v. Delhi Automobiles Pvt. Ltd.,* AIR 1991 Delhi 192.
8. *V. Lakshmanan* v. *B.R. Mangalagiri,* (1995) Supp. (2) SCC 33 : 1995 (1) CCC 40 : 1995 (1) BC 315 : 1995 (1) HLR 315 : 1995 (1) DMC 213.

deed after converting the suit land for non agricultural purposes, failure on the part of the defendant entitles the plaintiff seeking refund of the earnest money and part of consideration paid by him.[1]

Even where no loss is occasioned by the breach, the party who has received a deposit may retain it. But, if he seeks damages over and above the amount of the deposit, he must give credit for the same.[2] But Himachal Pradesh High Court held, where the appellant committing breach of contract claimed for the refund of the security deposit paid by him, he is entitled for the refund in the absence of the respondent suffering and legal injury and any actual loss or damage is shown. But, where the appellant contractor committed breach of contract relating to tender work, the respondent State cannot forfeit the security deposit under the work contract in the absence of any legal injury being caused as a result of breach of contract.[3]

When the defendant has not suffered any legal injury or actual loss on account of breach of contract by the plaintiff in connection with tender contract, the plaintiff is part entitled for the refund of earnest money deposit.[4]

Again, a vendee who has justifiably repudiated contract for the purchase of land is not precluded from recovering advances paid, but he must show that the defendant has regarded the contract as at an end or that a reasonable time has elapsed beyond which it was not right for the defendant to sit down and do nothing, either indicative of his intention to treat the contract as still in existence or to treat it as at an end or to sue for specific performance.[5]

The mere fact that at a future point of time the property in the cantonment area would be liable for resumption in accordance with law will not clothe the vendee to repudiate the sale agreement, more so when she herself volunteered to obtain a permission and got a conditional one.[6]

Where an agreement relating to sale of land between the appellant and respondent provided for the refund of earnest money, in the event of the land being acquired by the Government for a public purpose, the agreement becomes void on the issuance of acquisition declaration by the Government entitling the vendee appellant for refund of the earnest money.[7]

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1. *Sangappa Veerappa Katarki* v. *Bhimappa Yamanappa Chabbi,* AIR 2003 Kant. 462 : 2003 AIR Karn. HCR 2221 : ILR (Karn) 2003 (4) Kant 3259 : 2003 (6) Kant LJ 213.
2. *Raman* v. *Nagu,* (1937) Ran. 357; *Manian Patter* v. *Madras Railway Co.,* (1906) 29 Mad.118; *Firm of Trikamji* v. *Trustees of Karachi Port,* (1916) 36 IC 96 : 10 SLR 4; *Baji Rao* v. *Sheoram,* (1927) Nag. 168 : 100 IC 860.
3. *P.K. Abdulla* v. *State of Kerala,* AIR 2002 Ker. 108, 111 : 2002 (1) Civil LJ 514 (Ker).
4. *A Murali & Co.,* v. *State Trading Corpn of India Ltd.,* AIR 2001 Mad. 271.
5. *Oosman* v. *Gurtajee,* (1935) MWN 1081 : 42 LW 677 : 158 IC 827 : (1935) Mad. 903 : 69 MLJ 536.
6. *Rameshwar Swarup* v. *Smt. Saroj Tyagi,* AIR 1998 SC 3389 : (1998) 7 SCC 456 : 1998 (8) Supreme 87 : 1998 (7) JT 171.
7. *Gian Singh* v. *Gopala,* (1995) 2 SCC 528 : 1995 (2) JT 513 : 1995 (1) Scale 824.

Hire Purchase Contracts.—With reference to hire purchase agreements, the question has arisen whether a clause forfeiting all previous payments in case of default in punctual payment or a clause for seizure of the chattel will be a stipulation by way of penalty, so as to attract the provisions of this section. The answer will depend on the construction of the contract,[1] whether it is a sale or a mere agreement for hire. **[958]**

Where the hirer intending to buy a car under a hire purchase agreement has defaulted after paying some installments, a clause in such an agreement providing for forfeiture of the installments already paid in the event of any breach is unjustified as such forfeiture amounts to penalty.[2]

The object of the parties to a hire purchase agreement may not necessarily be to enter into a contract of sale, but only to enter into a contract of bailment. It may be that, ancillary to the contract of bailment, there is an incomplete agreement to purchase, incomplete because it is open to the bailee to terminate the contract and return the chattel. The terms of the contract may be such as not to *bind* him to buy. In such a case, the seizure clause or the clause forfeiting prior payments is not any fresh burden imposed on the normal incidents of the contract and may not therefore be considered as a penalty to be relieved against.[3]

On the other hand, if a document though in form an agreement of hire, is really a contract of sale, coupled with facilities for easy payment by instalments, a condition that the article which is the subject-matter of the agreement may be seized and kept in case of default of any instalment may be regarded as a penalty.[4]

It is, therefore, as said already, a question of construction. And the test is whether there is a legal obligation to buy. If there is, it is a sale; if on the other hand, the hirer has the option not to complete the purchase, it is a mere agreement for hire.[5]

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1. *Suraj & Sons* v. *J. O'Brien*, (1931) All. 759 : 133 IC 159; *Bhimji* v. *Bombay Trust Corporation*, (1930) 54 Bom. 381 : 32 Bom. LR 64 : 124 IC 800 : (1930) Bom. 306; *Auto Supply Co.* v. *Raghunatha*, (1929) 52 Mad. 829 : 30 LW 317 : 121 IC 593 : (1929) Mad. 884 : 54 MLJ 618; *Mackenzie & Co.* v. *Md. Ali*, (1929) 4 Luck. 510 : 115 IC 102 : (1929) Oudh 155; *Cecil Cole* v. *Nanalal Morarji*, (1925) 49 Bom. 172 : 92 IC 191 : (1925) Bom. 18; *Chekkera Ponnamma* v. *Thammayya*, AIR 1983 Kant. 124.
2. *Tarun Bhargava* v. *State of Haryana*, AIR 2003 P&H 98, 112 : I (2003) Civ.C.R. 758 (P&H) : 2003 Arbi. LR 645 : 2002 (2) Pun. LR 528.
3. *Mahabali Prasad* v. *Palmer*, (1932) ALJ 761 : (1932) All. 607; *Masseys Ltd.* v. *Krishnasamy*, (1935) Mad. 603 : 42 LW 578 : 158 IC 1001 : (1935) MWN 803 : 69 MLJ 69; *Abdul Qadeer* v. *Watson & Sons*, (1930) Ran. 193 : 125 IC 361 : 8 Ran. 236 and **see** *Helby* v. *Mathews*, (1895) AC 471, the leading English case. **See** *Chekkera Ponnamma* v. *Thammayya*, AIR 1983 Kant. 124. (Hire purchase and loan with power to seize pointed out).
4. *Compare, Anand Singh* v. *Commercial Credit Corpn.*, (1935) Lah. 861 : 37 PLR 293 : 160 IC 503.
5. *Balamukund* v. *Mahesh Narayan*, (1934) Oudh 133.

It however happens that in the vast majority of cases, the agreements are so worded as to be construed as only agreements for hire. In view of the fact that, almost invariably, the monthly or periodical payments provided are higher than they would be, if there were no option of purchase, such agreements have occasionally been the target of indignant criticism as "traps for the extravagant and the impecunious, mere devices to tempt improvident people into buying things which they do not want, and for which at the time, they cannot pay."

In *Bhimji* v. *Bombay Trust Corporation,*[1] the incidents of a hire purchase contract are discussed in some detail. In the above case, the hire purchases agreement provided that in default of payment of some future instalments, the hirer was to forfeit all the previous payments. The stipulation was held to be a penalty and was relived against. Similarly, in a case where a person paid a portion of the purchase money for a motor car, and for the balance entered into a document (wherein the seller was described as the owner, and the buyer as the hirer) by which the hirer agreed to pay every month a certain amount and at the end of the period, become the owner on payment of one rupee, it was held that a stipulation for seizure of the car and keeping it without making any payment back to the defaulter, was one by way of penalty.[2]

Forfeiture clauses in leases.—In *Krishna Shetti* v. *Gilbert Pinto,*[3] the court doubted whether the section can be construed as affecting or controlling the provisions of Section 111 of the Transfer of Property Act, which makes leases determinable in certain conditions. In *Madan Mohan* v. *Bohra Ram,*[4] the Allahabad High Court held that the section has no application to the case of a tenant holding over after receipt of a notice to quite or in the alternative, to pay a higher rent:

Where a provision for the payment of arrears of rent carried a stipulation that in default of payment of any instalment the tenant was liable to pay the entire balance and also to ejectment and forfeiture of superstructure, it was held that the clause as to ejectment and forfeiture of superstructure was *in terrorem* to secure payment and as it was penal the court can grant relief against it.[5]

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1. (1933) 54 Bom. 381 : 32 Bom. LR 64 : 124 IC 800 : (1930) Bom. 306.
2. *Maung Ba Oh* v. *Motor House & Co.,* (1929) 7 Ran. 431 : 120 IC 132 : (1929) Ran. 368; *Hotchand* v. *Premchand,* (1931) Sind 42 : 131 IC 710; *Dadun* v. *Somnath,* (1910) 7 IC 547; *Sampat* v. *Changu,* (1911) 10 IC 738.
3. (1919) 42 Mad. 654 : 36 MLJ 367 : 9 LW 431 : 50 IC 898; *Ramakrishna* v. *Mahadevayya,* (1935) 58 Mad. 856 : 41 LW 407 : (1935) MWN 312 : 156 IC 767 : (1935) Mad. 335 : 68 MLJ 482 (Covenant against alienation in lease—Clause for enhanced rent in case of breach—Held not penal); **see** *Krishna* v. *Narayana,* AIR 1949 Mad. 618.
4. (1934) All. 115.
5. 1975 MPLJ 470.

Where the plaintiffs deposited an earnest money of Rs. 5 lakhs for the purchase of land allotted to them, forfeiture of earnest money cannot exceed 10% of the premium as per amended Nazrul rules but not the total earnest money as a result of default on the part of the plaintiffs.[1]

Non-payment of instalments towards the allotment of flat necessarily results in the forfeiture of earnest money paid.[2]

When the forest authorities in consequence of the breach of contract committed by the plaintiff contractor whose highest bid was accepted forfeited the money deposited by the plaintiff, the defendant authorities in the absence of any serious damage suffered by them as result of breach of contract are liable to refund the actual deposit money paid by the plaintiff without costs.[3]

"Penalty"—WHOLE AMOUNT TO BECOME DUE.—In this connection one must have regard to Illustrations (f) and (g). In *Tatayya* v. *Gangayya,*[4] the Madras High Court applied Illustration (f) and held that a stipulation that on non-payment of an instalment of the debt due, the whole amount is to become payable, does not constitute a penalty under Sec. 74. The English case of *Wallingford* v. *Mutual Society,*[5] was referred to and followed. As pointed out in a Rangoon Case, the word 'penalty' can be used only if failure to comply with a condition puts the person in a worse position than he would have been if there had been no agreement at all.[6]

Even though there is no agreement to pay compensation on default in a hire purchase agreement, the court should order reasonable compensation in view of Sec. 74 of the Contract Act.[7]

The Madras High Court,[8] has pointed out that the word 'penalty' used in speaking of 'enhanced interest' is not in the sense of a claim *de hors* the contract, and that therefore the compensation given in place of the penal

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1. *Delhi Development Authority* v. *Grihasthapana Co-op. Group Housing Society Ltd.,* AIR 1995 SC 1176 : 1995 (1) Supp. (1) SCC 751 : 1995 (2) JT 530 : 1995 (1) Scale 807.
2. *Lalchand* v. *Chandigarh Administration,* AIR 1992 P&H 194 : 1992 PLJ 58.
3. *State of A.P.* v. *Singam Setty Yellananda,* AIR 2003 AP 182, 187 : 2003 (2) Arbi. LR 92; 2003 (2) An. WR 154 (AP).
4. (1927) 53 MLJ 562 : 26 LW 453 : (1927) MWN 587 : 105 IC 789 : (1927) Mad. 965. **See also** *Ramalinga* v. *Meenakshisundara,* (1925) Mad. 177 : 85 IC 261 : 21 LW 54 : 47 MLJ 833 (where the principles underlying illustrations (f) and (g) are explained); Cf. *Bahadursingh Gaind Singh Gupta* v. *Gulabdevi Onkar Prasad,* 1975 MPLJ 470.
5. (1880) 5 QBD 592.
6. *Ko Kyan swe* v. *U Ba,* (1935) Ran. 341 : 159 IC 801; *Narasimharao* v. *Supdt. of Police,* AIR 1977 AP 157.
7. *Ganga Maruthi* v. *Nagaraj,* AIR 1998 Karn. 407 : 1998 (5) Kant LJ 342.
8. *Suramma* v. *Venkayya,* (1934) 67 MLJ 653 : 40 LW 639 : (1934) MWN 971 : 152 IC 617 : (1934) Mad. 695.

provision in the contract is still deemed to be given under the contract itself so as to be impressed with the same legal incidents attending on the original provision. The question in the case was whether the compensation given in lieu of the provision for enhanced interest in a mortgage bond formed part of the mortgage money or was merely in the nature of damages. The court had no difficulty in holding that the security created by the mortgage was available in respect of the amount awarded.

Chit Fund Transactions.—What may be construed as a penalty in the case of an ordinary loan, is not necessarily a penalty in the case of a chit fund transaction.[1] In the case of a stake-holder of a chit, his relation to the subscribers is of a special nature and calls for stringent provisions to protect his interest, for without punctual payments by individual subscribers, he could not discharge his liabilities to the successful bidders as they arise.[2] Ordinarily therefore, a default clause in a subscriber's bond for payment of future calls, providing that the balance of all instalments shall become payable in default of payment of one instalment on the due date will not be penal.[3] But, as pointed out by Ramesam, J. this does not mean that the doctrine of penalty will not apply at all to provisions in a chit or Kuriwari.[4]

With regard to penal stipulations, it has been said that the Court should award compensation at a reasonable rate in case of default, and that where compensation is refused by the court, the court is bound to give reasons therefor.[5]

OTHER TRANSACTIONS.—The question whether a stipulation is penal or not should be decided according to the circumstances of each case. For instance, a stipulation at a partition among three brothers that one of them should, instead of getting a share of the property, get an annuity from the others, and in case of default of payment from any one of them, he should get the portion of the property allotted to the defaulter, was held not to be in

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1. *Sankunni* v. *Empire of India Life Assurance Co.*, (1931) 61 MLJ 388 : 34 LW 643 (Remarks apply to insurance also).
2. *Vaithinatha* v. *Govindaswami*, (1921) 42 MLJ 551; *P.K. Achuthan* v. *State Bank of Travancore*, 1974 Ker.LT 806 (FB).
3. *Raghavan* v. *Armugham*, (1935) Mad. 385 : 41 LW 376 : 158 IC 1037 : (1935) MWN 70 : 68 MLJ 283; *Subbiah Pillai* v. *Muthiah Pilliah*, (1933) 65 MLJ 302 : (1933) MWN 1298 : 38 LW 244 : 146 IC 1026; *Kunju Nair* v. *Narayanan Nair*, (1933) 65 MLJ 29 : (1933) MWN 678 : 37 LW 93 : 140 IC 833 : (1933) Mad. 252; *Ayyakunnyu* v. *Doraiswami*, (1933) Mad. 725 : 145 IC 1008 : 38 LW 344; P.K. *Achuthan* v. *State Bank of Travancore*, 1974 Ker. LT 806 (FB).
4. *Muthukumaraswami* v. *Subramania*, (1927) Mad. 1105 : 102 IC 14; **see also** *Subbiah* v. *Shanmugam*, (1928) Mad. 245 : 108 IC 319 : (1927) MWN 527.
5. *Nagappa* v. *Venkatarami Reddi*, (1930) MWN 1198 : 33 LW 540 : 130 IC 569 : (1930) Mad. 137.

the nature of a penalty.[1] But a stipulation in a kabuliat that, if paddy rent is not paid by a certain date, half as much again will be paid is a clear penalty.[2] So is stipulation for giving up possession of a field yielding Rs. 500 by was of annual income, in case of default in paying maintenance of Rs. 175.[3]

Stipulations for interest :—

(1) STIPULATION FOR HIGH RATE OF INTEREST IN THE BOND.—Here, the question will be whether in cases not coming under Section 16 of the Contract Act, an agreement stipulating for a very high rate of interest will be enforceable. On this point, it is to be noted that the Usurious Loans Act now gives power to the court to relieve against a high rate of interest where it is excessive and the transaction is substantially unfair. So far as the present section is concerned, it must be said that a high rate of interest is not *per se* a penal provision. The current of authority is fairly uniform.[4] Except for some cases decided by the Calcutta High Court,[5] in which apart from any question of undue influence, the rate of interest was reduced. But as a rule, the courts are careful not to make a new contract for the parties.[6] Where owing to the borrower's *laches,* the amount due has swollen to a high figure; there is no reason for reducing interest.[7]

Where in a transaction of lease for allotment of plots, the lease agreement provided for charging of penal interest at double rate of normal interest for default in payment of instalments it was held that since interest at normal

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1. *Rajagopala* v. *Varadaraja,* (1924) MWN 861 : 47 MLJ 605.
2. *Shyam Lal* v. *Kalim Shaik,* (1931) 58 Cal. 84 : 130 IC 274 : (1931) Cal. 111.
3. *Mt. Bana Bai* v. *Mt. Chandrabaga,* (1931) Nag. 60 : 132 IC 450.
4. *Hari Pada* v *Jugai Sheo,* (1934) 38 CWN 182 (In absence of undue influence Court cannot vary contract rate); *Shugan Chand* v. *Phul Chand,* (1935) Lah. 456 : 158 IC 359; **see** *Ram Prasad* v. *Khusal,* (1929) 1 Luck. 354 : 96 IC 413 : (1926) Oudh 409 (Apart from undue influence or fraud, no power to reduce); *Bashinullah* v. *Meajian,* (1926) Cal. 690 : 92 IC 593; *Nabinchandra* v. *Duda Mia,* (1925) 30 CWN 83 : 87 : IC 767 : (1925) Cal. 1193; *Chotanagpur Bank* v. *Bhagwat Bax,* (1922) 1 Pat. 263 : (1922) Pat. 491 : 69 IC 697; *Kesavulu* v. *Arithulai,* (1913) 36 Mad. 533; *Tohlu Mal* v. *Buta,* (1921) Lah. 53 : 67 IC 132; *Aziz Khan* v. *Dunichand,* (1918) 23 CWN 130 : 48 IC 933 (PC) (Compound interest 25 percent allowed by the PC—simple hardship no ground for relief); *Kasi Nath* v. *Bhikan Charan,* (1917) 45 IC 778 (Apart from undue influence, rate of interest not interfered with unless it shocks the conscience); *Annamalai* v. *Sellappa,* (1916) 2 LW 339 (36 per cent not penal); *Nathuni Sahu* v. *Baijnath,* (1917) 2 PLJ 212 : 39 IC 352 (Court cannot rip up a contract merely because it considers rate of interest unconscionable); (Cf.) *Ashraf* v. *Makbul,* (1923) 49 Cal. 1040 : 70 IC 931 : (1923) Cal. 166 (Merely because on breach, a person has to pay double, S.74 will not become applicable).
5. **See** *Krishnacharan* v. *Sanat Kumar,* (1917) 44 Cal. 162 (Reduction from 75 to 15 per cent); *Abdul Majeed* v. *Khirode,* (1914) 42 Cal. 690 (Reduction from 60 to 30 percent).
6. *Ramkrishna* v. *Heramba,* (1930) 56 Cal. 960 : 33 CWN 388 : 119 IC 207 : 11930) Cal. 207; *Satyabhama* v. *Mohamad Eshak,* (1923) Cal. 268 : 68 IC 497.
7. *Sitaram* v. *Ramrao,* (1931) Nag. 91 : 130 IC 817.

rate was already calculated along with each instalment to be paid, on default, penal interest at a double rate cannot be charged.[1]

Where the defendant executing a bond agree to serve the State Government for a period of five years or pay a sum of Rs.10, 000/- to the State in consideration of the State sanctioning leave to enable the defendant to complete the M.B.B.S course, the defendant on his default is liable to pay to the State Rs.10, 000/- with 6% interest from the date of the suit.[2]

In the absence of any provision under the contract to pay interest for default in making payment of price, no obligation arises to pay interest.[3]

(2) AGREEMENTS FOR INTEREST IF PRINCIPAL NOT PAID IN TIME.—Where no interest is payable originally, but becomes payable only on default, the agreement may be penal. In regard to this matter, there has been some difference of opinion. It was due to the Usury Laws Repeal Act (XXVIII of 1855) and the different interpretations put upon Sec. 2 which provides that "in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the court at the rate (if any) agreed upon by the parties, and if no rate shall have been agreed upon, at such a rate as the Court shall deem reasonable." In some early case, it was thought that where there was a stipulation for one rate of interest, and that payable only on default of payment of principal, the case fell strictly within the terms of the above Act and that Section 74 of the Contract Act, as it stood before the amendment would have no application to such a case. The result was that, however exorbitant the rate payable on default, the courts had no power to relieve. Thus in *Arjan Bibi* v. *Asgar Ali,*[4] and *Sankaranarayana* v. *Sankaranarayana,*[5] the Calcutta and Madras High Courts awarded interest at 150 and 180 per cent respectively from the date of bond, holding that the agreement was for payment of interest within the meaning of the said Usury Law Repeal Act (XXVIII of 1955). But, the Bombay and Allahabad High Courts had held, without reference of Section 74, that an exorbitant rate of interest was itself penal,[6] and that the said Act was no bar to the exercise of the equitable jurisdiction of the court.

The later current of decisions however, follows the Bombay view, that relief should be granted in all case, where the court considers the rate of interest

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1. *H.P. Fruit Growers Co-op. Mrtg. Processing Socy. Ltd.* v. *H.P. Hsg. Board,* AIR 1996 HP 94, 101 : 1996 (2) Ren. CR 534.
2. *Punjab State* v. *Dr.B.S.Nanda,* 2000 (3) CCC 121, 122 (P&H).
3. *Vasantha Viswanathan* v. *V.K. Elayalwar,* (2001) 8 SCC 133 : 2001 (6) Supreme 442 : 2001 (5) Scale 483 : 2001 (6) SLT 150 : 2001 (6) JT 622.
4. (1886) 13 Cal. 200; *Padma Lochun* v. *Rustom Khan,* (1917) 41 IC 897.
5. (1901) 25 Mad. 343 : 11 MLJ 421 (Case under S. 74 after amendment—Decision was however the same).
6. *Motoji* v. *Shekh Husen,* (1869) 6 BHCAC 8; *Bansidhar* v. *Bu Ali,* (1880) 3 All. 260.

to be penal. The amendment of the section "or any other stipulation. . . . by way of penalty" has been held to be wide enough to give the court jurisdiction to give relief in all cases where the rate of interest seems to be penal. In *Muthukrishna* v. *Sankaralingam,*[1] a Full Bench of the Madras High Court held, over-ruling *Sakranarayana's case,* that a stipulation for an exorbitant rate of interest from date of default may be a penalty even when no interest was stipulated for in the first instance. The Calcutta High Court has held similarly in *Khaga Ram* v. *Shankar,*[2] dissenting from *Arjan Bibi* v. *Asgar Ali that* a stipulation for 75% interest from the date of bond on failure to pay the principal in two instalments is a penal provision; and this view has been followed by the Allahabad, Lahore, and Bombay High Courts.[3]

Laterly, the Calcutta High Court,[4] has laid down the rules governing cases in which the bond stipulates that the loan will carry no interest for a period, but in default of payment within that period, interest is to be charged. They are:—(1) If interest is to be charged from the date of default, at the ordinary rate; the stipulation is not in the nature of a penalty; (2) If interest is to be charged from the data of bond, it is always a penalty; (3) If the rate of interest is exorbitant, the stipulation is also penal.

In a suit claiming interest at 21% on the refund of earnest money deposit by the plaintiff, the claim cannot said to be justified but having regard to the circumstances, he can be allowed to claim the refund of earnest money deposit with an interest at 12% per annum from the date of filing the suit.[5]

(3) STIPULATION FOR ENHANCED INTEREST IN CASE OF DEFAULT.—This case will resolve itself into two kinds according as the provision for enhanced interest is made to date from the date of default or from the date of the bond.

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1. (1913) 36 Mad. 229 : 24 MLJ 135 : 18 IC 417 (FB); *Subramania* v. *Subramania,* (1914) MWN 154 : 22 IC 411. (Agreement to pay in instalments without interest on default interest payable on whole amount, without reference to payments made stipulation penal).
2. (1915) 42 Cal. 652 : 19 CWN 775 : 27 IC 815; **see** *Miajan* v. *Abdul,* (1906) 10 CWN 1020; *Upendra Lal* v. *Mehraj,* (1916) 21 CWN 108 : 36 IC 404.
3. *Najaf Ali* v. *Md. Fazal,* (1928) All. 255 : 107 IC 249; *Bishenchand* v. *Narain,* (1928) Lah. 857 : 110 IC 311; *Velchand* v. *Flagg,* (1911) 36 Bom. 164 : 13 IC 853 : 14 Bom. LR 18; *Mahabir* v. *Mustapha,* (1925) Oudh 231 : 83 IC 92; *Bishambar Das* v. *Katha Singh,* (1933) Lah. 423 (Money payable by fixed date without interest—Stipulation for interest from date of bond in case of defeault is not penal).
4. *Mahomed Raja Mia* v. *Naderajjame,* (1931) 35 CWN 1224; *Baij Nath Goenka* v. *Daleep Narain,* (1920) Pat. 261 : 58 IC 489.
5. *A. Murali & Co.,* v. *State Trading Corpn of India Ltd.,* AIR 2001 Mad. 271,276.

In the latter case, it had been consistently held to be a penalty, and the court will award only reasonable compensation.[1] In the former case it is generally not a penalty, but may in particular circumstances, be penal.[2] The test in such cases is to find out whether the enhanced rate was intended to be part of the primary contract between the parties or was introduced only *in terrorem*. It is a question of construction of the document.[3] To take an ordinary case, a stipulation in a lease to pay a higher rent if the lessee remains in occupation after the expiry of the lease is not penal at all, as it only gives the lessee an option on particular terms.[4] Thus, where a mortgage bond provided for payment of principal and interest in annual instalments and for payment of the whole of the balance with enhanced interest in case of default, the court cut down the enhanced rate.[5] But where the rate was Rs. 1-12 per cent per mensem originally and Rs. 2 percent per mensem from date of default, the increase was held not penal.[6] An enhanced rate, which worked at double the original rate, was, however, held to be penal.[7] In one case, the special relation of the parties (subscribers to an auction chit) was held to justify such stringent conditions like forfeiture of dividend and liability to pay the whole amount with interest at 18 per cent from the date of the auction.[8] Similarly where the

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1. *Mackintosh* v. *Crow*, (1883) 9 Cal. 689 (a case of increased interest from date of default); *Mathura Persad* v. *Luggun*, (1883) 9 Cal. 615; *Sungut Lal* v. *Baijnath*, (1886) 13 Cal. 164; *Kalachand* v. *Shib Chunder*, (1892) 19 Cal. 392 (FB); *Rameshwar* v. *Rai Sham Kishen*, (1901) 29 Cal. 43; *Nanjappa* v. *Nanjappa*, (1888) 12 Mad. 161; *Narayanasami* v. *Narayana Rao*, (1893) 17 Mad. 62; *Narain Das* v. *Chait Ram*, (1884) 6 All. 179; *Brij Bhukham* v. *Samiuddin*, (1902) 25 All. 169; *Umar Khan* v. *Saleh Khan*, (1892) 17 Bom. 106; *Trimbak* v. *Bhagghand*, (1902) 27 Bom. 21; *Sunder Koer* v. *Rai Shan Kishen*, (1907) 34 Cal. 150 (PC) : 34 IA 9; *Vengideswara* v. *Chathu Achen*, (1879) 3 Mad. 224; *Vythilinga* v. *Sundarappa*, (1882) 6 Mad. 167; *Gopaludu* v. *Venkataratnam*, (1894) 18 Mad. 175; *Khurran* v. *Bhawani*, (1881) 3 All. 440; *Kharag Singh* v. *Bhola Nath*, (1881) 4 All. 8; *Maula Baksh* v. *Labhu Singh*, (1935) Lah. 873 : 157 IC 200; *Sohan Lal* v. *Imam Din*, (1929) Lah. 515 : 114 IC 444; *Mohammad Abdul Sattar* v. *Kondiba*, (1926) Nag. 173 : 89 IC 119; *Bhagwant Rao* v. *Damodar*, ILR (1938) Nag. 91 : (1938) Nag. 112 : 20 NLJ 285.
2. *Calcutta Improvement Trust* v. *Purna Chunder*, ILR (1937) 1 Cal. 300 : 41 CWN 781 : (1937) Cal. 654 (Provision for increased rate of interest if interest not paid punctually is penal); *Abdul Gani* v. *Nandlal*, (1902) 30 Cal. 15; *Periaswamy* v. *Subramaniam*, (1904) 14 MLJ 136; *Salem Town Bank* v. *Venkatachar*, (1911) MWN 134 : 9 IC 197; *Basawa* v. *Hem Singh*, (1891) 99 PR.
3. *Abbakke Heggadthi* v. *Kinhiamma*, (1906) 29 Mad. 491; *Pandit Jai Ram* v. *Sheo Shankar*, (1910) 9 IC 406; *Jyoti Cold Stores* v. *P.F. Corpn.*, AIR 1973 Guj. 38.
4. *Kuman Das* v. *Radhika*, (1929) Pat. 717 : 10 PLT 669; *Jitendranath* v. *Jasoda*, (1926) Pat. 122 : 92 IC 617.
5. *Marina Ammayi* v. *Sundayya*, (1929) Mad. 432 : 117 IC 124; *Najaf Ali* v. *Fazal Ali*, (1928) All. 255 : 26 ALJ 210 : 107 IC 249; *Sinnatami* v. *Ramaswamy*, (1911) 2 MWN 539 : 22 MLJ 85.
6. *Paul* v. *K.A.L.R. Firm*, (1924) 1 Ran. 46 : 76 IC 835; *Kirti Chunder* v. *Atkinson*, (1906) 10 CWN 640; *Mahomed Ali* v. *Parmanand*, (1918) 45 IC 232 : 125 PLR 1918; *Kandi* v. *Hussain Bibi*, (1923) Oudh 158 : 77 IC 768; *Kaluram* v. *Sham Rao*, (1935) 18 NLJ 267 (Original rate 12 per cent, provision for 24 per cent on defaulted instalments no penalty).
7. *Rumchand* v. *Jagiri Mal*, (1922) Lah. 268 : 4 LLJ 270; (Cf.) *Honda Mal* v. *Muhammad*, (1879) 25 PR; *Qadir Bux* v. *Badlu Ram*, (1933) Oudh 190 : 145 IC 188.
8. *Vaithinatha* v. *Govindswami*, (1922) MWN 203 : 67 IC 995 : (1922) Mad. 67 : 42 MLJ 551.

Articles of association of a fund provided that when a person ceased to be a share-holder under any of the Articles, the whole debt due from the person to the Fund would become repayable together with enhanced rate at 12[1]/2 per cent it was held that, considering that the alleged penal rate was common in commercial transactions, the provision was not penal.[1] Similarly where the original rate was 12 per cent and the default rate was 25 per cent it was held not to be a penalty.[2] The Patna High Court has held that where a deed provides a certain rate of interest on a single default and an increased rate on consecutive defaults the latter provision is a penalty.[3] **[585]**

(4) REDUCTION OF INTEREST IN CASE OF PUNCTUAL PAYMENT.—A covenant to accept interest at a reduced rate if interest is paid punctually does not make the originally rate of interest of a penalty.[4] Thus where the agreement was to pay interest at 12 per cent, but that if the amount was paid in advance, a lower rate of interest would be charged, the agreement was held valid.[5] Similarly, in an Allahabad case, where the interest was 24 per cent with a proviso that in case of punctual payment the interest would be calculated and accepted at 18 per cent, the creditor was held entitled to charge 24 per cent on default.[6] The Court held the lesser rate to be a premium for punctuality in the fulfilment of a legal obligation. But as pointed out by the Lahore High Court, all that a creditor has to do to escape Section 74 is to reserve the higher rate as payable, and provide for its reduction in case of punctual payments.[7]

(5) STIPULATION FOR COMPOUND INTEREST.—The Courts do not lean towards compound interest. Generally it is not awarded except where there is a clear agreement. Here again, the stipulation may be of two kinds. The compound interest may be at the same rate as simple interest or at a higher rate. **[586]**

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1. *Mylapore H.P. Fund* v. *Chinniah,* (1926) Mad. 785. **See also** *Devendra Nath* v. *Sambhu Nath,* (1925) 3 Pat. 657 : 84 IC 677.
2. *Chunni Lal* v. *Munna Lal,* (1931) 11 Lah. 635 : (1931) Lah. 120 : 131 IC 368.
3. *Habibun* v. *Baldeo,* (1934) Pat. 16.
4. *Kulada Prasad* v. *Ramanand,* (1921) 48 Cal. 1036 : 25 CWN 776 : 61 IC 923 : (1921) Cal. 109.
5. *Adnm. General, Burma* v. *Molla,* (1928) 5 Ran. 573 : 105 IC 592 : (1928) Ran. 19.
6. *Kutub-ud-din* v. *Bashir-ud-din,* (1910) 32 All. 448. **See also** *Moti Lal* v. *Eastern Mortgage and Agency Co.,* (1920) MWN 631 : 25 CWN 265 : 61 IC 486 : (1921) PC 118; *Sheo Prasad* v. *Sanaullah,* (1929) ALJ 894 : 115 IC 639 : (1929) All. 558.
7. *Fitz-Holmes* v. *Bank of Upper India,* (1923) 4 Lah. 258 : 77 IC 523 : (1923) Lah. 548; *Keshao Rao* v. *Krishna Rao,* (1922) Nag. 263 : 70 IC 31.

(a) A Stipulation for compound interest at the same rate as simple interest from date of default is not a penalty,[1]

A provision for payment of compound interest on default, and for Charging it on property, has been held not to be penal within Sec. 74.[2] In *Ramalinga* v. *Subramania,*[3] the court held that compound interest at 24 percent with six monthly rests is not such a high rate as to be penalty. Again, where a mortgage deed provided that every year one instalment of the principal and the interest due thereon should be paid, and in default, compound interest at a slightly higher rate should also be paid in addition the court held that the provision was not penal, in view of the special and unusual nature of the document.[4]

But where a mortgage deed provided for repayment in annual instalments without mentioning interest, but added that in case of default, the entire balance will become payable with twelve per cent compound interest, the Court held the latter stipulation a clear penalty.[5]

(b) A provision for compound interest at an enhanced rate on default is a penalty in *Sunder Koer* v. *Rai Sham Kishen,*[6] the Judicial Committees observed

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1. *Mangat Rai* v. *Babu Singh,* (1927) 8 Lah. 721 : (1927) Lah. 445 : 103 IC 437; *Malli Chettiar* v. *Veeranna Thevan,* (1921) MWN 717 : 69 IC 812 : (1921) Mad. 378 : 41 MLJ 470; *Muthu Chettiar* v. *Maruthanayagam,* (1929) MWN 810 : 31 LW 720 : (1930) Mad. 428 : 58 MLJ 435; *Raja Rao* v. *Veeraraju,* (1921) Mad. 1143 : 26 LW 351 : 104 IC 827. **See also** *Baij Nath* v. *Shamanand,* (1894) 22 Cal. 143; *Krupasindhu* v. *Ponchu,* (1933) MWN 408; *Ram Krishnayya* v. *Venkata Somayajulu,* (1933) MWN 597; *Abdul Ali* v. *Puranlal,* (1914) 82 PR 1914 : 25 IC 560; *Lakhi Chand* v. *Pear Chand,* (1917) 39IC 106 : 2 Pat. LJ 283; *Ram Sewak* v. *Baldeo Baksh,* (1918) 47 IC 649 : 5 OLJ 442; *Tirkha Ram* v. *Haidar,* (1928) 107 IC 617 : 10 LLJ 48; *Mt. Khallo* v. *Jwala Prasad,* (1927) All. 538 : 101 IC 759; *Ram Singh* v. *Ganga Ram,* (1927) Lah. 755 : 103 IC 496; *Kusan* v. *Sitaram,* (1927) Nag. 338 : 104 IC 191; *Ananja Perumal* v. *Pichamuthu,* (1925) 47 MLJ 910 : 20 LW 968 : 85 IC 394 : (1925) Mad. 332; *Abdul Rahman* v. *Sheo Dayal,* (1934) 56 All. 496 : (1934) ALJ 371 : 151 IC 900 : (1934) All. 152; *Gurmukh Singh* v. *Dial Singh,* (1934) Lah. 321 : 36 PLR 178 : 150 IC 878; *Mallavarapu* v. *Buddaraju,* AIR 1982 AP 313 : 1982 (1) APLJ 374 : 1982 (2) An.WR. 155; *Sambamurthy* v. *Maganti Krishna Rao,* AIR 1981 AP 77 : 1980 (2) APLJ 29 : 1980 LS 146 : 1980 (2) ALT 5..
2. *Nadershaw* v. *Shirinbai,* (1924) 25 Bom. LR 339 : (1924) Bom. 264 : 87 IC 129.
3. (1927) 50 Mad. 614 : 25 LW 699 : 103 IC 394 : (1927) Mad. 620 : 52 MLJ 612; *Mt. Said Khan* v. *Indrapathi Singh,* (1927) All. 315 : 100 IC 679 (Facts in pari materia); *Khota Ram* v. *Nawaz,* (1924) 4 Lah. 76 : 72 IC 765 : (1924) Lah. 21 (25p.c. compound interest not penal); **but see** *Ganapathi* v. *Sundara,* (1912) 22 MLJ 354 : 14 IC 511; *Ram Dayal* v. *Amiruddin,* (1931) All. 203 : 133 IC 311 : (1931) ALJ 29.
4. *Venkatasubbiah* v. *Lakshmipathi,* (1925) Mad. 302 : 20 LW 801 : 85 IC 392. **But see** *Sundersa* v. *Chotmal,* (1935) 18 NLJ 220.
5. *Ramamurthy* v. *Subba Rao,* (1939) 1 MLJ 491 : 49 LW 534 : (1939) MWN 323.
6. (1906) 34 Cal. 150; *Venkata Hanumantha Bhushan Rao* v. *Subbayya,* (1936) PC 283 : (1936) ALJ 1191 : 38 Bom. LR 122 : 64 CLJ 141 : 41 CWN 18 : 164 IC 27 : 44 LW 414; *Gangadhar* v. *Parshram,* (1928) Nag. 120 : 106 IC 38; *Jwala Ram* v. *Buchi Ram,* (1917) 38 IC 533; *Seetharamiah* v. *Pichayya,* (1915) 28 IC 860; *Zamindar of Karvetnagar* v. *Subbaraya,* (1918) MWN 146 : 7 LW 36 : 43 IC 871; *Ramakrishnayya* v. *Venkata Somayyajulu,* (1933) MWN 597 (FB); *Nanum* v. *Lachhman,* (1935) Lah. 38 : 152 IC 522.

that compound interest is perfectly legal in itself, but compound interest at a rate exceeding the rate of interest on the principal monies, being in excess of and outside the ordinary and usual stipulation, may be regarded as in the nature of a penalty.

In *Surendra Nath* v. *Jogendra Nath,*[1] the Calcutta High Court said that for determining whether an agreement to pay compound interest is penal the real question is whether the stipulation is in itself penal, independently of the results to which continued default on the debtor's part may lead.

"Any other stipulation."—In *Krishna Shetti* v. *Gilbert Pinto,*[2] the Court doubted whether the term 'penalty' in the section extends beyond stipulations intended to secure repayments of money, and held the section inapplicable to covenants in a lease of which the breach involves forfeiture. In an earlier case *Rajah of Ramnad* v. *Sellachami Thevar,*[3] the penal provision under the section was held wide enough to include a stipulation to convey a house on default of payment on a date fixed. In *Malayalam Plantations Ltd.* v. *Veeraraghaviah,*[4] the Madras High Court construed as a penalty a clause in a grant of mining rights that in case of default by the owner in paying the assessment of the land, the grantee would on payment of the assessment become owner of the entire land.

Compensation.—The section vests in the Court discretion in the matter of reducing the damages. Section 74 permits award of compensation even where the extent of the actual loss or damages is not proved. The Court has discretion to fix the amount. Where no loss or damage has ensured there can be no question of awarding compensation.[5] It fixes only the outside limit (*viz.,*) the amount previously agreed upon. Thus, in particular circumstances, the court may award even the full amount of the penalty agreed upon.[6] In a contract for supply of fuel to a railway company the plaintiff deposited a certain amount for the due fulfilment of the contract. There was a stipulation empowering the railway company to cancel the contract and forfeit the deposit in case of failure to deliver punctually. When the company forfeited the deposit

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1. (1921) 62 IC 717.
2. (1919) 42 Mad. 654 : 9 LW 431 : 50 IC 898; *Ramakrishna* v. *Mahadevayya,* (1935) 58 Mad. 856 : 41 LW 407 : 156 IC 767 : (1935) MWN 312 : (1935) Mad. 335 : 68 MLJ 482.
3. (1916) 2 MWN 247 : 4 LW 173 : 34 IC 500; *Narayana* v. *Venkataramana,* (1935) Mad. 899; (Interest in kind on paddy lent)—Stipulation for conversion into money—Penalty). **See also** *Mahadeo Baksh* v. *Sant Baksh,* (1921) 57 IC 513 : 23 OC 119.
4. (1938) Mad. 304.
5. *Satyanarayan Amolak Chand* v. *Vithal Narayan,* AIR 1959 Bom. 452; *Union of India* v. *Nasudeo Agarwal,* AIR 1960 Pat. 87.
6. *Abbakke Heggadethi* v. *Kinhiamma,* (1906) 29 Mad. 491; *Lekh Singh* v. *Dwarka Nath,* (1929) Lah. 249 : 113 IC 140; *Lachman Das* v. *Bhoja Ram,* (1925) Lah. 284 : 84 IC 865.

in accordance with the contract, they were held justified,[1] and the Court observed that no question for penalty arose in the case. In a suit for return of bridal gifts on a breach of promise of marriage among Buddhists, the Rangoon high Court held that the quaint rules of the Dhammathats as to payment of double value do not apply and that even if there is a contract to pay on that basis, Sec. 74 will enable the court to cut down the amount to a reasonable compensation.[2]

On the question of reasonableness of the compensation, ordinarily an appellate court will not interfere with the award by the trial court unless the discretion has been improperly exercised by that tribunal.[3]

Exception.—The exception provides that the whole amount mentioned shall be exacted, but the Courts have held that they have a discretion to reduce the amount of the penalty according to the circumstances of the case.[4] It has been held that a bond given by an administrator under the Succession Act,[5] does not fall within the exception, and it would therefore follow that the administrator will not be liable to pay the whole amount of his bond. Similarly, a bond given by a market contractor under the Local Boards Act,[6] is not a bond "given under the provision of any law" so as to make it incumbent on the court to exact the full amount; for the bond which is given is not under the Act itself,[6] but, very often, under the rules or bye-laws framed by the particular local body in regard to the farming out of this source of revenue.

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1. *Manian Patter* v. *Madras Railway Co.,* (1906) 29 Mad. 118. **See also** *Empress of India Cotton Mills Co.* v. *Naffer Chunder Roy,* (1898) 2 CWN 687 (Agreement for forfeiture of wages in case of servant leaving without notice); *Parampal* v. *Budh Singh,* (1938) Lah. 62 : 177 IC 354. (Payment of advance by lessee with covenant to pay balance by fixed date—Default clause re forefeiture of advance—No penalty).
2. *Maung Law Phyu* v. *Ma Baw,* (1933) 11 Ran. 143 : 146 IC 724 : (1933) Ran. 198.
3. *Muthia Chettiar* v. *Ramamoorthi,* (1935) Mad. 1072 : 42 LW 802 : 69 MLJ 841; *Habibur* v. *Baldeo,* AIR 1934 Pat. 16.
4. *Secretary of State* v. *Dilsizian Freres,* (1921) 45 Bom. 1213 : 23 Bom. LR 495 : 62 IC 675 : (1921) Bom. 447; *Sheik Shahabuddin* v. *Vilayat Ali,* (1926) Nag. 435 : 95 IC 614. **See also** *Singer Mfg. Co.* v. *Raja Prasad,* (1909) 36 Cal. 960 : 4 IC 418 (Agreement to forfeit deposit in case of non-performance — Forfeiture not relieved against if sum reasonable); *Mathur* v. *Union of India,* AIR 1974 Mad. 233; *The Spl. Officer, Amravathi Co-op. Sugar Mills* v. *Thirumalaswami,* (1973) 2 MLJ 361.
5. *Lechman Das* v. *Chatter,* (1887) 10 All. 29.
6. *President, Taluk Board, Kundapur* v. *Lakshminarayana,* (1908) 31 Mad. 54. **See also** *Srinivasa* v. *Rathnasabapathi,* (1892) 16 Mad. 474 (Deposit by municipal lighting contractor).

75. Party rightfully rescinding contract entitled to compensation.—A person who rightfully rescinds a contract is entitled to compensation for any damage, which he has sustained through the non-fulfilment of the contract.

Illustration

A, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre, and *B*, in consequence rescinds the contract. *B* is entitled to claim compensation for the damage, which he has sustained through the non-fulfilment of the contract.

Rightful rescission.—This section provides that a party who rightfully rescinds a contract shall be entitled to compensation for damage caused by the non-fulfilment of the contract, (*e.g.,*) a buyer may recover the earnest money paid in respect of a sale not completed owing to the seller's fault. In one sense, the section is supererogatory. Sec, 53 has made a similar provision for compensation, at the instance of a party rescinding a contract on the ground that the other party has prevented the fulfilment of the contract.

It has been suggested in a Nagpur case,[1] that the words "through the non-fulfilment of the contract" are intended to reproduce the distinction obtaining in English law between contracts rescinded on the ground of fraud and those rescinded for other reasons. Where a contract is avoided for breach it remains operative as to the past and so claims for restitution in respect of acts of performance prior to the rescission are precluded. But when it is rescinded for fraud etc., the act has retrospective effect and the contract is rescinded *ab initio* and so restitution alone can be claimed.

Where the essential terms of a contract of service were changed by the employer, it was held that the change amounted to a refusal by the employer to perform the previous contract in its entirety and the employee could rightfully put an end to it and sue for breach.[2]

Attention has also been drawn in the above case to the contract in language between this section and the fasciculus of Sections 53 to 56 dealing with avoidance for breach.

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1. *Imam Ali* v. *Rani Priyawati Devi,* (1937) Nag. 289 : 171 IC 553.
2. *Parashar Singh* v. *Hindustan Manganese Mines Ltd.,* (1968) MPLJ 846 : 1969 Jab. LJ 37; *Mirza Javid Murtuza* v. *U.P. Financial Corporation,* AIR 1983 All. 234.

CHAPTER VII

Sale Of Goods

This chapter containing Sections 76 to 123 [Sale of goods] has been repealed by the Sale of Goods Act (III of 1930), Sec. 65.

CHAPTER VIII

Of Indemnity And Guarantee

124. "Contract of indemnity" defined.—A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."

Illustration

A contracts to indemnify *B* against the consequences of any proceedings which *C* may take against *B* in respect of a certain sum of 200 rupees. This is a contract of indemnity.

Scope.—This chapter deals with two particular kinds of contingent contracts, indemnity and guarantee. Section 124 defines a contract of indemnity and the succeeding section describes the legal rights of an indemnity holder. The rest of the chapter deals with the subject of guarantees in general and also with continuing guarantees and the rights and liabilities of co-sureties.

Indemnity.—ENGLISH LAW COMPARED.—Where one person promises to another person to save such other from any loss caused to him by the conduct of the promisor himself or some person, the promisor is said to 'indemnify' the other person, and the contract between the parties is said to be a contract of indemnity.[1] The definition of a contract of indemnity in Indian law appears to be narrower than in English law. In Halsbury's Laws of England, an indemnity is defined "as a contract, express or implied, to keep a person who has entered into, or who is about to enter into, a contract, or incur any

1. *Mangladha Ram* v. *Ganda Mal*, (1929) Lah. 388 : 120 IC 424 (A clause in a sale deed that vendor shall make good, if on the objection of anyone, vendee suffers loss in connection with the property sold is a contract of indemnity).

other liability, indemnified against loss, independently of the question whether a third person makes default." This definition brings out one distinction between the English law and the Indian statute. Whereas in the latter the nature of loss is in terms confined to the *conduct* of some person, in English law, the nature of the loss is not so restricted, but may be due to any accident entirely unconnected with the conduct of any party. **[624]**

Indemnity under a Marine Insurance covered cannot be construed as indemnity contemplated by the Contract Act, since the loss is caused neither by the conduct of the insurer nor by the conduct of other persons.[1]

"Loss"—It follows from the definition given in the section that the promisee under a contract of indemnity must have suffered loss, before he can hold the promisor liable on the contract of indemnity; for the happening of the loss is the contingency on which the liability of the indemnifier springs into existence. The essence of any indemnity clause is that the assured must prove a loss.[2] It has however been held that the liability arises as soon as the loss or injury to the indemnity-holder becomes imminent.[3] It may however, be a question of some nicety as to what constitutes 'loss.' As a rule under the English Common Law, a contract of indemnity could not be enforced except on proof of actual loss.[4] But, in equity, it was held that where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has been actually damnified, and the limit of the defendant's liability is the full amount for which he is liable.[5]

In *Putty Narayanamurthy* v. *Marimuthu,*[6] a case under Sec. 145 of the Contract Act, Bhashyam Iyengar, J., held that a surety who had adjusted the original liability under the principal debt by the execution of a promissory note to the creditor (without actual payment) had no cause of action against the principal debtor on foot of the implied duty to indemnify enunciated in Section 145. The *ratio decidendi* would seem to be that the mere exoneration of the principal from the liability to the execution of a promissory note cannot be said to be a "loss" within the meaning of Sec. 124. This ruling has been followed by the Lahore High Court in *Jawala* v. *Mt. Raj Kuar.*[7] The case of *Raman Menon* v.

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1. *State of Orissa* v. *United Insurance Co. Ltd.,* AIR 1997 SC 2671 : (1997) 5 SCC 512 :1997 (5) Supreme 643 : 1997 (2) CLT 484 (SC) : 1997 (2) UJ 268.
2. *In re. British India General Insurance Co. Ltd.,* AIR 1971 Bom. 102 : 40 Com.Cas 554.
3. *Raghavaiah* v. *Md. Ibrahim,* (1963) 1 An. LT 344 : (1963) 2 An. WR 78.
4. *Montagu Stanley & Co.* v. *Solomon Ltd.,* (1932) 1 KB 611; The City of Peking, (1890) 15 AC 438.
5. *Tale* v. *Crewdson,* (1938) 3 AER 43; *Cruse* v. *Paine,* (1868) 6 Eq. 641; *Lacy* v. *Hill,* (1874) 18 Eq. 641; *Lacey* v. *Hill,* (1874) 18 Eq.182; *Law Guarantee Society, In re.,* (1914) 2 Ch. 617; *Ramanarayaningar* v. *Venkatalingam,* (1935) 57 Mad. 218 : (1933) MWN 486 : 38 LW 818 : 66 MLJ 4 : 149 IC 379 : (1934) Mad. 1.
6. (1902) 26 Mad. 322. **See also** *Doraisami* v. *Lakshmana,* (1904) 14 MLJ 285.
7. (1930) Lah. 812 : 31 PLR 329.

Chandra Sekhara Pattar,[1] is a similar authority for the position that a person cannot maintain a suit for indemnity unless he has actually incurred the loss against which he seeks to be indemnifies. This was a case of a mortgagor paying off a mortgage and subsequently having to discharge also a sub-mortgage, which had been created by the mortgagee. The mortgagor filed the suit for reimbursement before he had actually paid over the sum due to the submortgagee. The Court held that the suit was not maintainable in the absence of actual payment.

Similarly in *Seetamma* v. *Narayanamurthi,*[2] it was held that the mere breach of one of the terms of an indemnity clause does not start the cause of action but that it arises only when the promisee is damnified actually. But there are cases on the other side of the line also.[3] In *Chiranji Lal* v. *Naraini,*[4] it was held that the fact that a decree had been passed against a promisee under a contract of indemnity was sufficient to enable him to enforce the indemnity, though no actual payment may have been made under the decree.

Distinction between Indemnity and Guarantee.—The contract of indemnity is entered into with the object of protecting the promisee against anticipated loss.[5] It follows from the definition that such a contract requires only two parties, the promisor and the promisee. But the contract of guarantee postulates three persons, for it is a contract whereby promisor undertakes to perform or discharge the liability of a third person in case of default by such third person. It not however necessary or a *sine qua non* that the principal debtor must be expressly a party to the document of guarantee as it is adequate if the principal debtor is a party by implication.[6] While a contract of indemnity is a direct engagement between parties the contract of guarantee is a collateral engagement to be answerable for the debt, default or miscarriage of a third party.

It is to be observed that in the case of the contract of guarantee the surety undertakes his obligation at the request—express or implied—of the

1. (1912) MWN 37 : 13 IC 203; *Chand Bibi* v. *Santosh Kumar,* (1933) 60 Cal. 761 : 146 IC 863 : (1933) Cal. 641; *Ranganath* v. *Paohusao,* (1935) Nag. 147 : 156 IC 94; *Anwar Khan* v. *Gulam Kasam,* (1919) 50 IC 611.
2. (1920) 38 MLJ 478 : 57 IC 982; *Sham Sunder* v. *Chandu Lal,* (1935) Lah. 974 : 159 IC 853.
3. **See** *Raghunathachariar* v. *Sadagopa,* (1911) 36 Mad. 348 : 21 MLJ 983 : 2 MWN 227 : 12 IC 353 (Transfer of Property by A to B in consideration of B agreeing to pay certain sums to third persons-Failure by B to pay-A has right to suit and need not prove that he was damnified by B's failure); *Doraisinga* v. *Arunachalam,* (1899) 23 Mad. 441.
4. (1919) 41 All. 395 : 17 ALJ 394 : 51 IC 158; *Carr* v. *Roberts,* (1833) 110 ER 721 (Recovery of judgment against promisee under indemnity is sufficient to enable him to sue). **See also** *Durga Kunwar* v. *Kalicharan,* (1913) 35 All. 168 : 11 ALJ 184 : 18 IC 521 (Purchaser of property-Indemnity against defective title—No duty to wait till suit is brought).
5. **See** *Guild* v. *Conrad,* (1894) 2 QB 885.
6. *Nagpur Nagarik Sahakari Bank Ltd.* v. *Union of India,* AIR 1981 AP 53 : (1981) 1 An. WR 393.

third party, whereas in the case of the contract of indemnity, the obligation is undertaken without any request, since, *ex hypothesi,* there is no third party whose concurrence is required. The distinction, which flows out of this, is said to be this—that the promisor under a contract of indemnity cannot, on fulfilling his obligations under his contract, sue *in his own name* the third party, whose conduct had caused the loss to the loss to the promises. He must take an assignment from the promisee and then sue. But a surety can sue in his own name.[1] **[622]**

Section not exhaustive.—It will be observed that the Act does not deal with the contract of indemnity in all its aspects. It says nothing, for instance, about the rights of the promisor under the contract of indemnity. The principles of English law have therefore been applied. In *Osman Jamal* v. *Gopal Purshottam,*[2] the plaintiffs (a limited company in liquidation) had acted as commission agents of the defendant for purchase and sale of goods and the defendant had undertaken to indemnify the plaintiffs against losses. By reason of the defendant's failure to take delivery, the plaintiffs became liable to pay a third party, the vendor, damages and sued for reimbursement and also the commission due to them. The court took into consideration the fact that the defendant as an undisclosed principal may be exposed to the risk of a further action by the third party, and was therefore in the language of the English cases "concerned with the application of the money which he pays" and directed that the sum recovered under the indemnity should be exclusively applied in payment of the claim of the third party.

In one Bombay case, *Maharana Shri Jasvant Singji* v. *Secretary of State,*[3] it had been held by Jardine, J., that as regards the rights of the promisor under a contract of indemnity, the principle of subrogation was applicable because it is an essential part of the law of indemnity, and is based on natural equity and the Contract Act contains no provision inconsistent with it.

Indemnity implied.—This section does not seem to cover cases of implied indemnity (*e.g.*), Section 69 of the Act. But there is no doubt that a contract of indemnity may be express or implies. In a ruling of the Privy Council in *Secy. of State* v. *Bank of India,*[4] their Lordships recognised the "implied indemnity under the Common Law of India." In that case the question of

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1. *Periamiyanna Marakkayar* v. *Banians & Co.,* (1926) 49 Mad. 156 : 23 LW 432 : 95 IC 154 : (1926) Mad. 544.
2. (1929) 56 Cal. 262 : 118 IC 882 : (1929) Cal. 208. Followed in AIR 1942 Bom. 402 and 1956 Bom. 106 DB; *Bank of New India* v. *Govinda,* (1964) Ker. 267, Employees of Bank agreeing, to see to repayment of irregular loan.
3. (1889) 14 Bom. 299.
4. (1938) 65 IA 286 : ILR (1938) Bom. 502 : 175 IC 327 : 48 LW 8 : 67 CLJ 456 : 42 CWN 957 : (1938) MWN 753 : 19 Pat. LT 625 : 40 Bom. LR 868 : (1938) ALJ 807 : (1938) PC 191 : (1938) 2 MLJ 169 (PC); *Kuppan Chettiar* v. *Ramaswami Chettiar,* AIR 1946 Mad. 472.

implied indemnity arose with reference to Sec. 21 of the Indian Securities Act. A broker in possession of a Government promissory note endorsed it to a Bank under a forged endorsement. The Bank acting in good faith applied for and got a renewed promissory note from the Public Debt Office. Meanwhile the real owner successfully sued in conversion the Secretary of State who in turn sued the Bank on an implied indemnity. The Judicial Committee observed that even the fact that Sec. 21 of the Securities Act provides that an express indemnity may be demanded was not inconsistent with the existence of an implied right to indemnity under the Common Law of India. The statement of the principle was expressed by their Lordships thus:

> "It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing is entitled to an indemnity from him who requested that it would be done."

In *Krishnaswami Ayyar* v. *Raghaviah,*[1] Venkatasubba Rao, J., observed that a right to indemnity may arise by implied contract that is, if the true inference to be drawn from the facts is that the parties intended such indemnity even if they did not express themselves to that effect; or that the position of parties may be such, that in law or equity, there is an obligation to indemnify;[2] or that in a particular state of circumstances, the law may attach a duty to indemnify.[3] In respect of acts done by A, at the request of B, if A incurs any loss, there arises an implied right to indemnity.[4] Thus where a purchaser of property undertakes to pay off a subsisting encumbrance, as part of the consideration for the sale to him, an implied indemnity may arise in favour of vendor against any loss caused by failure to discharge the encumbrance.[5] So too, where money is paid by one person under compulsion of law in respect of a liability imposed on another person, the law implies an indemnity in favour of the person making the payment.[6] Similarly, a contract of indemnity may be implied between the assignee and assignor of a lease, in regard to demands that may be made on

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1. (1927) 53 MLJ 679 : 26 LW 687 : 107 IC 423 : (1928) Mad. 43.
2. *Eastern Shipping Co.* v. *Quah Beng Kee,* (1924) AC 177; *Wynne* v. *Tempest,* (1897) 1 Ch. 110; *Brimingham* v. *District Land Co.,* (1886) 34 Ch.D. 261.
3. *Sheffield Corpn.* v. *Barclay,* (1905) AC 392; *Starkey* v. *Bank of England,* (1903) AC 114.
4. *Cory & Son* v. *Lambton & Hetton Colleries,* (1916) 86 LJKB 401; *Dugdale* v. *Lovering,* (1875) 10 CP 196; *Fraser* v. *Murdoch,* (1881) 6 AC 855; *Kruger* v. *Moel Tyvan Ship Co.,* (1907) AC 272.
5. **See** *Ansur Subba Naidu* v. *Bathula Bee Bee Sahiba,* (1911) 34 Mad. 479 : (1910) MWN 302 : 7 IC 269; *Raghunatha* v. *Sadagopa,* (1911) 36 Mad. 348 : (1911) 2 MWN 227 : 12 IC 353 : 21 MLJ 983; *Doraisinga* v. *Arunachalam,* (1899) 23 Mad. 441 : 9 MLJ 8.
6. *Edmunds* v. *Wallingford,* (1885) 14 QBD 811; *Johnson* v. *Royal Mail Steam, Packet Co.,* (1867) 3 CP 38.

the assignor. Again, on a transfer of shares in a company, the transferor will be entitled to an implied indemnity against future calls. In a contract of guarantee, the law implies a promise by the debtor to indemnify the surety (see Section 145). In the case of an agency, the Indian Contract Act has made provision for an agent's right to an indemnity in Sections 222 to 224.

In a Patna case, it has been pointed out that a mere undertaking by a second mortgagee to pay off a prior mortgage does not amount to a contract of indemnity and a suit for damages for breach of the undertaking will not be governed by Art. 83 but by 116 of the Limitation Act.[1]

125. Rights of indemnity holder when sued.—The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

Scope of indemnity.—This section deals with the rights of an indemnity-holder when sued. Subject to the condition of his acting within the scope of his authority, and not contravening the specific directions of the promisor, the indemnity-holder may recover.

(a) damages, which he may have been compelled to pay in, any suit in respect of any matter covered by the contract,

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1. *Keshwar Rao* v. *Guni Singh*, A1R 1938 Pat. 275 : (1938) 17 Pat. 338.

(b) costs incidental to the institution or defending of any such suit,

(c) sums paid under any compromise of any such suit, provided the compromise was a prudent one to make had there been no contract of indemnity. **[625]**

Where an amount was deposited with a bank for the due performance of a contract with Government, in the absence of any obligation contractual or fiduciary undertaken by the bank with the officer of the Government with whom the deposit was meant to be kept as security, the banker is liable to pay the depositor and could not withhold payment.[1]

Damages.—In *Nallappa* v. *Vridhachala*[2] the Court held that a decree obtained against the promisee under a contract of indemnity, was binding on the promisor on the principle of estoppel by judgment and its propriety cannot be re-agitated. However, the promisee must have acted with reasonable prudence. So, if he takes steps which are reasonably necessary for 'laying the foundation to a future claim; he will be entitled to be indemnified.[3]

In English law, it is now settled that a party may recover all such charges as necessarily and reasonably arise out of the circumstances under which the party charged became responsible.[4]

Costs.—Here again, the general principle is that the costs eligible from the promisor under the indemnity must be such as a reasonable man, placed in the situation of the promisee, would think it necessary to incur.[5] As was pointed out in an early Calcutta case,[6] in contracts of indemnity the liability of the party indemnified to a third person is the very moving cause of the contract, and in such case, the costs reasonably incurred in resisting or reducing or ascertaining the claim may be recovered.

That the costs in such cases may be not merely taxed costs, but costs as between attorney and client, has been decided in *Howard* v. *Lovegrove.*[7]

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1. *United Commercial Bank Ltd* v. *Okara Grain Buyers Syndicate Ltd.*, AIR 1968 SC 1115 : 1968 (3) SCR 396 : 1968 (38) CC 636.
2. (1914) 37 Mad 270 : 25 IC 888. **See also** *Ramdhan* v. *Purushotham,* (1926) Nag 109 : 88 IC 699 and the English *case Parker* v. *Lewis,* (1873) 8 Ch. 1035.
3. *Ramaswami Sastry* v. *Kali Raghava Iyengar,* (1917) MWN 868 : 43 IC 124.
4. *Smith* v. *Howell,* (1851) 155 ER 739; *Great Western Railway* v. *Fisher,* (1905) 1 Ch. 316.
5. *Gopal Singh* v. *Bhawani Prasad,* (1888) 10 All. 531.
6. *Pepin* v. *Chunder Sekhur Mookerjee,* (1880) 5 Cal. 811; followed in *Ramdhan* v. *Purushotam,* (1926) Nag. 109 : 88 IC 699.
7. (1870) 6 Ex. 43. **See also** *Venkatarangayya* v. *Raju Varaprasada,* (1920) 43 Mad. 898 : (1921) Mad. 544 : 13 LW 297 : 60 IC 164 : 39 MLJ 316 (Actual costs paid to legal advisers—Held recoverable); *Mangladha Ram* v. *Ganda Mal,* (1929) Lah. 388 : 120 IC 424.

Implied authority to defend.—Where the promisee gives notice to the promisor of the action which has been filed against him (the promisee) and his intention to defend the same, and the promisor does not expressly forbid such defence, and authority to defend the suit may be presumed from the conduct of the promisor, and he will then be bound to pay the reasonable expenses of such defence.[1]

Compromise.—But in particular circumstances, the dictates of prudence may point to a compromise of the claim as proper; in such a case, the promisee may, in the absence of specific instructions to the contrary, compromise the claim, and recover the amount paid in pursuance of the compromise. It may however, be open to the promisor, in cases where no notice has been given to him of the suit, to show that the compromise was not justified.[2]

Rights of promisor.—The section stops short with describing the rights of the promisee, and is silent as to the rights of the promisor under an indemnity. It is submitted that the principle of Sec. 141, which deals with, a surety's rights will apply to the case of a promisor under a contract of indemnity. That principle has been thus described by the House of Lords: "Where one person has agreed to indemnify another he will on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against, or reimbursed himself for the loss."[3]

Non-disclosure or misstatement—In case of insurance policies non-disclosure or misstatement of certain facts unless considered to be material cannot deprive the right to indemnity.[4]

Indemnity under Insurance Policies—Where the appellant insurance company having assured of indemnifying as against the loss of bags of fertilizer under fidelity insurance policy, the respondent corporation is under a duty to physically verify all the bags and to intimate to the appellant insurance company failing which the respondent corporation is said to have committed the breach of condition.[5]

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1. *See Blyth* v. *Smith,* (1843) 134 ER 622 : 63 RR 331.
2. *See Duffield* v. *Scott,* (1789) 100 ER 628; *Durga Kanwar* v. *Kali Charan,* (1913) 35 All. 168 : 11 ALJ 184 : 18 IC 521.
3. *Simpson* v. *Thomson,* (1878) 3 AC 279; **see also** *Ramdhan* v. *Purushottam,* AIR 1926 Nag 109 and AIR 1942 Bom. 302; AIR 1946 Cal. 159; AIR 1934 Mad 1 (DB); *Ramchandra* v. *Shasurji,* AIR 1940 Bom 315; *Janwanth Raj* v. *Jethmal,* AIR 1958 Raj 343; *(Rajal Jagannath Baksh Singh* v. *Chandra Bushan Singh,* AIR 1937 Oudh 19; *Radhakumar* v. *Rant Narayan,* AIR 1952 All. 567; *Mir Niyammath Ali Khan* v. *Commercial & Industrial Bank,* AIR 1969 AP 294; *Nagpur Nagarik Sahakari Bank Ltd.* v. *Union of India,* AIR 1981 AP 153.
4. *Jayashree Roy Chawdhury* v. *Oriental Insurunce Co. Ltd.,* AIR 1992 Cal. 355 : 1981 (1) ALT 233 : 1981 (1) APLJ 316 : 1981 (1) An.WR. 393.
5. *Oriental Insurance* v. *Gujarat State Ware Housing Corpn. Ltd.,* AIR 2003 Guj 159 : (2003) 3 ILD 905 (Guj) : 2003 (3) GCD Guj 2015.

126. "Contract of guarantee", "surety", "principal debtor" and "creditor".—A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor," and the person to whom the guarantee is given is called the "creditor." A guarantee may be either oral or written.

Contract of guarantee.—As observed, already a contract of guarantee is a collateral engagement to perform the promise or discharge the liability of a third party, in case of his committing default. It therefore follows that such a contract requires the concurrence of three persons[1] and the section describes the three persons, as surety, principal debtor and creditor.

The definition of guarantee being an inclusion of both debts in presenti and debts in future, the guarantor is also stands in the position of debtor and thus entitled to create a mortgage by deposit of title deeds.[2]

It looks as if the section contemplates a case where the relationship of debtor and surety is created by an agreement to which the creditor is a party. But it is possible that the relationship may be established without the creditor being a party.[3] It is also possible that a person may become a surety without the knowledge or consent of the principal debtor. But in such a case, the rights of the surety will be limited to those mentioned in Sections 140 and 141. The case of *Muthuraman* v. *Chinna Vallayan* [4] is an authority for this proposition.

A contract of insurance containing an option by the insurer without any reference to the insured, such a contract is only a contract for reinstatement.[5]

The contract of guarantee may be either oral or in writing. It may be express or implied. It may even be inferred from the course of conduct of the parties' concerned.[6]

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1. *See Mahabir Prasad* v. *Siri Narayan,* (1918) Pat. 328. 46 IC 27; Md *Ishak* v. *Balaji,* (1934) Nag. 163 : 148 IC 585; *Pesticides India* v. SC & P *Corporation of India,* AIR 1982 Delhi 78 : 1981 Raj. LR 5 : *Texmaco Ltd.* v. *S.B.I.,* AIR 1979 Cal. 44; *Banwari Lal Radhe Mohan* v. *Punjab State Co-operative Supply & Marketing Federation Ltd.,* AIR 1982 Delhi 357 : 1982 Rajdhani LR 525 : 1982 Delhi Rep.J. 233.
2. *E.P. George* v. *Bank of India,* AIR 2001 Ker 107, 109.
3. *See Duncan Fox & Co.* v. *N&S Wales Bank,* (1881) 6 AC 1.
4. (1916) 39 Mad. 965 : 30 MLJ 369 : 3 LW 393 : 33 IC 508.
5. *Commissioner of Income Tax, Madras* v. *Kasturi & Sons Ltd.,* AIR 1999 SC 1275 : (1999) 3 SCC 346 : 1999 (3) Supreme 25 : 1999 (2) SCJ 441.
6. *Mir Niyamath Ali Khan* v. *Commercial & Industrial Bank Ltd.,* AIR 1969 AP 294.

No liability can be imposed on the defendant as a guarantor who has given a letter to the plaintiff bank assuring payment by the principal debtor in the absence of any specific execution of deed of guarantee and such letter is of only recommending nature.[1]

Even though the contract of guarantee is not signed by the principal debtor, by reading the scheme and intention of various clauses of contract of guarantee, the principal borrower by implication can be deemed as party to such contract.[2]

An assurance by a third party to collect a particular amount from the vendor and pay it to the vendee is neither a guarantee nor an indemnity.[3]

Where money was deposited with the National Chamber of Commerce, Kanpur, as margin money under the rules of the chamber by one constituent for registering contracts entered into with another constituent of the Chamber, the contracts being prohibited by Government control order, it was held that the position of the chamber was that of a stakeholder and not quite that of surety.[4]

The signing of a sale list by a person certifying the solvency of an auction-purchaser does not make him a surety for the latter undertaking to pay his liability in case he failed to discharge it.[5] A party does not become a guarantor merely because he has introduced a customer to the businessman with regards to the business dealings between them.[6]

Where an equitable mortgage by deposit of title deeds is created, it is needless to say that there are three requisites viz., (1) a debt; (2) a deposit of title deeds and (3) an intention that the deeds shall be security for the debt.[7]

Enforcement of bank guarantee against non-performance— Enforcement of bank guarantee is playing a vital role in the commercial world. It provides a mechanism of great importance in international trade and commerce. Any kind of interference with this mechanism will cause a serious set back to trade and commerce. Barring exceptional cases, the Courts should not interfere with the working of this mechanism.[8]

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1. *Indian Overseas Bank* v. *S.N.G. Castorete Pvt. Ltd.*, AIR 2002 Del. 309 : 2002 (2) Bank Cas 255 : 2002 Bank J 604 : 2002 (62) DRJ 32.
2. *M/s. Chand Chit & Finance (P) Ltd.* v. *M!s. Super Advertisers*, AIR 1992 Delhi 85,86 : (1991) 44 DLT 443.
3. *Chinnamma* v. *Dhanalakshmi*, 1977 An. LT 581.
4. *National Chamber of Commerce, Kanpur* v. *Nitya Nandan Deoki Nandan*, AIR 1963 All. 294.
5. *Joseph Abraham* v. *Tahsildar, Meenachil*, AIR 1971 Ker. 334 : ILR (1971) 1 Ker. 618.
6. *Chanana Steels Tubes Pvt. Ltd.* v. *Jaitu Steel Tubes Pvt. Ltd.*, AIR 2000 HP 48, 50 : 2000 (2) Bank CLR 580 : 2000 (1) Civ. LJ 364 : 2000-(99) Com.Cas 251 : 1999 (2) Shim LC 508 : 1999 (37) Arbi. LR 551.
7. *Lakshmi Vilas Bank Ltd.* v. *M/s. Shree Chakra Enterprises*, AIR 2003 Mad 1, 5.
8. *Tarapore & Co.* v. *Tractoro Export*, AIR 1970 SC 891 : (1970) 1 SCJ 650 : 1970 (1) An.WR. 105.

Where bank guarantee is furnished in order to ensure performance of contract, the bank guarantee furnished by the party guilty of breach of contract can be invoked and the bank is bound to pay.[1] Where a bank guarantee is furnished for the due performance of a contract relating to export of cotton textiles and when the respondent sought to invoke the bank guarantee, the bank is under a duty to honour the terms of the bank guarantee and as such the petitioner is not entitled for an injunction against invocation of the bank guarantee.[2] Where an unconditional bank guarantee was given at the instance of the plaintiff in favour of the defendant guaranteeing the due performance of a contract, on the failure of the plaintiff inspite of several opportunities given to him and also cautioned about the invocation of the bank guarantee, the defendant cannot be restrained from invoking the bank guarantee.[3]

The beneficiary of bank guarantee cannot be restrained from enforcing the same as the commitment of bank must be honoured free from interference of the court in the absence of fraud and special equities in the form of irretrievable injustice between the parties, otherwise the very purpose of bank guarantee is defeated jeopardising the trading operations.[4] Where an unconditional bank guarantee is not dependent upon the proof of default on the part of a company in liquidation, the banker cannot be restrained from making payment on the ground that the bank after payment shall have recourse to the securities of the company in liquidation and such action would affect the assets of the company in liquidation.[5] In order to restrain a bank guarantee being invoked, the only exception carved out is that there should be plea of fraud and the plea of irreparable loss is of no use.[6]

Where money was advanced under a contract to the contractor for making repairs as against the bank guarantee agreeing to recover from the running bills of contractor, the bank guarantee for breach of contract can be invoked only to the extent of advance remained unrecovered but not to its full extent.[7]

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1. *M/s. Triveni Engineering Works Ltd.* v. *M/s. Belganga S.S.K. Ltd.*, AIR 1992 Delhi 164,167.
2. *Mac Impex Chemicals P. Ltd.* v. *Union of India*, AIR 2003 Bom 88. 2003 (1) Arbi : LR 510 : 2003 (3) Bom. LR 440 : 2003 (3) Bom. LR 708.
3. *Vikas Laminator Ltd.* v. *Indian Overseas Bank*, AIR 2003 Delhi 434, 440 : 2003 (3) Bank Cas 355 : 2003 Bank J 539 : 2003 (4) Civil LJ 388 : 2003 (105) DLT 31 : 2004 (1) CTLJ 170 (Del).
4. *U.P. Co-op. Federation Ltd.* v. *Singh Consultants & Engjneers (P) Ltd.*, (1988) 1 SCC 174. **See also** *State Trading Corporation of India Ltd.* v. *Jain Sons Clothing Corporation*, AIR 1994 SC 2778, 2781 : (1994) 6 SCC 597 : 1994 AIR SCW 4331; *Dodstal Ltd.* v. *Krishak Bharti Co-op Ltd.*, AIR 1997 Bom. 3,6.
5. *Maharastra State Electricity Board Bombay* v. *Official Liquidator, High Court Ernakulam.*, AIR 1982 SC 1497.
6. *Krishna Electrical Industries (P) Ltd.* v. *State Bank of India*, AIR 1996 MP 188, 194 : 1996 (2) Bank LJ 323.
7. *Nangia Construction (India Ltd.* v. *International Airport Authority of India*, AIR 1992 Delhi 243.

Where the defendant company executed a bank guarantee in favour of plaintiff company for the mobilisation advance received by it, the bank cannot be restrained from allowing the encashment of bank guarantee despite the fact that the mobilisation advance was recoverable under the agreement from running bills payable to the defendants for the work done.[1]

Where a guarantee was given for a bank loan sanctioned to the principal debtor for purchase of a bus, the plea of the guarantors that the inaction on the part of the creditor bank to accept their offer to discharge the loan if the bus is transferred in their name and its possession is handed over to them, cannot absolve their liability and does not affect the guarantee.[2]

Where the bank guarantee is unconditional and payment should be made on demand, then the bank is under no obligation to find out whether any default is committed or whether any amount is due by the person at whose instance, the guarantee was issued and once the beneficiary invokes the bank guarantee and makes a demand, the bank is obliged to make payment.[3]

A bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the primary contract between the person at whose instance the bank guarantee is given and the beneficiary.[4]

A contract of bank guarantee or the letter of credit being independent of the main contract between the seller and the buyer, where there is an irrevocable bank guarantee or letter of credit, the buyer cannot obtain injunction against the banker on the ground that there was a breach of contract by the seller.[5]

Banker's lien over Fixed Deposits on discharge of Bank Guarantee—Where bank guarantee has been furnished in favour of court as against the deposit of Fixed Deposit Receipts to satisfy the decretal amount, the banker can set off in respect of the F.D.Rs. if the banker is entitled for any dues notwithstanding the discharge of Bank guarantee. Discharge of bank guarantee does not put an end to the general lien created over F.D.Rs.[6]

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1. *General Electrical Technical Services Co Inc.* v. *M/s. Punj Sons (P) Ltd.*, AIR 1991 SC 1994.
2. *Punjab National Bank* v. *Surinder Sing Mandyal*, AIR 1996 H.P. 1,5.
3. *Union Bank of India* v. J.B. *Khanna & Co.*, AIR 1996 Bom. 409, 415 : 1996 Bank J. 688 : 1996 (4) All. Mah. LR 194.
4. *Hindusthan Steel Works Construction Ltd.* v. *Tarapore & Co.*, AIR 1996 SC 2268, 2272 : (1996) 87 Comp. Cas 344. .
5. *Federal Bank Ltd.* v. *V.M. Jog Engineering Ltd*, AIR 2000 SC 3166, 3179 : (2001) 1 SCC 663 : 2000 (6) Supreme 619 : 2000 (3) RAJ 319; *Mauria Udyog Ltd.* v. *Corporation Bank*. AIR 2007 Del 259 (Del).
6. *Syndicate Bank* v. *Vijayakumari*, AIR 1992 SC 1066,1071 : 1992 (2) APLJ 15 : JT 1992 (2) SC 136 : (1992) 2 SCC 330.

Liability, secondary or accessory.—A guarantee therefore presupposes the existence of a separate obligation owed or to be owed, by the principal debtor to the creditor, and the liability of the guarantor or surety is thus secondary, accessory brought into existence only on default by the person primarily liable. The importance of the last qualification can best be illustrated by cases in which the guarantor or surety becomes insolvent before default is made by the debtor. In such cases, the creditor cannot prove against the surety's estate in anticipation of possible default by the principal debtor.[1] What constitutes default such as to attract the liability of the surety will depend on the facts of each case. So in the case of a guarantee for due accounting by a treasurer of a society, where the treasurer was, after collecting the moneys, attacked and robbed, it was held that the surety would be liable, because the principal debtor himself was excused from liability in the circumstances.[2] **[650]**

When arises.—Where the contract provides for the performance of conditions precedent by the creditor, such conditions must be strictly fulfilled (*e.g.*,) notice of demand on debtor[3] or surety, or notice to surety of the debtor's default,[4] or prosecution of the debtor where the surety ship is a fidelity guarantee.[5] Even in the performance of the consideration the surety has a right to except literal fulfilment of his terms. Thus where the guarantee was in respect of a loan for a time specified, and the creditor instead of giving the loan, simply allowed the debtor to overdraw, the surety was held not liable.[6] **[653]**

When not enforceable.—In the first place, as the guarantee is a *promise* to pay on another's default, a mere recommendation of the debtor will not suffice to create such a contract.[7] Again, as a guarantee is a promise to discharge a liability of a third party on his default, there can be no doubt that unless the third party's liability be one enforceable by law, the guarantee will be void and of no effect. For instance, if the primary liability of the debtor (in respect of which the guarantee is given) at the date of the guarantee is unenforceable owing to the bar of limitation, the guarantee is likewise is unenforceable for there is no real consideration for the contract of guarantee.[8] Again, mutual

1. *Antrobus* v. *Davidson,* (1817) 36 ER 219 : 17 RR 130; *Re. Wyatt & Thompson,* (1832) 2 Deac & Ch. 126.
2. *Walker* v. *British Guarantee* Association, (1852) 118 ER 194 : 88 ER 580.
3. *Rede* v. *Farr,* (1817) 105 ER 1188 : 18 RR 329; *Lawrence* v. *Walmsley,* (1862) 142 ER 1356 : 133 RR 519; *Brown* v. *Brown,* (1893) 2 Ch. 300; (Cf.) *Eshelby* v. *Federated European Bank,* (1932) 1 KB 423.
4. *Cokain* v. *Goodlage,* (1610) 80 ER 744.
5. *London Guarantee Co.* v. *Fearnley,* (1880) 5 AC 911.
6. *Burton* v. *Gray,* (1873) 8 Ch. Ap. 932.
7. *Muthukaru Alagappa* v. *Krishna Iyer,* (1927) Mad. 62 : 97 IC 866; *Mohamed Shamsuddin* v. *Shaw Wallace & Co.,* (1939) 1 MLJ 529 : 49 LW 343 : (1939) MWN 209.
8. *Manju* v. *Shivappa,* (1918) 42 Bom. 444. **But see** *Kashiba* v. *Shripat,* (1894) 19 Bom. 697 (Principal debtor incompetent to contract; surety liable as principal); *Chhajju Singh* v. *Emperor,* (1921) 2 Lah. 204 : 63 IC 454 : (1921) Lah. 79.

error as to the supposed liability will have the effect of making the guarantee void.[1] The result will be the same where the surety ship is in respect of an illegal or void contract of the principal debtor.[2]

Principal debtor a minor. — As to the rights of parties where a guarantee is in respect of a liability of a person incompetent to contract it has been held that the liability of the person who gives the guarantee is not secondary but direct and primary.[3] Consequently the guarantor will be liable though not the principal debtor. **[628]**

Principal debtor a Corporation. — As to the question of the surety's liability where the debtor is an incorporated society acting *ultra vires*, opinion seems divided.[4] Where the directors of a company gave a guarantee in respect of covenants *ultra vires* the company. It was held that irrespective of whether the company declined to carry out the covenants or was legally not liable to do so, the directors were liable on their promise.[5]

Formalities.—The section specifically says that the contract may be oral or in writing.[6] Here it differs from English law where under Sec. 4 of the Statute of Frauds, a contract of guarantee must be evidenced by a memorandum in writing. In India, no formality is required. Where on a promissory note by the principal debtor, the surety had written, "Repayment guaranteed by me," the Court held that it was a contract of guarantee.[7] But though no writing is necessary, the contract has to be strictly proved.[8]

A guarantee need not be on a duly registered stamp document and it can be either oral or written. [9]

Construction of contracts of guarantee.—The enforceability of a guarantee also depends upon its terms. In case of ambiguity when all other

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1. *Mountstephen* v. *Lakeman*, (1871) 7 HL 17.
2. *Pearse* v. *Morrice*, (1834) 111 ER 32.
3. *Sohanlal* v. *Puran Singh*, (1916) 35 IC 537; *Wauthier* v. *Wilson*, (1911) 27 TLR 582.
4. *Longher* v. *Molyneux*, (1916) 1 KB 718; (Not liable); *Chapleo* v. *Brunswick*, (1881) 6 QBD 696 (Liable but the case does not appear to be strictly one of guarantee).
5. *Garrard* v. *James*, (1925) 1 Ch. 616.
6. **See** *Mathura Das* v. *Secy. of State*, (1930) ALJ 1217 : (1930) All. 848; *Barkat-un-nissa* v. *Mahoob*, (1920) 42 All. 70 : 52 IC 648; *Nandlal* v. *Kishan Chand*, (1937) Sind 50 : 168 IC 222.
7. *Brojendrao* v. *Hindustan Co-operative Insurance Society Ltd.*, (1917) 44 Cal. 978 : 39 IC 705 : 21 CWN 482.
8. *Janki Nath Paul* v. *Vhokar Mall*, (1935) Pat. 376 : 156 IC 200; *H. Mohamed Khan* v. *Andhra Bank Ltd.*, AIR 1983 Kant. 73.
9. *Karnataka State Industrial* Investment *and Development Corporation Ltd., Bangalore* v. *State Bank of India*, 2004 (3) CCC 568 (Karn) : 2005 (1) CTLJ 331 (Karn) (DB).

rules of construction fail, the Courts interpret the guarantee *contrs proferentem that* is against the guarantor or use the recitals to control the meaning of the operative part where that is possible. But whatever the mode employed, the cardinal rule is that the guarantor must not be made liable beyond the terms of his engagement.[1] In *Phillips* v. *Mitchell,*[2] it was pointed out that the important thing to determine in a contract of guarantee is the contingency, which the parties had in mind when the contract was executed, in order to know what the parties meant; the court must look at all the surrounding circumstances. **[628]**

In the Privy Council case, *Raja Raghunandan* v. *Raja Kirtyanand,*[3] where a security bond was given under an order of court in consideration of stay of execution of a mortgage decree, the question arose whether it was an absolute security which the decree-holders could realise on default being committed by the judgment-debtors or whether it was only a security for any deficiency discovered after the sale of the property. Their Lordships held that having regard to the circumstances in which the document was executed, the bond was one for securing the balance unprovided for by the proceeds of the sale of the mortgaged property and therefore, the liability of the maker of the bond could not arise till the sale was held and the amount of deficiency ascertained. The Madras High Court has also pointed out in *Karuppan Chettiar* v. *Nagappa Chettiar* [4] that when a security bond is executed by a surety in pursuance of an order of Court, the bond should be considered in the light of the Court's order and that the circumstances in which it was executed may be looked at for construing the document. In *Vyravan Chettiar* v. *Official Assignee,* [5] the same Court

1. *State of Maharashtra* v. *Dr..M.N. Kaul,* AIR 1967 SC 1639 : 1967 MPLJ 937 : 1967 Mah. LJ 948.
2. (1930) 57 Cal. 764 : (1930) Cal.17 : 50 CLJ 403, on appeal 61 MLJ 191 (PC); 35 CWN 986 : (1931) PC 224; *Mathura Das* v. *Secy. of State,*(1930) ALJ 1217 : (1930) All. 848. **See also** *Lloyds* v. *Harper,* (1880) 16 Ch. D 290 (Guarantee to be construed reasonably by the words used, and with regard to surrounding circumstances); (Cf.) *Nicholson* v. *Paget,* (1832) 139 ER 309 (To be construed liberally in favour of the party giving guarantee); *Brunning* v. *Odhams* Bros., (1896) 75 LT 602; *Mayer* v. *Isaac,* (1840) 151 ER 554; 55 RR 734 (Liberal construction in favour of the creditor, as he is not responsible for the language of the document); *Bank of British North America* v. *Cuvillier,* (1861) 15 ER 275 : 134 RR 42; **see** *United Commercial Bank* v. *Bank of India,* AIR 1981 SC 1426 : (1981) 2 SCC 766 : 1981 (3) SCR 300 : (1981) 2 SCC 768; **see also** *Mohammed Khan* v. *Andhra Bank Ltd.,* AIR 1984 Kant. 73 : *Banwari Lal* v. *Punjab State Co-op. S&M Federation Ltd.,* AIR 1983 Delhi 86; *Harprashad & Co.* v. *M/s. Sudarshan Steel Rolling Mills,* AIR 1983 Delhi 128; *Nagar Nagarol Sahakari Bank Ltd.* v. *Union of India,* AIR 1981 AP 153 : 1981 (1) ALT 233 : 1981 (1) APLJ 316 : 1981 LS 138.
3. (1932) 63 MLJ 85 : 55 CLJ 413 : 36 CWN 741 : 36 LW 111 : (1932) PC 131; *Muthukaruppa* v. *Kathapudayan,* (1914) 27 MLJ 249 : (1914) MWN 706 : 25 IC 726.
4. (1934) 57 Mad. 688 : (1934) MWN 667 : 66 MLJ 248 : 39 LW 239 : (1934) Mad. 186 following *Loyman Bewa* v. *Easin Sarkar,* (1926) 53 Cal. 515 : 43 CLJ 493 : 30 CWN 609 : 95 IC 483 : (1926) Cal. 877.
5. (1932) 55 Mad. 949 : 139 IC 562 : (1932) MWN 969 : 36 LW 490 : 63 MLJ 615.

has pointed out the scope of a contract of guarantee and defined in the section, and has held that where a debt is borrowed by two persons jointly and severally bound as principals and shared by them—so that the debt was one equally of both—one of them will not, by the mere fact of payment of the entire debt, become entitled to the benefit of any securities held by the creditor.

The right to recover a debt wholly or partially vests in a creditor till such time the debt of the principal debtor is discharged. Then only the liability of the surety shall come to an end.[1]

The necessity of interpreting bonds of this kind according to their plain terms has been emphasised and the dangers of interpreting them in such way as to make them the most reasonable bonds the parties might have contemplated have been pointed out by the same High Court.[2]

Invocation of bank guarantee can be temporarily injuncted when the work by debtor had to be stopped for non providing adequate funds of the creditor.[3]

Bank guarantee, letters of credit etc.—Liability arising out of unilateral contracts of commercial credits such as bank guarantee, letters of credit, non-performance bonds, etc., generally stated, is absolute. The intention of the parties as gatherable from the language of the particular contract must ultimately govern the decision as to the enforcement of the liability thereunder.[4] Courts, should refrain from granting injunction restraining performance of contractual obligations arising out of letters of credit or bank guarantee, between one bank and another.[5] It is not correct to put the letter of invocation in respect of bank guarantee on par with documents that are required to be submitted under the letter of credit since the documents to be tendered specified in a letter of credit for the purpose of honouring the bills should conform to the description provided in the letter of credit.[6]

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1. *State Bank of India* v. *Madhya Pradesh Iron & Steel Works (P) Ltd.*, AIR 1998 MP 93.
2. *Paramasivam* v. *Ramaswami*, (1938) MWN 1158 : 48 LW 760.
3. *State of Bihar* v. *Hindustan Construction Co. Ltd.*, AIR 1998 Bom. 331 : 1998 (3) Bom CR 495 : 1998 Bank J 606 : 1998 (2) Mah LR 575 : 1998 (3) All Mah LR 236.
4. *Har Prashad & Co. Ltd.* v. *Sudarshan Steel Mills*, AIR 1980 Delhi 172.
5. *United Commercial Bank* v. *BankofIndia*, AIR 1981 SC 1426 : (1981) 2 SCC 766 : 1981 (3)SCR 300; Cf. *State Bank of India* v. *The Economic Trading Co.*, AIR 1975 Cal. 145; *Vinay Engineering* v. *Neyveli Lignite Corpn.*, (1983) 96 LW 61 (SN); *Harprashad & Co.* v. *M/s. Sudarshan Steel Rolling Mills*, AIR 1983 Delhi 128; *Road Machines India (P) Ltd.* v. *P&E Corpn. of India Ltd.*, AIR 1983 Cal. 91; *National Project Construction Corporation Ltd.* v. *G. Ranjan*, AIR 1985 Cal. 23 : (1985) 89 Cal.WN. 186.
6. *Hindusthan Copper Ltd* v. *Rana Builders Ltd.*, AIR 1999 Cal. 229, 236 (DB) : 1999 (4) Civ. LJ 700 : 1999 (2) Cur LJ (CCR) 277 : 1999 (3) Arbi. LR 169.

It is well settled that in order to restrain the operation of either irrevocable bank guarantee or letter of credit the party-seeking injunction must establish a strong prima facie case of fraud of egregious nature or special equities in the form of preventing irretrievable injustice between the parties.[1] Where the petitioner was given forged documents relating to shipment of readymade garments in respect of which he has given an unconditional bank guarantee, he is entitled for an injunction order against the encashment of the bank guarantee on the ground of fraud and irreparable loss.[2] Where a bank guarantee is furnished, no injunction can be granted restraining the encashment of such guarantee unless there is *prima facie* case of fraud or special equities in favour of party claiming injunction.[3]

The Supreme Court of India in *Himadri Chemicals Industries Ltd.* v. *Coal Tar Refining Company*,[4] has laid down the following principles while granting an injunction to restrain the encashment of a Bank Guarantee or Letter of Credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

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1. *EMCO Pressmaster Pvt. Ltd.* v. *Union of India*, AIR 2000 Delhi 37 : 1999 (77) DLT 575 : 1999 (49) DRJ 114; *Alcove Industries Limited* v. *Oriental Structural Engineers Ltd.*, AIR 2005 Del 173 : 2004 (2) CTLJ 465 (Del).
2. *Rigoss Exports International (P) Ltd.* v. *Tartan Infomark Ltd.*, AIR 2002 Del 285 : 2002 (1) Arbi. LR 594 : 2002 (2) Bank Cas 219 : 2002 Bank J 766 : 2002 (96) DLT 614.
3. *Bridge & Building Construction* Co. *Pvt. Ltd.* v. *Cemindia* Co. *Ltd.*, AIR 1994 Cal. 219, 221 : 1994 (2) Cal.LT 7 : 1994 (3) Civ. LJ 244 : (1994) 2 BC 530 : *Kamal Virdichandji Garg* v. *Fiat India Pvt. Ltd.*, AIR 2004 Bom. 462 : 2005 (1) CTLJ 225 (Bom) : 2005 (1) CCC 619 ; *Man Industries India Ltd.* v. *N.V. Kharote Engineers & Contractors*, 2005 (2) CTLJ 154 (Bom.) ; *Adani Exports Ltd.*, v. *Marketing Services Incorporated*, 2006 (1) CTLJ 195 (Guj) ; *Punj Lloyd Insulations Ltd.* v. *State Bank of India*, 2006 (1) CTLJ 209 (Del) (DB).
4. AIR 2007 SC 2798.

(v) Fraud of an egregious nature, which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary, seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.

Where a performance bank guarantee of Rs. 75 lakhs was furnished by the appellant, the bank guarantee being unconditional, without any strings attached and a case of fraud having not made out, the court cannot grant an order of injunction to restrain the invocation of performance bank guarantee.[1]

In order to seek injunction to restrain from invoking the bank guarantee or letter of credit it is necessary to prove not only fraud but also the fact that the bank knew about such fraud.[2]

Where the respondent contractor gave a performance bank guarantee in favour of the appellant and the appellant never claimed breach of contract on the part of the respondent during the validity period of bank guarantee, injunction in favour of the respondent restraining the appellant from invoking the bank guarantee is justified.[3]

Irrevocable bank guarantee can be encashed by the federation, in the absence of specific mention of the name of the mill on behalf of whom agreement was entered into.[4]

A bank guarantee which is payable on demand implies that the Bank is liable to pay as and when a demand is made upon the bank by the beneficiary and the bank is not concerned merely because interse disputes exist between the beneficiary and the person at whose instance the bank issued the bank guarantee.[5]

No ad interim injunction can be granted restraining the beneficiary from encashing the bank guarantee merely because a petition is pending before the arbitrator to resolve a dispute between the parties that arose subsequent to the execution of bank guarantee.[6]

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1. *Jagdish Constructions Ltd.* v. *M.P. Rural Road Development Authority*, AIR 2007 MP 266.
2. *Federal Bank Ltd* v. *V.M. Jog Engineering Ltd.*, AIR 2000 SC 3166, 3179 : (2001) 1 SCC 663 : 2000 (6) Supreme 619 : 2000 (3) R.A.J. 319 : 2000 (7) SLT 245.
3. *Seluj Jal Vidyut Nigam Ltd* v. *Jai Prakash Hyundai Consortium*, AIR 2006 Del. 239.
4. *National Textile Corporation Ltd.* v. *Tamil Nadu Co-operative Marketing Federation & Anr.*, AIR 1998 SC 2658 : (1998) 6 SCC 294 : 1998 (6) Supreme 111 : 1999 (96) Com Cas 171 : 1998 (5) JT 174.
5. *National Thermal Power Corporation Ltd.* v. *Flow More Pvt. Ltd*, AIR 1996 SC 445, 447 : 1996 Bank J. 368 : 1996 (1) LS 39 (SC) : 1995 AIR SCW 4306.
6. *Association of Corporation & Apex Societies of Handlooms* v. *State of Bihar*, AIR 2000 Del. 106, 112 : 1999 (81) DLT 457 : 1999 (51) DRJ 110 : 2000 (2) Arbi. LR 134 : 1999 (2) Bank. Cas 563 : 1999 (5) AD Del 769.

In cases of unconditional bank guarantee the Court will not grant injunction restraining the bank from honouring the bank guarantee except in case of fraud and irretrievable injustice.[1]

Merely because a suit relating to the recovery of money is pending before a civil court, the appellant bank cannot withhold payment of money on the maturity of a cash certificate to which the beneficiary is entitled.[2]

Bank guarantee could be enforced only to the extent of value of undelivered rice, when the said guarantee is furnished to secure delivery of rice.[3]

Dishonour by the bank of unconditional and irrevocable bank guarantee to the beneficiaries on receipt of notice is illegal. Dismissal of suit claiming the same is improper.[4]

From the terms and conditions of the bank guarantee when it is clear that the guarantee is irrevocable and the money under it is payable by the bank without any demur or protest, the existence of clause containing alleged conditions provided in an agreement between the parties does not render invocation of bank guarantee inoperative.[5]

Where the petitioner furnished an unconditional bank guarantee for the performance of a contract relating to civil interior and other works and the bank guarantee specifically said that the bank on notice from the beneficiary shall honour the encashment of bank guarantee, the bank is left with no option except making payment in the absence of any case of irretrievable injustice or fraud having been made out.[6]

Where the second respondent by giving a bank guarantee has undertaken to pay Rs.50 lakhs to the first respondent in respect of a contract between them for construction of a terminal against any loss or damage caused or would be caused to the first respondent upon demand from the first respondent in writing explaining the reasons for invoking the guarantee the

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1. *S.M.S. Demag AG* v. *Nilachal Ispat Nigam Ltd.*, AIR 2004 Ori 89.
2. *United Bank of India* v. *Rafiulla Tea and Industries (P) Ltd.*, AIR 2002 Gau. 101 : 2002 (110) Com Cas 427 : 2002 Bank J 701 : 2002 (1) Gauhati LR 556.
3. *General Manager Taluka Agricultural Produce Co-op. Marketing Ltd.* v. *Arbitrator, Dy. Registrar of Co-op. Societies, Raichur District*, AIR 1998 Karn. 354 : ILR 1998 Kar 2946 : 1998 (3) Kant LJ 527.
4. *S.A. Sattar* v. *Mrs. Kuruvilla*, AIR 1998 Ker. 292 : 1998 (3) Civ LJ 747 : 1998 (93) Com Cas 556 : ILR 1998 (3) Ker 170 : 1998 (2) Ker LJ 64 : 1998 (1) Ker LT 968.
5. *Association of Corporation & Apex Societies of Handlooms* v. *State of Bihar*, AIR 2000 Del. 106, 112 : 1999 (81) DLT 457 : 1999 (51) DRJ 110 : 2000 (2) Arbi. LR 134 : 1999 (2) Bank. Cas 563 : 1999 (5) AD Del 769 ; *Shaik Muneeruddin* v. *Karnataka Power Corporation Ltd.*, AIR 2005 AP 498 : 2006 (2) CTLJ 55 (AP) (SN). *Harcharan Dass Gupta* v. *Delhi Development Authority*, 2006 (2) CTLJ 475 (Del) (DB).
6. *Interior's India* v. *Balmer Lawrie and Co.* Ltd., AIR 2007 Del 16 : 2007 AIHC 42 (NOC) : 2006 (129) DLT 547.

bank to pay the amount notwithstanding any protest of the protest of the petitioner, the objection of the petitioner for invocation of the bank guarantee cannot be sustained.[1]

Where the bank guarantee stated that unless a suit or action to enforce the claim, under it was filed within six months from the date of its expiry, all the States rights under the bank guarantee would stand forfeited and the bank would be released and discharged from all liabilities thereunder, it cannot be held that the bank guarantee would remain effective and enforceable for so long until the work under the contract is successfully commissioned.[2]

Where the bank guarantee is invoked, the invocation of the same would be bad in law if such invocation is not in accordance with the terms of the bank guarantee, as it represents an independent contract between the bank and the person entitled to invoke.[3]

Where the plaintiff gave a bank guarantee for due performance of a contract to be entered with the defendant, the contract having fallen out, the plaintiff is entitled for the refund of earnest money and the action of the defendant in invoking the bank guarantee in advance is fraudulent. [4]

Where the defendant has partially accepted and partially not accepted the change of terms and conditions proposed by the plaintiff in the standard memo of contract to which the plaintiff has agreed to, no injunction can be granted as against the invocation of bank guarantee on the ground that the contract is not concluded when it was provided that the change of terms and conditions in the contract will not affect the invocation of bank guarantee.[5]

Where the appellant M/s BSES Ltd. (now Reliance Energy Ltd.) gave four work/purchase orders to the respondent M/s Fennar Ltd. and the respondent furnished four bank guarantees and subsequently the respondent also entered into a wrap-around agreement under which the parties agreed to treat all the four contracts as a composite one and the bank guarantees were to apply to all contracts, the Supreme Court held that under wrap-around agreement the appellant has a right to encash any or all of the bank guarantees in the event of the breach of terms of any one of the four contracts.[6]

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1. *Cretum Maritimes Co. (I) Ltd.* v. *ECON Engineering Pvt. Ltd.*, AIR 2003 Bom 163, 165, 2003 (1) Arbi LR 580 : 2003 (2) Bank Case 79 : 2003 (1) Bom. CR 488.
2. *Makharia Bros.* v. *State of Nagaland*, AIR 1999 SC 3466, 3467 (DB) : (2000) 10 SCC 503 : 2000 (3) R.A.J. 151 : 1999 (2) Arbi. LR 518.
3. *Hindustan Construction Co. Ltd.* v. *State of Bihar*, AIR 1999 SC 3710, 3713 (DB) : (1999) 8 SCC 436 : 1999 (9) Supreme 1 : 2000 (99) Com Cas 297 : 1999 (8) SLT 546.
4. *D.S. Constructions Limited* v. *Rites Ltd*, 2006 (1) CTLJ 123 (Del) : 2006 (2) CCC 29 (Del).
5. *Inter Continental (India)* v. *Indian S. & G. T. E. T. Corpn., New Delhi*, AIR 2001 Gau 227,233.
6. *BSES Ltd. (Reliance Energy Ltd.)* v. *M/s Fennar Ltd.*, AIR 2006 SC 1148 : (2006) 2 SCC 728 : 2006 (2) Supreme 106.

Where the terms of contract provide that the beneficiary to bank guarantee would be entitled to invoke it in the event of breach of contract by the party furnishing bank guarantee, the bank cannot disown its obligation to pay the money guaranteed and no injunction could be granted restraining the bank from honouring its obligation under the contract.[1] Where it was agreed that the beneficiary will be the sole judge as to the question whether there was any breach of contract and thus the bank guarantee became invocable, the bank on the invoking of bank guarantor cannot raise any objection in the absence of fraud or irretrievable injustice or special equity vitiating the contract.[2]

Where the defendant, a contractor furnished performance bank guarantee in favour of the plaintiff Karnataka State Power Corporation in connection with the contract to lift coal mill rejects, the plaintiff cannot be prohibited from invoking the bank guarantee, when there was a breach of contract on the part of the defendant.[3]

Where the respondent furnished a bank guarantee in favour of the petitioner Textile Commissioner in connection with the performance of a contract relating to export of cotton, the petitioner is entitled to invoke the bank guarantee when there was a breach of contract on the part of the respondent and the bank is bound to pay the guarantee amount.[4]

Where the petitioner who gave bank guarantee in connection with automobile dealership and claimed that the respondent has fraudulently invoked the bank guarantee in spite of his handing over cheques and settling the account, the plea of the petitioner cannot be accepted unless the post-dated cheques given by him are cleared and encashed.[5]

For the purpose of invoking an unconditional guarantee furnished as against the breach of contract, the letter of invocation need not specify the loss suffered or would be suffered or the damage caused or to be caused.[6]

Where a bank guarantee is given to the Electricity Board for performance of a contract in respect of commission of coal handling plant, the guarantee

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1. *Dwarikesh Sugar Industries Ltd* v. *Prem Heavy Engg. Works (P) Ltd.,* AIR 1997 SC 2477, 2483.
2. *M/s National Telecom of India Ltd* v. *Union of India,* AIR 2001 Delhi 236, 240 (DB).
3. *Shaik Muneeruddin* v. *Karnataka Power Corporation Ltd.,* AIR 2005 AP 498 : 2006 (2) CTLJ 55 (AP) (SN) : 2005 (5) ALD 832 : 2005 (6) ALT 684.
4. *Shree Rani Sati Investment & Finance Ltd.* v. *Union of India,* AIR 2004 Bom 424 : 2004 (4) Bom CR 81 : 2004 (3) Bom LR 398.
5. *Kamal Virdichandji Garg* v. *Fiat India Pvt. Ltd,* AIR 2004 Bom 462 : 2004 (3) Arbi. LR 589 : 2005 (1) CTLJ 225 (Bom) : 2005 (1) CCC 619 (Bom) : 2004 (4) Bom.CR 744.
6. *Hindusthan Copper Ltd* v. *Rana Builders Ltd.,* AIR 1999 Cal. 229, 235 (DB) : 1999 (4) Civ. LJ 700 : 1999 (2) Cur LJ (CCR) 277 : 1999 (3) Arbi. LR 169.

would remain valid till the successful completion of trial operation of the plant and after the Board has admittedly taken over the plant, it cannot be encashed.[1]

Where the petitioner importing the goods from Singapore claimed the goods to be custom free and furnished the bank guarantee to ensure his claim, immediate encashment of guarantee after the order was passed by the custom's authority declaring that the goods are chargeable to custom duty is not proper until such time, the petitioner has exhausted his statutory right to appeal.[2]

The plea of the appellants that the bank guarantee furnished by them cannot be encashed by the beneficiary on the ground that there was a dispute between the parties relating to the trial performance of the machinery for which the bank guarantee was furnished cannot be sustained in the absence of any proof of fraud or irretrievable laws.[3]

Merely because a debtor company was declared as Sick Industry under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 and execution of proceeding against the sick industry are barred cannot be ground to restrain the party from encashing the bank guarantee in whose favour it is given.[4]

In case of a bank guarantee the fact that the proceedings under Sick Industrial Companies Act is pending before the Board for Industrial and Financial Reconstruction (BIFR) cannot be a ground to absolve the bank from its liability under the bank guarantee when the bank guarantee clearly provides that the amount under it is to be paid without any demur, reservation, contest, recourse or protest or without any reference to the respondent contractor.[5]

Where a surety bank unconditionally and irrevocably undertook to pay the creditor the sum guaranteed, the surety is under an obligation to pay without demur without requiring the creditor to invoke the legal remedy.[6] From the terms and conditions of the bank guarantee when it is clear that the

1. *Larsen &Toubro Ltd.* v. *M.S.E.B.*, AIR 1996 SC 334, 335 : 1996 (1) Bank CLR 473 : 1996 Bank. J 139 : 1996 (2) Bank Cas. 255 : 1996 (85) Com. Cas. 214.
2. *Ocean Driving Center Ltd.* v. *Union of India*, 2005 (1) CTLJ 158 (Bom) (DB).
3. *Hagglunds Drives AB* v. *National Heavy Engg. Co-op. Ltd., Pune*, AIR 2002 Bom. 305 : 2002 (3) Arbi. LR 178 : 2002 Bank J 706 : 2002 (2) Bom. LR 681 : 2002 (3) Mah. LR 446.
4. *Allahabad Bank, Jabalpur* v. *M.P. Electricity Board, Rampur*, AIR 1996 MP 1,3 : 1996 Bank CLR 167 : 1996 (2) Comp. LJ 156 : 1996 (3) Bank LJ 211. **See also** *A.V.N. Tubes Ltd.* v. *Steel Authority of India*, AIR 1996 MP 53,67.
5. *National Capital Power Station* v. *Bank of Baroda*, AIR 2003 All. 360 (DB) : 2003 (2) Bank CLR 460 : 2003 (3) Bank Cas 331 : 2003 All. LJ 2864.
6. *H.S. Works Construction Ltd.* v. *G.S. Alwal* & Co., *(Engineers) Pvt. Ltd.*, AIR 1996 SC 131,132 : 1996 (1) Bank CLR 95 : 1996 Bank J 135.

guarantee is irrevocable and the money under it is payable by the bank without any demur or protest, the existence of clause containing alleged conditions provided in an agreement between the parties does not render invocation of bank guarantee inoperative.[1]

Where the bank has undertaken to honour the bank guarantee unconditionally as and when it is invoked by the beneficiary, the nature of the obligation of bank is to pay the guarantee amount and its obligation does not depend on any dispute arising between the party furnishing the guarantee and the beneficiary.[2]

Where the defendant contractor furnishing the bank guarantee has agreed that the amount under the bank guarantee shall be payable to the plaintiff without demur, reservation, contest, recourse or protest and/or without any reference to the contractor, a demand made by the owner on the bank shall be conclusive and binding notwithstanding any difference between the owner and the contractor or any dispute pending before any Court, Tribunal, Arbitrator or any other Authority, and as such the bank cannot withhold the payment when the owner makes a demand for the payment.[3]

The general principle is that a banker is bound to honour a letter of credit, stand by letters of credit, performance bond and bank guarantees on their face value subject to few exceptions like fraud, failure to comply with the letter of credit or defective documents.[4] Where a bank guarantee has been furnished for performance of a contract, the beneficiary cannot be restrained from invoking the bank guarantee in the absence of the contract pursuant of which bank guarantee was given being sought to be void on the ground of fraud having been played.[5]

Where the defendant in whose favour a bank guarantee was given gives a letter of invocation which shows no breach of contract resulting in loss or damage to them, the defendants are restrained from invoking the bank guarantee, since the invocation letter is not in accordance with the terms of the bank guarantee. [6]

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1. *Association of Corporation & Apex Societies of Handlooms* v. *State of Bihar,* AIR 2000 Del. 106, 112 : 1999 (81) DLT 457 : 1999 (51) DRJ 110 : 2000 (2) Arbi. LR 134 : 1999 (2) Bank Cas 563 : 1999 (5) AD Del 769.
2. *Coal India Ltd.* v. *Bharat Explosives Ltd.,* AIR 2007 (NOC) 2638 (Cal).
3. *National Capital Power Station* v. *Bank of Baroda,* AIR 2003 All. 360 (DB): 2003 (2) Bank CLR 460 : 2003 (3) Bank Cas 331 : 2003 (4) Civ. LJ 613.
4. *A.V.N. Tubes Ltd.* v. *Steel Authority of India,* AIR 1996 MP 53,67; *Saw Pipes Ltd.* v. *Gas Authority of India,* AIR 1999 Del. 308,309.
5. *Coronation Construction Pvt. Ltd.* v. *Indian Oil Corporation,* AIR 1999 Del. 268, 270 : 1999 (1) Bank CLR 16 : 1999 (96) Com. Cas 298 : 1999 (2) Cur. LJ (CCR) 295 : 1999 (78) DLT 328 : 1999 (49) DRJ 264 : 1999 (1) Arbi. LR 683.
6. *V.V. Gupta* v. *New Delhi Municipal Council,* 2006 (1) CTLJ 444 (Del).

Where the appellant contractor is alleged to have committed the breach of contract entered into with the Government by failure to perform, the Government is entitled to invoke the bank guarantee but however it is required to show the existence of atleast one of two conditions i.e. (i) amount claimed was due by way of loss or damage to the Government by breach of contract and (ii) that amount was claimed by reasons of contractor's failure to perform the agreement.[1]

Where a bank neglected to take measures in recovering the amount from the debtor after the bank guarantee was invoked by the beneficiary, the bank is under an obligation to compensate or reimburse the amount under the bank guarantee to the beneficiary.[2]

Giving of letter by the owner of bank guarantee to the bank reiterating previous invocation of bank guarantee asking to wait for further instructions does not extinguish the cause of action arising out of the earlier invocation of bank guarantee being contrary to the contents there of.[3]

Where a fresh letter of invocation of bank guarantee was given without prejudice to the terms of the first letter of invocation of guarantee when the bank guarantee was to expire, the objection of the petitioner that the original letter was not in consonance with the terms of the bank guarantee is not a valid notwithstanding that the subsequent letter of invocation was addressed to the bank to obviate the deficiencies of the first letter of invocation of bank guarantee.[4]

127. Consideration for guarantee.—Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

Illustrations

(a) *B* requests *A* to sell and deliver to him goods on credit. *A* agrees to do so, provided *C* will guarantee the payment of the price of the goods. *C* promises to guarantee the payment in consideration of *A's* promise to deliver the goods. This is a sufficient consideration for *C's* promise.

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1. *National Telecom of India Ltd* v. *Union of India,* AIR 2001 Delhi 236, 238 (DB).
2. *Rampur Engineering Co. Ltd.* v. *United Construction Company,* AIR 2002 Del. 170 : 2002 (1) Arbi. LR 293 : 2003 (1) Bank CLR 107 : 2002 (95) DLT 250.
3. *Modi Korea Telecommunications Ltd.* v. *Indus Industrial Bank Ltd.,* AIR 2001 Delhi 254, 257.
4. *Crown Maritimes Co. (I)* v. *ECON Engineering Pvt. Ltd.,* AIR 2003 Bom 163, 166. 2003 (1) Arbi LR 580 : 2003 (2) Bank Cas. 79 : 2003 (1) Mah LJ 193.

(b) *A* sells and delivers goods to *B*. *C* afterwards requests *A* to forbear to sue *B* for the debt for a year, and promises that, if he does so, *C* will pay for them in default of payment by *B*. *A* agrees to forbear as requested. This is a sufficient consideration for *C's* promise.

(c) *A* sells and delivers goods to *B*. *C* afterwards, without consideration, agrees to pay for them in default of *B*, the agreement is void.

Consideration.—The contract of suretyship, like any other species of contract requires the two positive elements of *consensus ad idem,* and consideration or form.[1] The present section accordingly says that anything done or any promise made for the benefit of the principal debtor may be a sufficient consideration for the contract of suretyship.[2] It will be observed that no fresh or separate consideration needs move from the promisee to the surety. What is done for the benefit of the debtor is of itself the consideration for the contract by the surety.[3] **[631]** In a case of promissory note executed by several promisors consideration received by one of the promisors, is sufficient consideration in so far as the other promisors who have not received the considerable to make them liable.[4]

Anything done or any promise made for the benefit of the principal debtor must be contemporaneous to the surety's contract of guarantee in order to constitute consideration therefor.[5] Where the borrower has availed the credit facility extended by the appellant bank enhancing the credit cash limit time and again, subsequent execution of deed of guarantee by the guarantor without making a reference to the loans advanced in the past cannot make him liable as guarantor.[6]

Thus, the release of a certificate debtor from arrest under the Bengal Public Demands Recovery Act, is sufficient consideration for a security bond in favour of the certificate officer.[7]

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1. *Ram Gopal* v. *Agu Saheb Jan,* (1916) 33 IC 732.
2. *Kalicharan* v. *Abdul Rahman,* (1919) 23 CWN 545 : 10 LW 34 : 50 IC 651 *(PC); Pestonji* v. *Bai Meherbai,* (1928) 30 Bom. LR 1407 : 112 IC 740 : (1928) Bom. 539; *Jagadindranath* v. *Chandranath,* (1904) 31 Cal. 242; *Mir Niyamath Ali Khan* v. *Commercial and Industrial Bank Ltd.,* AIR 1969 AP 294.
3. *Chakkan Lal* v. *Kanhaiya Lal,* (1929) ALJ 199 : 119 *IC* 86 : (1929) All. 72; *Mathura Das* v. *Shamboo Nath,* (1929) Lah. 203 : 112 IC 843. **See also** *Sornalinga* v. *Pachai,* (1915) 38 Mad. 680 : (1914) MWN 27 : 22 IC 1 : 26 MLJ 113 (Value received by principal—Sufficient consideration for contract by surety).
4. *Andhra Bank* v. *Ananthnath Goel,* AIR 1991 AP 245,248.
5. *Ram Narain* v. *Lt. Col. Hari Singh,* AIR 1964 Raj. 76 : ILR (1963) 13 Raj. 973.
6. *Union Bank of India* v. *Monin Enterprises,* AIR 2002 Kam 270 : 2002 (1) Civil LJ 204 : 2002 (1) Bank CLR 284 : 2001 (6) Kant LJ 113 : 2002 AIR Kant HCR 1518.
7. *Malda* Dt. *Board* v. *Chandra Ketu,* ILR (1937) 2 Cal. 698 : 66 CLJ 373 : 41 CWN 1008 : (1937) Cal. 625.

The illustrations (a) and (b) suggest the supply of goods to, and forbearance to sue[1] the principal debtor, as some varieties of consideration for the contract of suretyship but of course other kinds of consideration are possible. It has been held that advances made on the mere recommendation of a person are not sufficient consideration in law for a promise by him guaranteeing their payment.[2] Again, where in consideration of money advanced by *A*, *B* hypothecated his property and in the deed named *C* as surety for any balance that might remain due and *C* was not a party to the deed, but subsequently executed a surety bond, the bond was held void for want of consideration.[3]

In a Madras case it was pointed out that where one person merely tells another that he may safely do business with a third party it is nothing more than a recommendation and no question of guarantee can arise.[4]

If the consideration is unlawful, the contract is void. Thus a guarantee given in consideration of not prosecuting the principal debtor will be unenforceable.[5]

Further, the consideration should not be illusory. For instance, forbearance to sue must be forbearance of a right, which may be enforced with effect.[6]

Where the consideration fails, it necessarily has the effect of discharging the surety from liability (*e.g.*) postponement of a sale in execution, which however is not in fact postponed.[7]

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1. (Cf.) *Oldershaw* v. *King*, (1857) 157 ER 213 : 115 RR 667; *Crears* v. *Hunter*, (1857) 19 QBD 341 (Forbearance in fact is enough—Express request to forbear not necessary); *Kanisetti Audilaxamana Rao* v. *Attipalli Raghurami*, A1R 1970 AP 158 (FB).
2. *Muthukaruppa* v. *Kathappudayan*, (1914) MWN 706 : 27 MLJ 249 : 25 IC 726.
3. *Nanak Ram* v. *Mehin Lal*, (1877) 1 All. 487; (Cf.) *Raikes* v. *Todd*, (1838) 112 ER 1058 : 47 RR 751; *Wood* v. *Benson*, (1831) 149 ER 40 : 37 RR 635 (Advances before guarantee—Those made before guarantee held to be no consideration); (Cf.) *Broom* v. *Batchelor*, (1856) 156 ER 1199 : 108 RR 555; *Johnston* v. *Nicholls*, 1845 (135) ER 535.
4. *Md. Shamsuddin* v. *Shaw Wallace & Co.*, (1939) 1 MLJ 509 : 49 LW 343 : (1939) MWN 209.
5. *Kessowji Tulsidas* v. *Hurjivan Mulji*, (1887) 11 Bom. 566; *Jones* v. *Merionethshire Permanent Benefit Building Society*, (1892) 1 Ch. 173. **See also** *Nerot* v. *Wallace*, (1789) 100 ER 432 (Guarantee in transaction in fraud of bankruptcy law).
6. *Jones* v. *Ashburnham*, (1804) 102 ER 905 (Debt due by deceased—No fund available for creditor-Promise to pay in consideration of forbearance—No consideration); *Harris* v. *Venables*, (1872) 7 Ex. 235 (Withdrawal of bankruptcy) proceeding against debtor, sufficient consideration for guarantee).
7. ***See*** *Cooper* v. *Joel*, (1859) 45 ER 350 : 125 RR 432.

Similarly, where a guarantee covers an existing liability and also future advances, the guarantee for the existing liability will not attach unless further advances are made.[1]

128. Surety's liability.—The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration

A guarantees to *B* the payment of a bill of exchange by *C*, the acceptor. The bill is dishonoured by *C*, *A* is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

Nature of liability.—As observed already the surety's liability is accessory and secondary. It follows therefrom that the liability is no less and no more than that of the debtor;[2] in other words, the liability is co-extensive with that of the debtor. This however is only the general rule applicable, where the parties have not specially agreed as to the extent of liability.[3] It is undoubted that it is perfectly open to the surety to limit his liability in any manner he chooses. **[657]** A guarantor incurs liability only to the extent of the terms of the guarantee bond.[4]

Collateral.—Where a person becomes surety in a named figure, in respect of supplies, advances etc., to the debtor, the surety will on default of the debtor, be liable for that amount, even though the creditor may have supplied a larger quantity than the surety had bargained for.[5] In cases of this kind, it has been held that the advance by the creditor to a greater amount

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1. *Westhead* v. *Sprawson*, (1861) 158 ER 301; (Cf.) *Wood* v. *Benson*, (1831) 149 ER 40 : 37 RR 635. (A guarantee on similar lines, was held void as to existing dues). **See also** *Boyd* v. *Moyle*, (1846) 135 ER 1099; *Mhite* v. *Woodward*, (1848) 136 ER 1097; *Royal Bank of Canada* v. *Joseph Salvotori*, (1927) PC 272 : 47 CLJ 300 : 107 IC 346.
2. *Maharaja of Benares* v. *Har Narain*, (1906) 38 All. 25 : (1905) AWN 167 : 2 ALJ 585; *Pestonji* v. *Bai Meherbai*, (1928) 30 Bom. LR 1407 : 112 IC 740 : (1928) Bom. 539; *The Bharat National Bank* v. *Thakur Das*, (1935) 16 Lah. 757 : 156 IC 553 : 37 PLR 92 : (1935) Lah. 729; *Maqsudul* v. *Collector of Farukhabad*, (1931) Oudh 134 IC 1100; *Gokulchand* v. *Laxminarayan*, (1933) Nag. 287.
3. *Ahmad Ali* v. *Rathan Raja*, (1934) All. 525 : 148 IC 639 : (1934) ALJ 682; *Bank of Bihar Ltd.* v. *Dr. Damodar Prasad*, AIR 1969 SC 297 : (1968) 2 SCWR 381 : 1968 Pat. LJR (SC) 92 : 1969 (39) CC 133 : (1968) 2 SCJ 380 : (1969) BLJR 437 : 1969 All. LJ 475 : 1969 MPWR 418 : (1916) 1 SCA 269; *Hukamchand Insurance Co.* v. *Bank of Baroda*, A1R 1977 Karn. 204 : (1977) 2 Kant.LJ. 194 : ILR (1977) 2 Kant 980.
4. *Ramzan Khan* v. *State of Rajasthan*, 2000 (2) WLC 765 (Raj).
5. *Gordon* v. *Rae*, (1858) 120 ER 396 : 112 RR 897; *Seller* v. *Jones*, (1846) 153 ER 1121; *Parker* v. *Wise*, (1817) 105 ER 1232 : 18 RR 359; *Laurie* v. *Scholefield*, (1869) 4 CP 622.

than that named will be no defence unless the bond showed clearly that the parties intended that the restriction was to operate as a condition upon which the whole security may become void.[1] Again, the mere fact of the cessation or supply by the creditor, before the limit fixed by the surety is reached, does not absolve the surety from liability for the lesser figure.[2] Where there is a money as well as mortgage decree against the surety, the creditor cannot be forced to exhaust the remedy against the mortgaged property first and then to proceed against the guarantor.[3]

ORIGINAL CONTRACT VOID OR VOIDABLE.—The section deals only with the extent of a surety's liability where the contract does not specify it. It is silent with regard to the nature or character of the obligation of the principal debtor. In certain cases, therefore, where the original agreement or obligation of the debtor is void, the surety may yet become liable as a principal debtor. It was so laid down by the Lahore Court.[4] following an early decision of the Bombay Court in *Kashiba* v. *Shripat*.[5] The last was a case of a surety to a bond passed by a minor for moneys borrowed for purposes not found to be 'necessary' and the court held that the surety was liable, whatever may be the nature of the contract by the principal debtor.

On the same reasoning, the same court has held in the case *Pestonji* v. *Bai Meherbai*,[6] that the fact that by operation of law the liability of the principal debtor is limited to the estate in his hands does not affect the contract of guarantee except in so far as there is any limitation provided by the section or the agreement of parties. A surety therefore cannot escape liability on the ground that the circumstances were such that the principal debtor was entitled to avoid the contract, when in fact, the contract has not been avoided.[7] So too, a decree against a debtor in a proceeding to which the sureties could not be parties will not deprive the creditor of his rights against the sureties.[8]

Secondary.—The expression that the liability of the surety is secondary ought not, therefore, to be understood as meaning that the surety can be proceeded against only after exhausting the remedies as against the

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1. **See** *Hajee Moosa* v. *Abdul Karim*, (1937) 1 MLJ 143 : 45 LW 605 : (1937) MWN 46 : 167 IC 1006 : (1937) Mad. 360; *Suwalal* v. *Fazle Hussain*, (1939) Nag. 31.
2. *State Bank of India* v. *M/s. Indexport Registered*, AIR 1992 SC 1740, 1745 : 1992 (2) APLJ 52 : JT 1992 (4) SC 273 : (1992) 3 SCC 159 : 1992 AIR SCW 1939.
3. *Lloyd* v. *Blackburn*, (1851) 17 LT (OS) 105.
4. *Chhajju Singh* v. *Emperor*, (1921) 2 Lah. 204 : 63 IC 454 : (1921) Lah. 79.
5. (1894) 19 Bom. 697. **See also** 54 PR 1916 and *Indar* v. *Thakar*, (1921) 2 Lah. 207 : 63 IC 387.
6. (1928) 30 Bom. LR 1407 : 112 IC 740 : (1928) Bom. 539.
7. *South Indian Export Co.* v. *Condiah*, (1915) 29 IC 712.
8. *Traders Co-operative Bank* v. *Mallick*, (1934) Pat. 52.

debtor. A surety is liable to the creditor irrespective of the remedy, which the creditor may have against the principal debtor and the creditor may proceed against the surety without exhausting his remedies against the principal debtor.[1] It is well settled that it is not incumbent on the creditor to sue the principal debtor in the first instance.[2] Nor has the surety in the absence of some special equity a right to restrain any action against him by the creditor on the ground that the principal debtor is solvent or that the creditor may have relief against the principal debtor in some other way.[3] The liability of the surety springs into existence immediately on the default of the debtor. The moment a default is made the surety is burdened, with a liability for the whole amount as if he were himself the person originally liable. As was pointed out in *Chockalinga* v. *Dandayuthapani,*[4] the creditor can pursue his remedies concurrently against both the principal debtor and the surety, and obtain a decree against both in the same suit. But, if the terms of the bond make it clear that the debtor must be proceeded against first, then it is incumbent on the creditor to endeavour to realise the amount due from the principal debtor.[5] In such cases, it is not enough for the creditor to merely demand payment from the debtor.[6] **[650]**

Where the agreement does not contain any stipulation to the effect that the creditor must exhaust his remedies against the principal debtor first before proceeding against the surety, the liability of the surety is immediate and it is not deferred until the creditor exhausted the remedies against the principal debtor.[7]

The creditor can sue both debtor and surety together or he can sue the surety alone, like-wise where he has sued both and obtained a decree, he can, in execution proceed against the surety in the first instance.[8] The guarantor cannot insist in the event of default by principal debtor that the creditor should first proceed against the principal debtor.[9] The guarantor cannot plead

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1. *Sukur Pradhan* v. *Orissa State Financial Corporation,* AIR 1992 Orissa 281 : (1992) 74 LLT 241.
2. *Swaminatha Pillai* v. *Lakshmana Iyer,* (1935) MWN 757 : 42 LW 291 : 157 IC 979 : (1935) Mad. 748; *Parthasarathi* v. *Narayana,* (1917) 5 LW 161 : 37 IC 401.
3. *Armugham Chettiar* v. *Sadasivan Pillai,* AIR 1971 Mad. 321 : (1971) 1 MLJ 228 ; *Bank of Bihar Ltd.* v. *Dr. Damodar Prasad,* AIR 1969 SC 297. **See** further *Madho Sah* v. *Sitaram Sah,* AIR 1962 Pat. 405; *Budh Singh* v. *Mukund Murari,* AIR 1975 All. 201.
4. (1928) MWN 814 : 113 IC 337 : (1928) Mad.1262. **See also** *Deepak Datt* v. *Secretary of State,* (1929) 118 IC 443 : (1929) Lah. 393; *Diyalu Mal* v. *Nandu,* (1921) Lah. 691 : 132 IC 590.
5. *Muhammad Yusuf* v. *Ram Govind,* (1928) 55 Cal. 91 : (1928) Cal. 177 : 109 IC 538.
6. *Radhakrishna* v. *Ajodhiya,* (1937) ALJ 1265.
7. *Syndicate Bank* v. *A.P.Manjunath,* 1999 (3) CCC 289 (Kam) : 1999 (2) Bank CLR 415 (Kant).
8. *Ram Sagar Singh* v. *Yogendra Narain Pd. Singh,* AIR 1975 Pat. 239.
9. *Ram Bahadur Singh* v. *Tehsildar, Bilsi,* AIR 2002 All. 344.

that failure on the part of the plaintiff creditor to institute the suit against the defaulting principal debtor and would not entitle the creditor to proceed against him.[1] The petitioner who was guarantor for the chit amount prized by second respondent, his plea that the chit company must proceed against the principal borrower in first instance is not correct, since surety's liability is co-existence with that of principal debtor.[2] When there is default on the part of the principal debtor, the creditor can straight away proceed by filing a suit against the guarantor and no suit need be filed by him, against the principal debtor.[3] Where the execution of court's decree is suspended against the sureties as long as the principal paid the money by way of instalments in discharge of his debt, no sooner the principal debtor fails to comply with the court's direction, the liability of the sureties will become effective.[4]

The liability of a surety being joint and several, the creditor has the option to decide against whom he should proceed with and the co-surety cannot insist that the creditor should first proceed against the principal debtor or other co-sureties before proceeding against him.[5]

The decree passed against principal debtor and surety is joint and individual.[6]

The liability of principal debtor and the surety being joint and several, the surety who gave guarantee for the loan extended by the appellant bank cannot disown the liability merely because he will be left with no remedy for realization of the amount from the principal debtor.[7]

Where there is a default on the part of the principal debtor there is neither necessity for the creditor to demand payment from the principal debtor nor sue the principal debtor before proceeding against the guarantor.[8]

Where the principal debtor died to whom his son stood as surety and brought on record as a legal representative, the surety is not discharged from liability on the basis of the plea that he is not liable to repay the loan in the absence of liability fixed on the principal borrower.[9]

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1. *SICOM Ltd.* v. *Harjinder Singh,* AIR 2004 Bom 337 : 2004 (4) BankCas 350 : 2005 (2) CTLJ 299 (Bom) : 2004 (5) Bom CR 304 : 2004 (4) BomLR 685.
2. *V. Thangaraj* v. *Sriram Chits and* Investments *Limited, Dindigul,* 2004 (1) CTLJ 291(Mad).
3. *Sicom Ltd.* v. *Harjindersingh,* AIR 2004 Bom 337 : 2005 (2) CTLJ 299 (Bom).
4. *State Bank of India* v. *M/s. Sujatha Engineering Works,* AIR 1992 Orissa 237, 238.
5. *State Bank of India* v. *G.J. Herman,* AIR 1998 Ker.161, 164.
6. *Malladi Ravishankar* v. *Anadaraju Chits Pvt. Ltd., Amalapuram,* 2007 (3) ALD 229.
7. *Syndicate Bank* v. *Narayan Iyer,* 2004 (1) CTLJ 373 (Ker) (DB).
8. *N.Narasimahaiah* v. *Karnataka State Financial Corpn.* AIR 2004 Kant 46.
9. *Balakrishnan* v. *H. Chunnilal Bigmar,* AIR 1998 Mad. 175, 177.

Where the creditor bank gave loan to the principal debtor on the guarantee of the surety for purchase of vehicle and obtained a decree on the default of principal debtor, the contention of the surety that the decree cannot be executed him till the creditor exhausted other remedies of proceeding against the vehicle hypothecated and recovering the amount from other principal debtors is not tenable.[1] Merely because the creditor advancing loan has several remedies for the recovery of the loan on the default of the principal debtor, the plea of the guarantor that the creditor must avail the other remedies before proceeding against him is not tenable.[2] Where the bank has advanced a loan on the hypothecation of goods as well as depositing of FDRs of the guarantor and has obtained a decree from the court against the guarantor on the default, the bank can proceed against the FDRs of the guarantor without resorting to the hypothecated goods.[3]

In *Tulshi Prasad* v. *Dip Prakash,*[4] a mortgage deed was executed by some persons, one of them alone being the owner and the others being merely sureties. The deed however contained a distinct personal undertaking by the sureties to pay the amount. After sale of the properties, the mortgagee sought for a personal decree against the sureties also. The court held he was entitled to such a decree; on the principle of the present section. In *Appaswami* v. *Ramanathan Chettiar,*[5] where, in a suit against two debtors and their surety, a decree had been passed against all three for a certain sum, and against the principal debtors alone for a larger sum (inclusive of the former amount), and the decree-holder recovered some amount by rateable distribution, it was held that the surety could not claim to have such amount or a proportionate part credited to his liability under the decree.

As already observed, it is not incumbent on the creditor to sue the principal debtor in the first instance.[6] It has even been held that notice of the debtor's default is not necessary before action against the surety. Whether a demand is necessary before suit may, however, depend on the construction of the document.[7] If the guaranteed debt is, under the contract, payable only after notice of demand, the surety can be held liable only after such notice.[8]

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1. *Sunder Singh* v. *Punjab National Bank,* AIR 1992 All. 132 & 134 : 1991 (18) ALB 413 : 1991 (2) ARC 241.
2. *Kailash Chandji* v. *Uttar Pradesh Financial Corpn.,* AIR 2002 All. 302 (DB).
3. *State Bank of India* v. *Goutmi Devi Gupta,* AIR 2002 MP 81 : 2002 (3) Bank CLR 540 : 2003 (1) Bank Cas 165 : 2003 Bank J 62 : 2002 (3) Civil LJ 746.
4. (1931) ALJ 559 : 132 IC 561 (2) : (1931) All. 631.
5. (1907) 30 Mad. 167.
6. *Deepak Datt* v. *Secretary of State,* (1929) Lah. 393 : 118 IC 443; *Sankana* v. *Virupakshappa,* (1883) 7 Bom. 146; *Lachman* v. *Bapu,* (1869) 6 BHC AC 241; *Parthasarathy* v. *Narayana,* (1917)5 LW 161 : 37 IC 401; *Shangunni Menon* v. *Varid,* (1881) 4 MHCR 190; *Gurdi* v. *Gujjar,* (1919) 93 PR 59 IC 312; *Wright* v. *Simpson,* (1802) 31 ER 1272.
7. *Re. Brown's Estate,* (1893) 2 Ch. 300; *Sicklemore* v. *Thistleton,* (1819) 105 ER 1146 : 18 RR 280.
8. *Hajarimal* v. *Krishnarao,* (1881) 5 Bom. 647.

Where the second defendant purchasing the business of a company from the claimants under a sale agreement and executed a loan note and guaranteed along with the first defendant, the claimants on the default can directly proceed against the first defendant without resorting its remedy against the defaulting second defendant. [1]

Co-extensive.—The term 'co-extensive' relates ordinarily only to the quantum of the principal debt.[2] The creditor is free to bring a suit against the guarantors alone without having resort to the principal debtor.[3] The liability of the surety does not also in all cases arise simultaneously.[4] The section sketches the ambit of the liability of the surety; when it enacts that the liability is co-extensive with that of the debtor; it has nothing to do with the consequences of the recovery of the debt.[5] The surety will, in a case where interest is awarded on the sum due by the principal, be liable also for interest.[6] Where a person was surety for payment of principal and interest under a mortgage, which had fixed a date for repayment, the surety's covenant for payment of the interest was construed as a covenant to pay interest as long as the principal remained unpaid.[7] But if the contract contains no stipulation for interest, the surety cannot be made liable for it.[8] Nor does the death of the principal debtor before decree in any way affect the surety's liability.[9] But, as pointed out in *Mathura Das* v. *Secy. of State,*[10] the liability is strictly limited by the terms of the bond and therefore where a person executes a fidelity bond in favour of Government to enure for a certain period, and there is no covenant for continuation of the security in case of re-appointment of the principal debtor. The surety will not be liable for losses accruing after re-appointment. Similarly sureties for a guardian of property are liable on their bond only in respect of defalcations by the guardian after his appointment as such by the court: and the mere fact that the same person might have been *de facto* guardian prior to

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1. *Moody* v. *Condor Insurance Ltd.*, [2006] 1 All ER 934 (Ch D).
2. *Gopilal J. Nichani* v. *Track Industries & Components Ltd.*, AIR 1978 Mad. 134 : 1978 (2) Mad.LJ. 94.
3. *Indian Bank, Madras* v. *State of Tamil Nadu,* AIR 2002 Mad. 423 (DB) : 2003 (1) Arbi. LR 128 : 2002 (3) Bank Cas 261 : 2003 (1) Civil LJ 469 : 2002 (2) Mad LJ 649 : 2002 (3) Mad. LW 790.
4. *Hukumchand Insurance Co. Ltd.* v. *Bank of Baroda,* AIR 1977 Karn. 204 : 1977 (2) Kant. LJ. 194 : ILR (1977) 2 Kant. 980.
5. *Aypunni Mani* v. *Devassy,* AIR 1966 Ker. 203 : 1965 Ker.LJ 1063 : 1965 Ker.LT 1266; **See also** *Subramani* v. *Narayanswam,* AIR 1951 Mad. 48 (FB).
6. *Zakir Hussain* v. *Dy. Commissioner of Gonda,* (1929) All. 687 : 115 IC 138; (Cf.) *Omnium Insurance Corpn.* v. *United London & Scottish Insurance,* (1920) 36 TLR 386; *Board of Trade* v. *Employer's Liability Assurance,* (1910) 2 KB 649.
7. *King* v. *Greenhih,* (1843) 134 ER 808.
8. *Maharaja of Benares* v. *Har Narain,* (1906) 28 All. 25.
9. *Maula Dad* v. *Wadhwa,* (1924) Lah. 428 : 71 IC 46.
10. (1930) All. 848 : 128 IC 598 : (1930) ALJ 1217. **See** also observations in *Venkamma* v. *Sanyasayya,* (1938) Mad. 422 : 47 LW 84 : (1938) MWN 68.

the court's order will not render the sureties retrospectively liable for any misappropriation made by the guardian before appointment as such by the court.[1]

The liability of guarantors is both joint and several unless otherwise provided by the contract the liability of the surety co-extensive with that of principle decree holder has a right to proceed against any of the judgment debtors/principal debtors and guarantors.[2]

If a person becomes surety for a debtor, the creditor, in case the debtor fails, may recover from the surety the amount guaranteed, but not the costs of a fruitless action against the debtor, unless he had given previous intimation to the surety, of his intention to sue the principal debtor.[3] But where the proceedings are taken at the surety's request, the costs of such proceedings are recoverable from the surety.[4] But the creditor is not entitled to the benefit of any counter securities given by the debtor to the surety.[5] Unless it be in virtue of a contract or trust, or on the bankruptcy of both debtor and surety.

A statutory reduction or extinguishments of the principal debtor's liability would *pro tanto* reduce or extinguish the surety's liability.[6]

Payment by a surety cannot keep alive the debt against the principal debtor.[7]

Limiting of surety's liability.—The surety may limit his liability in two ways. He might say "I will be liable for a portion of the amount which B shall owe you" or he may say, "I shall be liable for the amount B shall owe to you, subject to the limitation that I shall not be asked to pay more than a certain limited sum." The distinction assumes very great practical importance in case of the bankruptcy of the debtor. Generally, a limited guarantee in respect of an ascertained sum is taken to be a guarantee for the whole. In such a case, on the bankruptcy of the debtor, it is open to the creditor to prove for the whole debt, though the surety may have paid the amount guaranteed by him and the surety cannot recover anything in the debtor's insolvency until the creditor is paid in full.[8] Where, however, the surety has guaranteed only part

1. *Gauri Lal* v. *Raja Babu,* (1929) Pat. 626.
2. *M.G. Brothers Finance Ltd. Yemmiganuru* v. *J. Badarinath,* 2007 (1) ALD 451.
3. *Baker* v. *Garrat,* (1825) 130 ER 434.
4. *Evans* v. *Pugh,* (1834) 2 Dowl 360.
5. *Re Walker,* (1892) 1 Ch, 621; *Bank of Bengal* v. *Lucas,* (1924) 51 Cal. 185 : 28 CWN 497 : 41 CLJ 1 : 81 IC 471 : (1924) Cal. 578.
6. *Aypunni Mani* v. *Devassy,* AIR 1966 Ker. 203; *Narayan Singh* v. *Chhatar Singh,* AIR 1973 Raj. 347 : 1973 Raj.LW 330 : 1973 WLN 128; Cf. *Velappa Konar* v. *Kosamattam Chit Fund,* 1978 Ker. LT 10 (Surety can't avoid liability where judgment-debtor escapes liability under a decree by reason of statutory provision).
7. *Sudarsan Trading Co. Ltd.* v. *Madanlal,* 1977 An. LT 504.
8. *Ellis* v. *Emmanuel,* (1876) 1 Ex. D. 157; *In re. Sass,* (1896) 2 QB 12.

of the debt, and pays it, he will be entitled to the dividend from the debtor's estate, along with the creditor, who may prove for the balance of the debt (*i.e.*) the excess over the amount guaranteed.[1] As observed by Vaughan Williams, J. in *Re.Sass* [2]:

> "Where under the terms of a guarantee, the surety become a surety for the whole amount of the debt, although his liability is limited to a specified sum, and has paid that sum to the creditor, the creditor is nevertheless entitled to prove in the bankruptcy of the debtor for the full amount of his debt without deducting therefrom the amount received by him from the surety. It makes no difference whether the payment was made before or after the date of receiving order. [But] where the surety is surety for a part of the debt, as between the principal creditor and the debtor, the right of the surety (to stand pro tanto in the shoes of the creditor) arises merely by payment of the part, because that part, as between him and the creditor, is the whole for the purpose of the guarantee." **[657]**

Where the defendant surety has given guarantee to the plaintiff bank in respect of a sum of Rs. 25000/- borrowed by the principle debtor, he cannot disown the liability as a surety merely because the bank has announced a scheme by which it will not ask for the owner's contribution in the form of margin money or seek collateral security or third party guarantee for the loan.[3]

The banker who issues a bank guarantee occupies the position of surety and as such it cannot question the liability otherwise of the principal debtor or the justification for the principal debtor who has incurred the liability.[4]

The liability of the guarantor bank is confined to the amount specified in guarantee bonds and is discharged of its obligation when the guarantor bank has paid such money and no burden of payment of interest can be imposed when the terms and conditions of the guarantee bond does not specify the same.[5]

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1. **See** *Hobson* v. *Bass,* (1871) 6 Ch. 792; *Bardwell* v. *Lydall,* (1831)131 ER 189 : 33 RR 540; *Gray* v. *Seckham,* (1872) 7 Ch. Ap. 680; *Gee* v. *Pack,* (1863) 33 LJ QB 49; *Paley* v. *Field,* (1806) 33 ER 164 : 8 RR 349; *Thornton* v. *McEwan,* (1862) 71 ER 230 : 136 RR 229; (Cf.) *London Assurance* Co. v. *Buckle,* (1820) 4 Moore 153; *Re. Sherry, London & County Banking* Co. v. *Terry,* (1884) 25 Ch.D. 692.
2. (1896) 2 QB 12; *Phihips* v. *Mitcheh,* (1930) 57 Cal. 764 : 50 CLJ 303 : (1930) Cal. 17.
3. *Syndicate Bank* v. *K. Manohara,* AIR 2003 Ker 284, 285 : 2004 (1) Bank Cas 234: 2003 (117) ComCas 312.
4. *South India Wire Ropes Ltd.* v. *Usha Martin Industries Ltd.,* AIR 2007 Karn 59 : 2007 AIHC 709 (KARN) : 2007 (1) AIRKarn. 267.
5. *Vysya Bank Ltd.* v. *Dy. Director, DGFT (Enforcement-cum-adjudication) Govt. of India,* 2004 (13) AIC 798 (AP) : 2003 (6) ALD 241.

FLOATING BALANCE.—*Prima facie*, a continuing guarantee limited in amount to secure a floating balance, is, as between surety and creditor, a guarantee of so much only of the debt as does not exceed the sum named in the limitation, for it is presumed that the surety did not contemplate the creditor allowing the debtor to become indebted to him beyond that amount. No such presumption arises where the debt in respect of which the bond is given, is an ascertained amount extending the sum named in the limitation.[1] Where liability has been limited to a specific sum, it is a question of construction whether it was intended to cover floating balances.[2] Where the surety has given to the creditor a continuing guarantee limited in amount in respect of the floating balance of the principal-debt that may be due from time to time, *prima facie* the liability of the surety is only to the extent of part of debt guaranteed.[3]

Proof of liability.—The surety's liability must be proved against him specifically. It is not determined by any admissions of the debtor.[4] In English law, it has been clearly laid down that an award or judgment against the debtor is no evidence against the surety.[5] Before the surety can be called upon to answer, the default of the debtor must be proved. Thus, in case of a surety for due accounting, by the principal debtor it must be proved that money actually reached the hands of the debtor.[6]

Limitation against surety and debtor.—Though the liabilities of the principal debtor and surety may have relation to one and the same transaction, their liabilities are distinct for the purpose of the Limitation Act. So, even where the suit as against the principal is barred, if the surety has made payments towards the debt or acknowledged his liability, he will be liable.[7] [See also under Sec. 134.] Right to recover the debt is never extinguished not withstanding the remedy barred under the Limitation Act.[8]

Further it has been held in *Gopal* v. *Gopal Bin Sona*,[9] that for the purpose of Sec. 20 of the Limitation Act, the principal debtor is not an agent of the surety authorised to pay the interest on a debt. The payment of interest by the

1. See *Ellis* v. *Emmanuel*, (1876) 1 Ex.D.157.
2. *Kirby* v. *Marlborough*, (1813) 105 ER 289 : 14 RR 573; *Walker* v. *Hardman*, (1873) 7 ER 99; *Re. Medewe's Trust*, (1859) 53 ER 1025.
3. *Aditya Narayan Chouresia* v. *Bank of India*, AIR 2000 Pat. 222, 225 : 2000 (1) Pat. LJR 966.
4. *Evans* v. *Beattie*, (1803) 170 ER 725.
5. *Ex parte Young*, (1881) 17 Ch.D. 668.
6. *Pattison* v. *Belford Union Guardians*, (1856) 156 ER 1309 : 108 RR 702.
7. *U. Ba Pe* v. *Ma Lay*, (1932) 10 Ran. 39B : (1932) Ran. 88 : 139 IC 138; *Krishto Kishori* v. *Radha Romun*, (1885) 12 Cal. 330; *Charu Chandra* v. *Faithful*, (1919) 53 IC 999.
8. *Punjab National Bank* v. *Surendra Prasad Sinha*, AIR 1992 SC 1815 : 1992 Cri. LJ 2916 : 1992 BBCJ (SC) 164 : 1992 JLJ 411.
9. (1903) 28 Bom. 248 : 5 Bom. LR 1020; (Cf.) *Burleigh* v. *Stott*, (1828) 108 ER 956.

debtor will not start limitation afresh against the surety also, because the relation of principal and surety does not give rise to any implied authority. In *Brajendra Kishore* v. *Hindustan Co-operative Insurance Society,*[1] the court went further and said that even the knowledge and consent of the surety in regard to the payment of interest by the debtor will make no difference unless the circumstances could be said to render the payment one made on behalf of the surety. Nor will an acknowledgment by the principal debtor save limitation against the surety.[2]

Where it is provided in the deed of guarantee that the guarantor shall be liable to pay the principal debt together with interest on demand from the creditor, the limitation period starts from the date of demand made by the creditor.[3]

The objection of the guarantor that a debt borrowed by the principal debtor from the respondent bank which is barred by limitation cannot be revived by a revival letter given by the principal debtor cannot be sustained when giving of such revival letter was authorised by petitioner.[4]

In view of the principle that the liability of the surety is co-extensive with that of the principal debtor, the liability of the surety cannot be limited to the principal amount, in the absence of any provision in the contract to that effect.[5]

129. Continuing guarantee.—A Guarantee which extends to a series of transactions is called a "continuing guarantee."

Illustrations

(a) *A*, in consideration that *B* will employ *C* in collecting the rents of *B's* Zamindari, promises *B* to be responsible, to the amount of 5,000 rupees, for the due collection and payment by *C* of those rents. This is a continuing guarantee.

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1. (1917) 44 Cal. 978 : 25 CLJ 238 : 39 IC 705 : 21 CWN 482.
2. *Dialu Mal* v. *Nand Sah,* (1931) 13 Lah. 240 : 132 IC 590 : (1931) 13 Lah. 240 : 132 IC 590 : (1931) Lah. 691; *Kothandarama* v. *Shanmuga,* (1917) 32 IC 608. *Surajlal* v. *Fazle Hussain,* (1939) Nag. 31.
3. *Syndicate Bank* v. *Channaveerappa Beleri,* AIR 2006 SC 1874 : 2006 (5) Supreme 115 : 2006 (131) CompCas 303 : 2006 (42) AIC 89 (SC).
4. *Ibrahim Abdul Latif Shaikh* v. *Corporation Bank, Karwar,* AIR 2003 Kant 98, 103.
5. *Indian Overseas Bank* v. *G.Ramulu,* 1999 (2) CCC 289 (AP) : 1999 (2) ALD 104 : 1999 (2) ALT 40 : 1999 (1) LS 218.

(b) *A* guarantees payment to *B*, a tea-dealer, to the amount of £ 100, for any tea he may from time to time supply to *C*. *B* supplies *C* with tea to above the value of £ 100, and *C* pays *B* for it. Afterwards *B* supplies *C* with tea to the value of £ 200. *C* fails to pay. The guarantee given by *A* was a continuing guarantee, and he is accordingly liable to *B* to the extent of £ 100.

(c) *A* guarantees payments to *B* of the price of five sacks of flour to be delivered by *B* to *C* and to be paid for in a month. *B* delivers five sacks to *C*. *C* pays for them. Afterwards *B* delivers four sacks to *C*, which *C* does not pay for. The guarantee given by *A* was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

Continuing guarantee.—This is a guarantee, which extends to a series of transactions. The feature of continuing guarantee so long as the guarantee has not been revoked or so long as the sureties have refused to perform their obligation under the contract of guarantee and a suit has been filed within the limitation period the sureties continue to become liable to the creditor.[1] It may, for instance, relate to collection of rents payable periodically. [See Illustration (a)]. Or it may relate to supply of goods from time to time. [See Illustration (b)]. In *Durga Priya Chowdhury* v. *Durga Pada Roy,*[2] where a person was appointed for collecting rents and another held himself responsible for due collections of the rents and executed a security bond for a certain amount, the court held that it was a continuing guarantee, placing reliance on illustration (a).[3] Similarly in *Wali Mahomed* v. *Ganpat,*[4] a surety bond in the following terms: "I agree to become surety for the judgment-debtor and covenant that I shall produce the judgment-debtor in court on each and every occasion when his attendance is called for by the order of the court" was held to be a continuing guarantee. But in *Bhagwandas* v. *Secy. of State,*[5] where the plaintiff stood surety for a licence for sale of liquor and under the terms of the licence, the money was payable in instalments, it was held that the guarantee was not a continuing one.

1. *Union Bank of India, Ernakulam* v. *T.J. Stephen,* AIR 1990 Ker. 186 : 1989 (1) Ker. LJ 759 : 1989 (1) Ker. LT 627.
2. (1928) 55 Cal. 154 : 109 IC 752 : (1928) Cal. 204.
3. **But see** *Mying Yan Municipal Committee* v. *Maung Po,* (1930) 8 Ran. 320 : (1930) Ran. 173 (III) (a) is wrong as a statement of law).
4. (1931) 52 All. 1014 : 132 IC 813 : (1931) ALJ 74 : (1931) All. 243.
5. (1926) 28 Bom. LR 662 : 96 IC 248 : (1926) Bom. 465; **see** *Kanti Chandh* v. *Udayabansha,* (1925) Nag. 7 : 80 IC 349 : 22 NLR 158.

Where on finding the salient stipulations of the document it appears to be a contract of continuing guarantee but imprudently drafted containing mutually inconsistent stipulations, the surety is entitled to revoke the agreement although it is totally in conflict with the concept of continuing agreement.[1]

In a case before the Allahabad High Court,[2] the court laid down the test of a continuing guarantee. Where the guarantee has been given for the performance of a definite engagement which has already come into existence and is not contingent and the consideration for which is not variable as the result of future dealings between the parties, the contract is not one of continuing guarantee. **[681]**

In the above case, there was a lease for a definite term, and the rent was payable in instalments, but the stipulation for the several payments were definite engagements constituting one transaction. The guarantee was given for the due fulfilment of the engagements stipulated. The court held that the successive payments of rent upon each instalment falling due could not be treated as successive transactions and that it would be unduly straining the language of the section to call such a transaction a continuing guarantee.[3]

Fry, J., said in *Lloyds* v. *Harper,*[4] "Where a relationship is constituted on faith of a guarantee, there is a strong reason for holding that the guarantee could not be annulled during the continuance of that relationship." This is perhaps the reason why a guarantee in the nature of a surety for a servant's fidelity has been held not to be a continuing guarantee in *Myingyan Municipal Committee* v. *Maung Po,*[5] and *Sen* v. *Bank of Bengal.*[6]

In a case before the Judicial Committee,[7] it appeared that a surety bond had been given for the treasurer of a Collectorate and that the bond had been renewed three times, but that the previous bonds had not been taken back by the surety. Years afterwards, certain defalcations were discovered, and in a suit for recovery against the surety, the court, overruling the contention that the new bond was a novation of the previous bonds, held, that the surety was liable on the previous bonds.

Where the directors of a company have executed a deed of guarantee in respect of the loan advanced to a company by a financial corporation, a

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1. *Ibrahim Abdul Latif Shaikh* v. *Corporation Bank, Karwar,* AIR 2003 Kant. 98, 103.
2. *Hasan Ali* v. *Waliullah,* (1930) All. 730 : (1930) ALJ 1271 : 128 IC 821; **but see** *Sherumal* v. *Greenfield,* (1930) Sind 316 : 129 IC 897.
3. **See also** *Gopal Singh* v. *Bhawani Prasad,(1888)* 10 All. 531.
4. (1880) 16 Ch. D. 290.
5. (1930) 8 Ran. 320 : (1930) Ran. 173.
6. (1920) 58 IC 1 : 32 CLJ 223 (PC).
7. *Lala Banshidhur* v. *The Govt. of Bengal,* (1872) 14 MIA 86; *Mathura Das* v. *Secy. of State,* (1930) All. 848 : 128 IC 598 : (1930) ALJ 1217.

subsequent letter by the directors acknowledging such loan cannot said to be an extension of the original guarantee and no recovery proceedings can be brought against them to recover the debt which is barred by limitation.[1]

Where the defendant guarantor furnished guarantee for the cash credit to be advanced by the plaintiff bank to the principal debtor upto a limit of Rs. 2,50,000/- the liability of the guarantor cannot be extended for the overdrawals permitted by the plaintiff bank and the contention that the guarantee extended to series of transactions is incorrect.[2]

Rules of construction.—Whether a transaction is a continuing guarantee or not is a question of construction depending on the terms of the instrument.[3] The document should be interpreted as a whole and is not to be confined merely to the operative part. If there is any ambiguity, it is permissible to take into consideration the nature and character of the business, the relative position of the parties and the surrounding circumstances.[4] The Allahabad High Court has laid down the above rules of construction in *Hasan Ali* v. *Waliulla*.[5] The court, of course, should not alter the language of the instrument but "may fill up the instrument where it is silent." **[634]**

130. Revocation of continuing guarantee.—A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations

(a) *A*, in consideration of *B's* discounting, at *A's* request, bills of exchange for *C* guarantees to *B*, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. *B* discounts bills for *C* to the extent of 2000 rupees. Afterwards, at the end of three months, *A* revokes the guarantee. This is revocation discharges *A* from all liability to *B* for any subsequent discount. But *A* is liable to *B* for the 2,000 rupees, on default of *C*.

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1. *Annama Jose* v. *Kerala Financial Corpn.*, AIR 2002 Ker 396 : 2002 (3) Bank Cas 533 : 2002 (2) Ker. LJ 32 : 2002 (2) Ker. LT 834.
2. *Bishwanath Agarwala* v. *State Bank of India*, AIR 2005 Jhar 69 : 2005 (30) AIC 709 (Jhar) : 2005 (2) JCR 232 : 2006 (1) Civ.CR 115 (Jhar).
3. *Haffield* v. *Meadows*, (1869) 4 CP 595 ("*I, J,* will be answerable for £ 50 sterling that W butcher may buy of H" held continuing guarantee from surrounding circumstances); *Kirby* v. *Marlborough*, (1813) 105 ER 289 : 14 RR 573 (Liability limited to specific sum—Held not applicable to floating balance—No continuing guarantee); *Batson* v. *Spearman*, (1838) 112 ER 1225.
4. *Laurie* v. *Scholefield*, (1869) 4 CP 622; *Burgess* v. *Eve*, (1872) 13 Eq. 450.
5. (1930) All. 730 : (1930) ALJ 1271 : 128 IC 821; **see also** *Coles* v. *Pack*, (1869) 5 CP 65; *Heffield* v. *Meadows*, (1869) 4 CP 595.

(b) *A* guarantees to *B*, to the extent of 10,000 rupees, that *C* shall pay all the bills that *B* shall draw upon him. *B* draws upon *C*. *C* accepts the bill. *A* gives notice of revocation. *C* dishonours the bill at maturity. *A* is liable upon his guarantee.

Revocation of continuing guarantee.—The English law as to determination of guarantees by notice is based upon the entire and indivisible, as opposed to the fragmentary and divisible character of the consideration for such guarantee. Thus where a guarantee is in reference to the conduct of a person appointed to some office, the appointment, which forms the consideration, is a single act. The consideration is here indivisible.[1] In such cases, the surety is not permitted to revoke his guarantee arbitrarily, as it would defeat the object of the suretyship. But where the guarantee is in reference to, say, discounting bills during a certain period, as in *Offord* v. *Davies*,[2] each separate transaction is an acceptance of the standing offer of guarantee. The consideration for the continuing guarantee is "fragmentary, supplied from time to time and therefore divisible." In such a case, even the person to whom the guarantee is given is not prejudiced by the revocation of the guarantee, as there is no question of the whole object of the transaction being defeated by the revocation. **[681]**

The section appears really founded on the distinction pointed out above. For if the consideration is one and entire, it will be difficult to speak of "future transaction." The very term implies a series of separate and separable transactions.

Notice of revocation.—There must be a distinct notice of withdrawal. It has been held that a mere denial of the guarantee by the surety when impleaded, as a defendant along with the principal debtor is enough to constitute a notice within the meaning of the section.[3] Where the guarantee is by more than one person, notice is to be given by or on behalf of all of them.[4] **[681-682]**

Section 130 in terms refers to a notice to the creditor, leaving it open to the parties to provide as to the manner in which the notice is to be given. If therefore, the parties provide for a particular method by which such a notice for the revocation of the guarantee under the section has to be given such a contract is a binding contract and it cannot be brushed aside on a *priori* considerations.[5]

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1. *Lloyds* v. *Harper*, (1880) 16 Ch.D. 290; *Balfour* v. *Crace*, (1902) 1 Ch. 733; (Cf.) *Wingfield* v. *De St. Croix*, (1919) 35 TLR 432. (Guarantee of rent for a term fixed and thereafter from week to week, held terminable by a week's notice in the fourth month of the tenancy).
2. (1862) 142 ER 1336 : 133 RR 49a1.
3. *Bhikabhai* v. *Bai Bhuri*, (1903) 27 Bom. 418 : 5 Bom. LR 396.
4. *Egbert* v. *National Crown Bank*, (1978) AC 903.
5. *Seth Dhanoomal Parsaram* v. *Kuppuraj*, AIR 1977 Mad. 274 : (1977) 1 MLJ 86.

Time of revocation.—In *Wali Mahomed* v. *Ganpat,*[1] it was observed that a notice revoking a continuing guarantee (in this case, the guarantee was for production of a judgment-debtor in court) just a day prior to the performance of the contract was not invalid. It has been pointed out in a recent case that where a surety for the appearance of a judgment debtor produces him in court and requests to be absolved from liability, the court should not refuse the prayer.[2]

Revocation of surety bonds in Court proceedings.—The question has arisen in reference to this section, whether surety bonds given for a guardian under the Minors' Act or for the due administration of an estate by an administrator under the Succession Act are revocable or not. There is some diversity of judicial opinion on the point. In *Bai Somi* v. *Chokhsi,*[3] the Bombay High Court held the section inapplicable to a bond executed under Sec. 12 of the Minors' Act but their Lordships also observed that it may be open to the surety to apply to the court to take proper steps for his protection against acts of waste by the guardian. This principle was accepted and applied by the Madras High Court in *Subraya* v. *Rangammal,*[4] to the case of a surety to an administration bond who sued to revoke his guarantee. The Allahabad High Court also in *Kandhya* v. *Manki,*[5] is of the view that the section does not apply to surety bonds under the Probate and Administration Act. The Calcutta High Court,[6] however has taken the opposite view, on the ground that the surety must not be left without any remedy whatever. This last case has been referred to by the Privy Council in *Mahomed Ali* v. *Howeson Brothers,*[7] where it was ruled that it is not competent to the surety for a Receiver appointed by court to discharge himself merely by notice to the decree-holder or other person at whose instance the Receiver was appointed. An Allahabad ruling on the subject, *in the matter of Avinas Chandra Banerji,*[8] while accepting the law as laid down in earlier decisions to the effect that a surety cannot claim to be relieved of liability by a mere expression of his intention to do so, either by notice or through application in court, adds the qualification that there is nothing to prevent the court, on proper cause shown, from cancelling the undertaking given by the surety with respect to future transactions. It may be added that the Calcutta High Court has in one ruling,[9] dissented from *Raj Narain* v. *Fulkumari* and held, in consonance with the Allahabad High Court that a surety to an

1. (1931) 52 All.1014: (1931) ALJ 74 : 132 IC 813 : (1931) All. 243.
2. *Siraj-ud-din* v. *Guranditta,* (1934) Lah. 962 : 151 IC 154.
3. (1894) 19 Bom. 245.
4. (1905) 28 Mad. 161 : 14 MLJ 482; *Maung Ba Oh* v. *Ma Pwa,* (1916) 36 IC 1000.
5. (1909) 31 All. 56 : 6 ALJ 19 : 1 IC 143.
6. *Raj Narain* v. *Fulkumari,* (1901) 29 Cal. 68 : 6 CWN 7.
7. (1926) MWN 493 : 30 CWN 266 : 98 IC 506 : (1926) PC 32.
8. (1932) 54 All. 293 : 140 IC 127 : (1932) All. 262 : (1932) ALJ 140.
9. *Prohlad Chandra* v. *Paran Chandra,* (1938) Cal. 757 : 42 CWN 1058 : 68 CLJ 433.

administration bond has no absolute right to be discharged from his bond for the mere asking but that the Court may grant relief in suitable cases.

131. Revocation of continuing guarantee by surety's death.—The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

Death of surety.—The death of the surety puts end to the continuing guarantee, unless there be a contract to the contrary. Therefore the legal representatives of a deceased surety will not ordinarily be liable as regards transactions dating after the death of the surety.[1]

The rule in English law is that where a person dies without revoking a continuing guarantee, notice of his death to the creditor is necessary for the revocation of the guarantee.[2]

Insanity of surety.—The lunacy of a guarantor operates as a revocation from the date of notice to the creditor, of the fact of lunacy.[3]

Contract to the contrary.—Section 131 provides for a contract to the contrary because under the Act the death of a surety would operate as a revocation of a continuing guarantee in the absence of a contract to the contrary.[4] In *Gopal Singh* v. *Bhawani Prasad,*[5] the guarantee was in respect of rent due under a lease for a term. The Court held, having regard to the circumstances, that it was the intention of the parties that the guarantee should continue for the full term of the lease and following the principle of *Lloyds* v. *Harper,* decided that the death of the guarantor did not put an end to the contract of suretyship. Again, where a bond bound the surety *and his representatives,* and contained a provision that the surety may terminate his liability by six months notice, the Court held that the death of the surety did not automatically terminate the guarantee.[6]

132. Liability of two persons, primarily liable not affected by arrangement between them that one shall be surety on other's default—Where two persons contract with a

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1. *Durga Priya Chowdhury* v. *Durga Pada Roy,* (1928) 55 Cal. 154 : 109 IC 752 : (1928) Cal. 204.
2. **See** *Coulthart* v. *Clementson,* (1879) 5 QBD 42.
3. *Bradford Old Bank* v. *sutchliffe,* (1918) 2 KB 833.
4. *Seth Dhanoomal Parasram* v. *Kuppuraj,* AIR 1977 Mad. 274 : (1977) 1 MLJ 86.
5. (1888) 10 All. 531.
6. *Mohammad Ubed-ullah* v. *Muhammad Insha' Ullah,* (1921) 43 All. 132 : 61 IC 138 : (1921) All. 287; (Cf.) *Sivester Re.,* (1895) 1 Ch. 573.

third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Illustration

A and *B* make a joint and several promissory note to *C*. *A* makes it, in fact, as surety for *B*, and *C* knows this at the time when the note is made. The fact that *A*, to the knowledge of *C*, made the note as surety for *B*, is no answer to a suit by *C* against *A* upon the note.

Suretyship among joint debtors.—This section simply declares that one of two joint promisors who, as between themselves is a surety, cannot plead the fact as a defence against the creditor's claim even though the creditor himself may be aware of the relationship.

It is a question whether the section is intended to exclude the rule of English law as laid down in *Rouse* v. *Bradford Banking Co.*[1] that a creditor who gets notice of the fact of suretyship as between persons who are, so far as he is concerned, joint promisor is under an obligation not to deal with the principal debtor to the prejudice of the surety.[2]

In *Harjiban Das* v. *Bhagwan Das,*[3] a case decided before the Contract Act was passed, it was held that if the creditor, knowing of the contract of suretyship as between his co-debtors, does something which would ordinarily discharge a surety, the debtor (who is by the subsequent arrangement only a surety) will be discharged.

But in view of the terms of the section, it would perhaps be safe to say that the English rule has no application in India.

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1. (1894) AC 586.
2. **See also** *Overend, Gurney & Co.* v. *Oriental Financial Corporation,* (1874) 7 HL 348; *Goldfarb* v. *Barlett,* (1920) 1 KB 639; *Greenough* v. *McClelland,* (1860) 121 ER 162 : 119 RR 778; *Strong* v. *Foster* , (1855) 139 ER 1047 : 104 RR 653; *Pooley* v. *Harradine,* (1857) 119 ER 1307 : 110 RR 666; *Wythes* v. *Labouchere,* (1859) 44 ER 1397 : 121 RR 238 (Notice of relation of principal and surety sufficient without further acceptance of it on the part of creditor); *Pogose* v. *Bank of Bengal,* (1877) 3 Cal, 174.
3. (1871) 7 Ben. LR 535.

In *Behari Lal* v. *Allahabad Bank,*[1] the Court observed in reference to joint executants of a negotiable instrument that there is an essential antithesis between the legal position of a surety and that of the executant of a promissory note and therefore a person who executes a promissory note cannot be held in law to have the position of a surety.

As the section can apply only if the liability undertaken is the same, it follows, for instance, in the case of an acceptor and drawer of a bill or exchange that the former, if he accepts simply to accommodate the latter, may prove that he was an accommodation acceptor only.[2] "The liability which is undertaken by the acceptor and drawer of a bill is, in no sense, a joint liability. It is true that they each contract to pay the same sum of money, but they contract severally in different ways, and subject to different ways, and subject to different conditions."

In *Rama Kistayya* v. *Kassim,*[3] a single judge of the Madras High Court held that an acceptor of a bill for purposes of accommodating the drawer was discharged by the payee giving time to the drawer.

133. Discharge of the surety by variance in terms of contract.—Any variance, made without the surety's consent, in the terms of the contract between the principal [debtor][4] and the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations

(a) *A* becomes surety to *C* for *B's* conduct as a manager in *C's* bank. Afterwards, *B* and *C* contract, without *A's* consent, that *B's* salary shall be raised, and that he shall become liable for one fourth of the losses on overdrafts. *B* allows a customer to overdraw, and the bank loses a sum of money. *A* is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) *A* guarantees *C* against the misconduct of *B* in an office to which *B* is appointed by *C*, and of which the duties are defined by an Act of the Legislature. By a subsequent

1. (1929) ALJ 1137 : (1929) All. 664.
2. *Pogose* v. *Bank of Bengal,* (1877) 3 Cal. 174.
3. (1889) 13 Mad. 172.
4. This word 'debtor' was inserted by S.2 and Sch. I of the Repealing and Amending Act, 1917 (XXIV of 1917).

Act, the nature of the office is materially altered. Afterwards, *B* misconducts himself. *A* is discharged by the change from future liability under his guarantee, though the misconduct of *B* is in respect of a duty note affected by the later Act.

(c) *C* agrees to appoint *B* as his clerk to sell goods at a yearly salary, upon *A's* becoming surety to *C* for *B's* duly accounting for moneys received by him as such clerk. Afterwards, without *A's* knowledge or consent, *C* and *B* agree that *B* should be paid by a commission on the goods sold by him and not by a fixed salary. *A* is not liable for subsequent misconduct of *B*.

(d) *A* gives to *C* a continuing guarantee to the extent of 3,000 rupees for any oil supplied by *C* to *B* on credit. Afterwards *B* becomes embarrassed, and without the knowledge of *A*, *B* and *C* contract that *C* shall continue to supply *B* with oil for ready money and that the payments shall be applied to the then existing debts between *B* and *C*. *A* is not liable on his guarantee for any goods supplied after this new arrangement.

(e) *C* contracts to lend *B* 5,000 rupees on the 1st March. *A* guarantees repayment. *C* pays the 5,000 rupees to *B* on the 1st January. *A* is discharged from his liability, as the contract has been varied, in as much as *C* might sue *B* for the money before the 1st of March.

Discharge of surety—Variation of Terms.—The provisions of section 133 are not subject to a contract to the contrary. The section is in unqualified terms.[1] If an alteration was made in an instrument of guarantee when it was in the custody of the principal debtor without the consent of the surety, it would not lead to the avoidance of the guarantee when the alteration was for the benefit of the surety.[2] A binding obligation arising under a composition arrangement between a company and its creditors does not affect the surety's liability unless the contract of suretyship otherwise provides.[3] As

1. *Union of India* v. *Pearl Hosiery Mills,* AIR 1961 Punj. 281.
2. *M.S. Anirudhan* v. *Thomcos Bank,* AIR 1963 SC 746 : 1963 Suppl. (1) SCR 63.
3. *Punjab National Bank* v. *Sri Bikram Cotton Mills,* AIR 1970 SC 1973 : 1970 (2) SCR 462 : (1970) 1 SCC 60 : 1970 (40) CC 927.

a surety bargains only in respect of the debtor's liability for a particular debt, it is only natural that any variation in the terms of the debtor's liability which will make a change in the legal rights of the surety must be held to exempt the latter from liability. **[676]**

In *Keshavalal Hiralal* v. *Pratap Singh,*[1] the Bombay High Court has pointed out that the guarantee contemplated by the section is a continuing guarantee and not a guarantee for a single transaction, for it is only in a continuing guarantee that there can be transactions before, and after the variance, such as to attract the operation of the section.

Variation material.—Where the variation of the contract has the result of laying in additional burden on the surety, there can be no doubt, as observed in *Khatun Bibi* v. *Abdulla,*[2] that the surety will be discharged. An unauthorised material alteration by the promisee whether that is by adding anything to or by striking out any part of a written contract avoids the contract against the person otherwise liable upon it. In a printed form of guarantee, if the signature of the guarantor is obtained prior to the filling up of the blanks relating to material particulars of the contract, the filling up of the blank spaces in the form of guarantee amounts to material alteration. In the document of guarantee, if the blank spaces relating to the amount for which the person standing as guarantor, the date of the instrument, the rate of interest for which the person stands as surety are filled up, such filling up would amount to material alteration to the detriment of the surety and will discharge the surety from liability.[3] In *Ramanand* v. *Choudhry Soonder,*[4] where, under a consent decree, it was provided that in default of one instalment, the properties in suit may be sold, and the surety proceeded against for any deficiency, the Privy Council held that the decree-holder's delay in actually bringing the properties to sale had the effect of discharging the surety *pro tanto,* as to interest due from the date of the order for sale, because the act of the creditor in postponing the sale laid an additional burden on the surety by increasing the interest.

But, difficulties may arise where the alteration is not substantial. Can it be laid down as a general rule that the surety will not be discharged if the variance does not affect the surety's liability? Could the question of the discharge of the surety be made to depend on a decision on the facts of each case as to the materiality of the alteration? The answer as given in the English case of *Holme*

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1. (1932) 56 Bom. 101 : 34 Bom. LR 167 : 137 IC 564 : (1932) Bom. 168.
2. (1880) 3 All. 9. **See also** *Re. Darwen and Pearce,* (1927) 1 Ch. 176.
3. *Perumal Reddiar* v. *Bank of Baroda,* (1981) 1 MLJ 419.
4. (1878) 4 Cat. 331 (PC); *Puree Soonduree* v. *Chunder Sekhur,* (1871) 15 WR 252 : 7 Ben. LR 10 (Instalment bond taken from debtor without surety's consent, discharges surety); *Kali Prosonno* v. *Umbica Charan,* (1872) 18 WR 416 (Acceptance by creditor of interest in excess, and giving time—Surety discharged).

v. *Brunskill* [1] is that "although in cases where it is without inquiry evident that the alteration is unsubstantial or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, if it is not self-evident that the alteration, is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration or allow the question whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration... but will hold that in such a case, *the surety himself must be the sole judge, whether or not he will consent to remain liable, notwithstanding the alteration,* and that if he has not so consented, he will be discharged."

As the Judicial Committee observed in a case [2]:

> "The principle of the law on the discharge of sureties is that the surety, like any other contracting party, cannot be held bound to something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract, no further question arises. The original contract has gone, and unless the surety has assented to the new terms there is nothing on which he can be bound, for the final obligation of the principal debtor will be something different from the obligation which the surety guaranteed."

What amounts to variation.—The principle may be illustrated by decided cases. In *Pratapsingh* v. *Keshavlal* [3] above mentioned the Privy Council held that the surety was discharged by a substantial alteration of the original contract though no actual prejudice had been suffered by him. In *Venkamma* v. *Sanyasayya,*[4] the defendant who had guaranteed payment of any amounts

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1. (1878) 3 QBD 495. **See also** *Ward* v. *National Bank of New Zealand,* (1883) 8 AC 755; *Tayleur* v. *Wilding,* (1868) 3 Ex. 303 (Rent for yearly tenancy guaranteed-Notice to quit-Waiver by acceptance of rent-Guarantee does not attach in regard to subsequent year's rent); *Blest* v. *Brown,* (1862) 45 ER 1225 : 135 RR 188 (If the engagement of surety be altered in a single line, no matter if even for his benefit, he is relieved); *Durham Corpn.* v. *Fowler;* (1889) 222 QBD 304 (But mere laches of the obligee does not discharge surety); *Browne* v. *Carr,* (1831) 131 ER 197 (Material variation discharges); *Whitcher* v. *Hall,* (1826) 108 ER 101 : 29 RR 244 (Surety discharged even if the variation only his risk); *Polak* v. *Everett,* (1876) 1 QBD 669 (Even if damage caused by variance is nominal-Surety is discharged); *Archer* v. *Hudson,* (1844) 49 ER 1180 (Agreement for advance-Credit only given, but no actual advance—Surety held not liable); *Smith* v. *Wood,* (1929) 1 Ch. 14.
2. *Pratap Singh* v. *Keshavlal,* (1935) 59 Bom. 180 : (1935) ALJ 242 : 39 CWN 440 : 61 CLJ 42 : 37 Bom. LR 315 : 153 IC 700 : (1935) MWN 97 : 41 LW 210 : (1935) PC 21 : 68 MLJ 339. **See also** *S. Perumal Reddiar* v. *Bank of Baroda,* AIR 1981 Mad. 180 : ILR (1981) 1 Mad 190 : 94 Mad. LW 116.
3. (1932) 56 Bom. 101 : 34 Bom. LR 67 : (1932) Bom. 168; **see also** *Jagjivandas* v. *Hamilton & Co.,* (1931) 55 Bom. 677 : 134 IC 545 : (1931) Bom. 337.
4. (1938) Mad. 422 : 47 LW 84 : (1938) MWN 68.

that might be decreed against the defendant in a pending action was held discharged when the plaintiff got a compromise decree against one defendant and allowed the suit to be dismissed against the other. The court observed that it was immaterial whether or not the variation was substantial. Similarly, in *Nuserwanji* v. *Mahamayi,*[1] where the original contract contemplated immediate delivery of certain assets, and the debtor and creditor subsequently agreed to postponement of delivery without the surety's concurrence, the latter was held discharged. In *Chitguppi & Co.* v. *Vinayak,*[2] a change in the terms of remuneration to a sub-agent was held to discharge the surety for the sub-agent. In *Ghuznavi* v. *National Bank,*[3] it was held that the opening of a new account where there was a guaranteed current account discharged the surety. In *Muhammad Yusuf* v. *Ram Govind,*[4] the surety agreed before the trial of a suit against the debtor to pay such sum as the court may, *after contest,* find due. The suit was subsequently compromised. The surety was held discharged because compromise of the suit was a variation of the original idea of contesting the case. So too, a consent decree passed without the knowledge of the surety was held, in *National Coal Co.* v. *Kshithish Bose & Co.,*[5] to be sufficient to discharge the surety. Where the creditor bank failed to inform the sureties about the short fall in godown stock of the principal debtor against which creditor advanced loan and also where he obtained a second mortgage from the principal debtor, the sureties are discharged in view of the variance of the terms of the original contract.[6] Where the plaintiff bank has enhanced the credit facility to the principal debtor altering the original credit limit for which the defendant surety has furnished guarantee, the defendant surety whose consent is not obtained for enhancing the cash/credit limit is discharged.[7]

Similarly, where a person stood surety for payment of the decree amount in instalments on the strength of the fact that the property of the debtor was under attachment before judgment, a subsequent arrangement by which the decree-holder consented to a private sale of the property was held to be a variation so as to discharge the surety.[8] So too, where a person guaranteed the

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1. (1938) Mad. 585 : (1938) MWN 325.
2. (1921) 45 Bom. 157 : (1921) Bom. 164.
3. (1916) 20 CWN 562 : 33 IC 34.
4. (1928) 55 Cal. 91 : 109 IC 538 : (1928) Cal. 177; *Tatum* v. *Evans,* (1885) 54 LT 336.
5. (1926) 30 CWN 540 : 95 IC 409 : (1926) Cal.818 following *Tatum* v. *Evans,* **see** Note 5.
6. *Indian Bank* v. S. *Krishna Swamy,* AIR 1990 Mad. 115 : 1989 (104) Mad. LW 105.
7. *M.V. Shantanarasimhaiah* v. *Dena Bank,* 2002 (2) Civil LJ 156 (Karn).
8. *Darshan Ram* v. *Khair Din,* (1924) Lah. 194 : 71 IC 783; *Emperor* v. *Pandhi Khan,* (1934) Sind 152 : 152 IC 874 (Bail bond—surety for appearance—Transfer of case to different Court without surety's knowledge or consent—surety discharged); *Probodh Kumar Das* v. *Gillanders Arbuthnot & Co.,* (1934) 59 CLJ 503 : 152 IC 571 : (1934) Cal. 699. **But see** *Madanlal* v. *Radhakisan,* (1935) Nag. 258 (where it has been said that Ss.133 to 139 do not apply to surety bonds given to a Court).

fidelity of a tax collector of a municipal committee, and subsequently the committee allowed the son of the collector to officiate for his father and the son committed defalcations, the surety was held discharged by reason of the variation.[1]

One Lahore case would appear to suggest that a variation that would discharge the surety must be one that materially affects the position of the surety.[2]

Though a surety bond executed in favour of a Court for the performance of a decree governed by Section 145, Civil Procedure Code is not in the strict sense a contract of guarantee governed by the provisions of the Contract Act and the provisions of Sections 133 to 139 of the Act will not directly apply to such bonds, it is well established that the principles contained in those sections do apply, and in the absence of a stipulation in that behalf there is no ground for limiting a surety's liability to decrees passed after contest.[3] A compromise decree will discharge a surety if such decree was not contemplated at the time the surety executed the surety bond.[4]

What does not amount to variation.—Where the defendant had guaranteed the performance of a contract of sale, and subsequently a contract for re-sale to the vendor was made between the original creditor and debtor, it was held that each of the contracts was capable of separate performance, and that there was no variation such as to discharge the surety.[5]

Where the creditor permitted the debtor to continue in office, in spite of an express stipulation in the contract disqualifying the debtor from continuing in case of default in rendering accounts, it was held that there was no variation of terms within the meaning of this section.[6] But where the suretyship was in respect of a contract for a delayed advance, but the advance was made immediately, the surety was held discharged on the ground of a variation.[7] On the other hand, a mere attempted variation, which was ineffectual, was held not to discharge a banking guarantee.[8]

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1. *Pin Sein* v. *Paungde Municipality,* (1938) Ran. 126 : 177 IC 75; (Cf.) *Jowand Singh* v. *Tirath Ram,* (1939) 41 PLR 47.
2. *Mathura Das* v. *Shamboo Nath,* (1929) Lah. 203 : 112 IC 843; **see** *Prag Das* v. *Dhani Ram,* (1931) Oudh 426 : 134 IC 1097.
3. *Adamsab Usmansab* v. *Gurushinddayya,* AIR 1967 Mys. 147 : 1965 (2) Mys. LJ 87.
4. *Smt. Vali Bai* v. *Sheo Narain,* 1967 All. LJ 273.
5. *Uderam* v. *Shivbhajan,* (1920) 22 Bom. LR 711 : 58 IC 272; (Cf.) *Uttam Chand* v. *Jewa Mamooji,* (1919) 46 Cal. 534 : 23 CWN 704 : 54 IC 285 (Case of settlement contract); *Guranditta* v. *Gurdasmal,* (1925) Lah. 552 : 91 IC 772.
6. *Kanai Prasad Bose* v. *Jatindra Kumar,* (1909) 36 Cal. 626.
7. *Bonser* v. *Cox,* (1844) 13 LJ Ch. 260 : 55 RR 113.
8. *Egbert* v. *National Crown Bank,* (1918) AC 903. **See also** *Stewart* v. *M'Kean,* (1855) 10 Ex 675 : 102 RR 766 (Mere variation in mode of accounting between employer and employee does not discharge fidelity guarantee).

Where the loan agreement executed on 31-10-1986 provided a period of 5 months for the discharge of the loan amount and the expiry date was mentioned as May 1987 instead of March 1987, the surety cannot plead his discharge from the liability on the ground of material alteration in view of the fact that the surety will not be adversely affected when the time for discharge of liability is to expire after five months.[1]

The making of an acknowledgement by the principal debtor does not involve any variance of the contract within the meaning of the section,[2] nor transfer of an account in a bank from one head to another.[3]

Where under the terms of a contract of guarantee the creditor is allowed to file a suit against the guarantor without proceeding against the principal debtor and the guarantor having waived his right claiming discharge according to the terms of the contract, his contention of discharge in view of the creditor not resorting to steps to preserve security or to call for additional security is not maintainable.[4]

Where the document of guarantee consisted of type and ink writing the alteration in pencil is not intended to be operative as it was in the form of note and did not alter the substance of the guarantee.[5]

Variation of terms due to an Act of the Legislature.—It would appear from Illustration (b) to the section that a variation in the terms of the original contract will discharge the surety, even if the variation is not by act of parties.[6]

Contract distinct.—It has been held in some English cases that where the guarantee is for the performance of separate and distinct matters, a change in one of them will not necessarily discharge the surety.[7] The same rule may apply under the section also.

In an English Case, *Simmons* v. *Meek*,[8] the question of severability was raised, in regard to a guarantee of payment for goods to be supplied from time to time, The creditor had, without the surety's knowledge accepted from the

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1. *C.N.Sundaram* v. *Chennai Finance Company Limited*, Hyd., 2005 (4) ALD 850 : 2005 (5) ALT 60 : 2005 (2) LS 336.
2. *W.J. Chits Ltd.* v. *Mathew*, 1979 Ker. LT 566.
3. *Mahabir Prasad* v. *Bank of Bihar Ltd.*, 1962 BLJR 62.
4. *Mukesh Gupta* v. *SICOM Ltd., Mumbai*, AIR 2004 Bom. 104 (DB) : 2004 (15) AIC 898 (Bom). 2004 (1) Mah. LJ 159.
5. *Co-operative Bank Plc.* v. *Tipper*, (1996) 4 All. ER 366 (Ch.D).
6. *Hajarimal* v. *Krishnarao*, (1881) 5 Bom. 647.
7. *Croydon Gas Co.*v. *Dickinson*, (1876) 2 CPD 46; *Skillet* v. *Fletcher*, (1867) 2 CP 469; *Woodcock* v. *Oxford & Worceste Railway Co.*, (1853) 61 ER 551 : 94 RR 765. **See also** *Keshavalal Hiralal* v. *Pratap Singh*, (1932) 56 Bom. 101 : 34 Bom. LR 167 : (1932) Bom. 168. (Section contemplates a continuing guarantee only).
8. (1939) 2 AER 645.

debtor in part payment, bills of exchange maturing after six months. The Court held that the surety was discharged only to the extent of the value of the bills, but was liable for the balance.

Surety's knowledge of the variation.—Mere knowledge of the variation in the terms of the contract will not amount to consent to such variation. But consent may be implied from the surety's silence with such knowledge, coupled with other circumstances.[1] **[679]**

134. Discharge of surety by release or discharge of principal debtor.—The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Illustrations

(a) *A* gives a guarantee to *C* for goods to be supplied by *C* to *B*. *C* supplies goods to *B*, and afterwards *B* becomes embarrassed and contracts with his creditors (including *C*) to assign to them his property in consideration of their releasing him from their demands. Here *B* is released from his debt by the contract with *C*, and *A* is discharged from his suretyship.

(b) A contracts with *B* to grow a crop of indigo on *A's* land and to deliver it to *B* at a fixed rate, and *C* guarantee *A's* performance of this contract. *B* diverts a stream of water which is necessary for irrigation of *A's* land and thereby prevents him from raising the indigo. *C* is no longer liable on his guarantee.

(c) *A* contracts with *B* for a fixed price to build a house for *B* within a stipulated time, *B* supplying the necessary timber. *C* guarantees *A's* performance of the contract. *B* omits to supply the timber. *C* is discharged from his suretyship.

Release or discharge of principal debtor.—The liability of the surety is, as was seen already, dependent on the existence of the obligation of the principal debtor to the creditor, and if for any reason, traceable to an act or

1. *Leathley* v. *Spyer*, (1869) 5 CP 595. **See** *Indian Bank* v. *S. Krishnaswamy*, AIR 1990 Mad. 115.

omission of the creditor, or to a specific contract with the debtor, such obligation is discharged, the accessory liability of the surety also disappears. As was observed in *Cragoe* v. *Jones.*[1] "If the creditor, without the consent of the surety, by his own act destroys the debt, or derogates from the power which the law confers on the surety to recover it against the debtor in case he shall have paid it to the creditor, the surety is discharged."

Reservation of surety's liability.—Under the English law it is open to the creditor to give time to the principal debtor reserving as a condition of the arrangement his rights against the surety.[2] In such a case, the surety continues to be liable, even where the arrangement is not communicated to him.[3] The intention to reserve the creditor's right against the surety must, however be clearly expressed.[4] The reservation may be made in the guarantee[5] itself or in the instrument of release.[6] It may however be noticed that in such cases, the release of the debtor will be more apparent than real, because the debtor will have to indemnify the surety in respect of payments made by him to the creditor.[7]

Such a reservation is however, obviously incompatible with an actual release of the principal, for where the original dept itself is extinguished by release, there can be no remedy outstanding against the surety.[8] Thus no reservation will be operative, where another debtor is accepted in the place of the debtor guaranteed.[9]

Generally, the presence of such a reservation in deeds purporting to release the principal, is a reason for construing words of release as a mere covenant not to sue.[10] **[683]**

In *Murugappa* v. *Munuswami,*[11] the Madras High Court held that the principle of the English law that the discharge of the principal debtor will not affect the right of suit against sureties, where there is a reservation to proceed

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1. (1873) 8 Ex. 81.
2. *Wyke* v. *Rogers,* (1852) 42 ER 609 : 91 RR 133; *Nevill's case,* (1870) 6 Ch. Ap. 43; *Bateson* v. *Gosling,* (1871) 7 CP 9; *Oriental Financial Corpn.* v. *Overand Gurney,* (1871) 7 Ch. 142.
3. *Webb* v. *Hewitt,* (1857) 69 ER 1181 : 112 RR 224.
4. *Overend Gurney & Co.* v. *Oriental Finance Corporation,* (1874) 7 HL 348.
5. *Perry* v. *National Provincial Bank,* (1910) 1 Ch. 464.
6. *North* v. *Wakefield,* (1849) 116 ER 1368.
7. *Close* v. *Close,* (1853) 43 ER 474 : 102 RR 73.
8. *Webb* v. *Hewitt,* (1857) 69 ER 1181 : 112 RR 224; *Maltby* v. *Carstairs,* (1828) 108 ER 898.
9. *Commercial Bank of Tasmania* v. *Jones,* (1893) AC 313.
10. *Annadana Jadaya Gounder* v. *Konammal,* (1933) 56 Mad. 625 : 64 MLJ 386 : (1933) MWN 45 : 37 LW 170 : 141 IC 852 : (1933) Mad. 309; *Bateson* v. *Gosling,* (1871) 7CP 9; (Cf.) *Price* v. *Barker,* (1855) 119 ER 281 : 99 RR 734.
11. (1920) 38 MLJ 131 : 11 LW 248 : (1920) MWN 178 : 54 IC 758; **see also** *Jowala* v. *Mt. Raj Kuar,* (1930) Lah. 812 : 31 PLR 329; *Bank of Hindustan* v. *Govindarajulu,* (1933) 38 LW 961 (Case under S. 37 Neg. Ins. Act)

against them is applicable in India, and followed the ruling in *Bateson* v. *Gosling*[1] In *Mahanth Singh* v. *U Ba Yi*,[2] the Judicial Committee have approved of the above Madras case. The creditor had sued the debtor and surety in one action, but on a technical objection by the former, had withdrawn the suit against him, without leave of court, and sought to continue the action against the surety. The Privy Council held that the creditor's act amounted to a clear reservation of rights against the surety.

Contract between the creditor and debtor.—Where by a novation, the original obligation of the debtor is extinguished, the surety for such obligation is naturally discharged. (*e.g.*) where the creditor accepts another person as his debtor, releasing the old debtor [3] or accepts a fresh security such as a promissory note or a mortgage.[4] Where the plaintiff, owner of certain shares had hypothecated them as a general continuing security for payment of the present and future liability of a company wherein her husband was the principal shareholder, and on the company becoming bankrupt, the creditors acquired the properties of the company in satisfaction of the debt, it was held that the creditor having accepted the properties in full discharge of the debt, the guarantee came to an end.[5]

Act or omission of the creditor.—'Act'.—Illustration (b) to the section is an instance of the surety being discharged by an act of the creditor, which has the effect to making performance by the debtor impossible. Other illustrations are, refusal by the creditor to perform or disabling himself from performance, as in Sec. 39, or his preventing performance by the debtor, as that in Sec. 53, or his failure to perform a condition precedent as in Sec. 54, or a novation of the original contract as in Sec. 62, or a neglect to afford reasonable facilities for performance, as in Sec. 67 of the Indian Contract Act. In all the above cases, the creditor's act has the effect of discharging the debtor from his obligations, and therefore discharges the surety *ipso facto*. Likewise, if with the knowledge and concurrence of the surety, the creditor makes a composition with the debtor, the surety will be liable for the balance.[6] [See Sec. 135 for further details.] In *Bombay Company* v. *Official Assignee*,[7] a Bench of the Madras High Court held that the principle of Sec. 134 or 135 will not apply to a case of

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1. (1871) 7 CP 9.
2. (1939) PC 110. **See** *Bombay Dyeing & Mfg. Co.* v. *State of Bombay*, AIR 1958 SC 328 at 335 : 1958 SCJ 620 : 1958 SCR 1122.
3. *Commercial Bank of Tasmania* v. *Jones*, (1893) AC 313; *Lowes* v. *Maugham*, (1884) 1 TLR 6.
4. *Ramakrishnayya* v. *Kassim*, (1889) 13 Mad. 172; Cf. *Sitaram* v. *D'Costa*, (1866) 294 (Fresh acknowledgment taken).
5. *Jean Mackenzie* v. *Royal Bank of Canada*, (1934) AC 468 : (1934) ALJ 763 : 40 LW 400 : 151 IC 981 : (1934) PC 210.
6. *Perry* v. *National Provincial Bank of England*, (1910) 1 Ch. 464.
7. (1921) 44 Mad. 381 : (1921) MWN 281 : 63 IC 173 : 40 MLJ 404 : (1921) Mad. 236.

a composition, after notice to the surety. In *Bhagwan Das* v. *Secy. of State,*[1] where a creditor without giving up his rights against the debtor, chose to sue one co-surety alone, it was held that the other surety was not discharged. But where a creditor omitted to submit a statement of debts owed to him by his debtor as required by the C.P. Debt Conciliation Act with the result that the debtor became discharged, it was held that the creditor could not proceed against the surety who had guaranteed payment.[2] Where a suit is brought by the creditor against the principal debtor and sureties, if the suit abates against the principal debtor, the suit cannot be decreed against the sureties, otherwise there will be two conflicting decrees in respect of the same subject matter of suit.[3] Where in a suit against the principal debtor and the surety, the principal debtor died during the pendency of the suit, the omission on the part of the creditor to bring his legal representatives on record resulting in the abatement of suit does not entitle the creditor for a decree of the suit.[4]

MERGER.—Where, by operation of law, there is a merger of the estate of the debtor and creditor, the surety's obligation comes to an end. In *J. Kannu Sami Iyer* v. *Muthukumara*[5] the suretyship was for *mesne* profits under a partition decree pending an appeal. After the dismissal of the appeal, the debtor died and his estate vested in the creditor. The creditor sought to execute the decree for *mesne* profits against the surety and it was held that he could not.

OPERATION OF LAW.—As the discharge or release of the debtor has to be by some act or omission of the creditor, it will follow that the insolvency of the debtor does not in any manner affect the surety's liability.[6] Thus, where a decree that, on the principal debtor failing to pay, the surety shall be liable, is reversed on an appeal by the debtor only, without touching the liability of the surety, the latter will continue to be liable.[7]

EXTENSION OF TIME.—It is not every granting of time or of accepting additional security which will discharge the surety but only such of them as come under Section 134, by being elements in a new contract between the creditors and the principal debtor to which the surety is not a party. The granting of time is merely an act of forbearance on the part of the creditor to sue the principal debtor.[8]

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1. (1926) 28 Bom. LR 662 : 96 IC 248 : (1926) Bom. 465.
2. *Babu Rao* v. *Babu Manaklal,* (1938) Nag. 413 : 176 IC 686.
3. *T. Raja Setty* v. *Bank of Baroda,* AIR 1992 Kant. 108,121.
4. *Syndicate Bank, Tangutur Branch,* v. *Pamidi Somaiah (died),* AIR 2002 AP 12 : 2001 (6) ALD 365 : 2001 (6) ALT 640.
5. (1923) 44 MLJ 171 : (1923) MWN 253 : 72 IC 194 : 17 LW 473 : (1923) Mad. 340.
6. *Morice* v. *Simla Bank,* (1878) 2 PR; *Khushal Chand* v. *Gauri Shankar,* (1935) Lah. 906.
7. *Sham Lal* v. *Sohnu Singh,* (1911) 98 PLR.
8. *Ushadevi Malhotra* v. *Bhagwandas,* AIR 1967 MP 250 : 1967 MPLJ 224 : 1967 Jab.LJ 167.

Omission.—Illustration (c) is an instance of omission on the part of the creditor. It has been pointed out that from the illustrations, it is clear that the act or omission of the creditor should be something in the nature of a breach of the contract on his part.[1] Thus the mere fact that the creditor, after having filed a suit against the principal debtor and the surety allows the suit against the former to abate on his death, will not operate to discharge the surety.[2] On the same principle, where the debtor by not taking proper steps for service of summons on the principle debtor allows the suit as against him to be dismissed, the surety's liability is not on that account discharged.[3] The pronouncement of the Judicial Committee in *Mahanth Singh* v. *U. Ba Yi* [4] shows that the withdrawal of the suit as against the principal debtor without leave of Court, will not discharge the surety who was impleaded as a co-defendant.

Effect of failure to sue principal debtor within limitation period.—On the question whether an omission by the creditor to sue the principal within the period of limitation is to be construed as an act or omission of which the legal consequence is the discharge of the principal debtor under the present section or a mere forbearance to sue, as in Sec. 137 there was, till the pronouncement of the Privy Council in *Mahanth Singh* v. *U. Ba Yi* [5] considerable difference of opinion among the several High Courts. It is due in part, to the language of Sec. 137 *infra,* where it speaks of "mere forbearance on the part of the creditor to sue the debtor." The Allahabad High Court has held in *Salig Ram* v. *Lachhman Das,*[6] following some earlier decision,[7] that if the remedy against the principal is allowed to be barred by efflux of time, the surety is discharged also. This view is based on the interpretation of "forbearance" in Sec. 137 as forbearance for a time only, but not so as to the remedy. The same

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1. *Anand Singh* v. *Collector of Bijnor,* (1932) 54 All. 1007 : 143 IC 526 : (1932) ALJ 868 : (1932) All. 610.
2. *Nur Din* v. *Allah Ditta,* (1933) 13 Lah. 817 : (1932) Lah. 419 : 138 IC 305; *Shankar Bapu* v. *Vishnu,* (1867) 4 Bom. HC AC 79 (Creditor neglecting to get mortgage bond registered—surety discharged). **But see** *Ram Saran* v. *Bindeshri,* (1921) 54 IC 105.
3. *Nathubai* v. *Ranchodlal* (1915) 39 Bom. 52 : 16 Bom. LR 696 : 27 IC 165; *Shaik Ali* v. *Mahomed* (1889) 14 Bom. 267; *Bharat National Bank* v. *Thakar Das,* (1935) 16 Lah. 757 : 156 IC 553 : 37 PLR 92 : (1935) Lah. 729 (Foreign judgment dismissing creditor's suit against debtor for default—Surety not discharged). **See also** *Balaji* v. *Hastimal,* (1914) 17 IC 893 : 8 NLR 188; *Maung Po* v. *Maung Kyaw,* (1917) 44 IC 693; (Cf.) *Sohan Lal* v. *Puran singh,* (1916) 54 PR 36 IC 537.
4. (1939) PC 110; **see also** *Kanahai* v. *Sukanan,* (1937) 14 Ran. 594 : (1937) Ran. 72 : 168 IC 815.
5. (1939) PC 110; **see** *Bombay Dyeing & Mfg. Co.,* v. *State of Bombay,* AIR 1958 SC 328 : 1958 SCR 1122.
6. (1928) 50 All. 211 : 25 ALJ 937 : 107 IC 42 : (1928) All. 46. **See also** *Jagmohan* v. *Gatali,* (1930) ALJ 1084. ***See also*** *Chettar Singh* v. *Makhan Singh,* (1936) Pesh. 20 (where the matter is discussed *in extenso).*
7. *Ranjit* v. *Naubat,* (1902) 24 All. 504; *Radha* v. *Kinlock,* (1889) 11 All. 310; *Hajari* v. *Chuni Lal,* (1886) 8 All. 259.

High Court has, however, distinguished the above cases, and held that the act or omission of the creditor, which is contemplated by the section, must be something in the nature of a breach of the contract on his part, and therefore failure to sue the debtor within the period of limitation will not suffice to attract the section.[1] The other High Courts have adopted the latter view, though not for the same reasons. Thus, the Madras High Court in *Subbamania* v. *Gopala,*[2] in holding a surety liable where the creditor had allowed his remedy against the debtor to be barred, referred to the observations of Lindley, J., in *Carter* v. *White.*[3] "Is it the law that a creditor who, neglects to sue his debtor till the statute has run will thereby discharge his surety? There is no decision to that effect. On the contrary, the true principle is that mere omission to sue does not discharge the surety, because the surety himself can set the law in operation against the debtor." The Bombay,[4] Calcutta,[5] Lahore,[6] and Rangoon[7] High Courts as also the Nagpur Court incline to the above view. The conflict has however been set at rest by *Mahanth Singh* v. *U. Ba Yi* [8] in which the Judicial Committee have affirmed the view of the majority of the High Courts and observed that the view of the Allahabad High Court in *Ranjit* v. *Naubat* [9] is inconsistent with the English law also. Where the surety has agreed with the creditor for the variance in terms or for giving time to the principal debtor or agreeing with principal debtor not to sue him, acknowledgment of debt by debtor barred by limitation shall be binding on the surety.[10]

135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.—A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

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1. *Anand Singh* v. *Collector of Bijnor,* (1932) 54 All. 1007 : 143 IC 526 : (1932) ALJ 868 : (1932) All. 610.
2. (1909) 33 Mad. 308 : 20 MLJ 633.
3. (1883) 25 Ch. D 666.
4. *Sankana* v. *Virupakshapa,* (1883) 7 Bom. 146.
5. *Birendrajit* v. *Renupada,* (1936) 40 CWN 465; *Bireswar* v. *Saidpur Commercial Bank,* (1937) 41 CWN 1361; *Krishto Kishori* v. *Radha Raman,* (1885) 12 Cal. 330.
6. *Nur Din* v. *Allah Ditta,* (1933) 13 Lah. 817 : (1932) Lah. 419 : 138 IC 305; *Din Mahomed* v. *Sain Das,* (1927) Lah. 396 : 100 IC 922; *Tulsidas* v. *Hashi,* (1925) Sind 164 : 78 IC 868; *Naraindas* v. *Nenu,* (1929) Nag. 145 : 116 IC 421.
7. *U Ba* v. *Mahanth Singh,* (1937) Ran. 302 : 171 IC 291 (Reversed by the P.C.). But in *Kanahai* v. *Sukanan,* (1937) 14 Ran. 594 : (1937) Ran. 72 : 168 IC 815, it was held the other way.
8. (1939) PC 110.
9. (1902) 24 All. 504.
10. *United Commercial Bank* v. *B.M. Mahadev Babu,* AIR 1992 Kant. 294.

Principle of the section.—This section provides that where by a contract with the debtor, the creditor compounds with, or gives time to or agrees not to sue the principal debtor, without, in either case, the concurrence of the surety, the surety is discharged from his obligation. The ground upon which the surety is discharged in either case, is that his right to pay the debt at any time, and sue the principal in the name of the creditor, is interfered with, for the creditor, will not be in a position to place his remedies at the disposal of the surety, without committing a breach of his contract with the principal.[1]

"Contract."—The section requires that there must be a *contract* by which the creditor compounds or promises to give time or not to sue and of course such a contract requires to be supported by consideration.[2] It would therefore necessarily follow that if the creditor promises to give time to the debtor, but there is no consideration for the promise, the act of the creditor in giving time will be only a "mere forbearance," within the meaning of Sec. 137. The real test, as pointed out in *Damodar* v. *Muhammad Hussain* [3] is whether the agreement to give time became a contract, (*e.g.,*) (whether the consideration for the promise made in the agreement). It may be mentioned in this connection that in *Kally Prosonno* v. *Umbik-Charan Bose* [4] it was held that the contract contemplated by the section may be express or implied, and accordingly, contract was inferred from payment and acceptance of interest.

In *Tejumal* v. *Secretary of State,*[5] it was doubted whether the view in the Allahabad case above mentioned would be tenable, after the Privy Council ruling on the construction of Sec. 63 in *Chhunna Mal* v. *Mul Chand.*[6] It is submitted that the language of Sec. 135 is quite clear and requires a *contract* between the creditor and the debtor, and the Privy Council ruling leaves the present question untouched. Even otherwise, it is possible that the principle *Generalia specialbus no derogant* will apply.

The mere giving of additional security, by a principal will not discharge a surety, but if the giving of such security is really a *consideration* for giving time to the principal, it will discharge him.[7] In a Madras ruling. *T.N.S. Firm* v. *Mahomed Husain* [8] the third defendant had guaranteed plaintiff's advances to the first

1. *Nisbet* v. *Smith,* (1789) 29 ER 317; *Price* v. *Krikham,* (1864) 159 ER 601 : 141 RR 542.
2. *Bank of Ireland* v. *Beresford,* (1818) 3 ER 1456 : 19 RR 50; *Samuel* v. *Howarth,* (1817) 36 ER 105 : 17 RR 81; *Ushadevi Malhotra* v. *Bhagwandas,* AIR 1967 MP 250 : (1967) MPLJ 224 : 1967 Jab. LJ 197.
3. (1900) 22 All. 351; *Tejumal* v. *Secy. of State,* (1933) sind 311. **See also** *Philpot* v. *Braint,* (1828) 130 ER 945 : 29 RR 710; *Clarke* v. *Birely,* (1888) 41 Ch.D. 422.
4. (1872) 9 Ben. LR 261 : 18 WR 416.
5. (1933) Sind 311.
6. (1928) 55 IA 154 : 9 Lah. 510 : 55 MLJ 1 : 26 ALJ 603 : 30 Bom. LR 837 : 47 CLJ 503 : 33 CWN 738 : 108 IC 678 : 28 LW 251.
7. *Overend Gurney & Co.* v. *Oriental Financial Corporation,* (1874) 7 HL 348; *Twopenny* v. *Young,* (1824) 107 ER 711.
8. (1933) 65 MLJ 458 : (1933) MWN 1095 : 38 LW 481 : 146 IC 608 : (1933) Mad. 756.

defendant. Later, on plaintiff demanding payment, the first defendant asked for time and gave plaintiff bills payable at a future date as security. The Court observed that the plaintiff had by accepting the bills put it out of his power to sue for the amounts till the date of maturity, and held the surety discharged.

Applicability to bond in favour of Court.—The section may not in terms apply to a bond executed in favour of a court, but the principle is the same. For instance, where a surety bond was executed in favour of the Court to enable the debtor's motor vehicle to be released from attachment and later on the creditor and the principal debtor entered into a compromise permitting instalmentary payments and a compromise decree was passed, it was held that the surety was automatically discharged.[1]

Composition.—Ordinarily where in a composition, the creditor *voluntarily* takes a certain amount *in full settlement* of his claims against the debtor, equity demands that the surety must be released, otherwise, it will amount to the creditor being paid twice over in respect of his claim. It was decided in *Bombay Company* v. *Official Assignee, Madras,*[2] that a private composition with the debtor, behind the back of the surety, will have the effect of discharging the surety, but if the composition is made, under the supervision of the court and after notice to the surety, the liability of the surety is not affected. The same case is authority for the further proposition that the acceptance by the creditor of a composition of the insolvency of the debtor, after some part payments had been made by the surety, will not entitle the surety to recall such payments. In *Narsingh* v. *Nirpat,*[3] where the suretyship was for mesne profits that may be decreed after inquiry, and the debtor compromised with the decree-holder and agreed to a certain figure, the surety was held not liable as the composition deprived him of the possibility of discharge by the decision of the court that no mesne profits were due. **[686]**

A composition however may be in other forms also. Thus, in *Muhammad Yusaf* v. *Ram Gobinda,*[4] where the surety had undertaken to pay such sum as the court may after contest find due, and the creditor compromised the suit, the surety was held discharged. Similarly in the case of a consent decree passed against the debtor without the surety's knowledge, the Court held the surety was released from his obligation.[5] Doubts have however been cast on the

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1. *John Kuruvilla* v. *Parameswaran Pillai,* AIR 1980 Ker. 87 : 1979 Ker.LT 885; *Bankim Behari Ray* v. *Halima Bibi,* AIR 1962 Orissa 54; *Kurien* v. *Allepy C.C.M.s. Society,* AIR 1975 Ker. 44 : 1974 Ker. LT 541. Cf. *Amin Abdul Kadar Murtuza* v. *Jirrag Cotmal Ratangiri Bhagdari,* (1971) 73 Bom. LR 715 : (1971) Mah. LJ 956.
2. (1921) 44 Mad. 381 : 63 IC 173 : (1921) MWN 281 : (1921) Mad. 236 : 40 MLJ 404.
3. (1932) 11 Pat. 590 : 140 IC 564 : (1932) Pat. 313.
4. (1928) 55 Cal. 91 : 109 IC 538 : (1928) Cal. 177.
5. *National Coal Co.* v. *Kshitish Bose,* (1926) 30 CWN 540 : 95 IC 409 : (1926) Cal. 818.

correctness of the above decisions in a later case of the same court.[1] But in *Haji Ahmed Karim* v. *Maruti* [2] where the surety for a judgment-debtor undertook to fulfil the terms of any decree that may be passed, and the suit was *bona fide* compromised, the Bombay High court held, distinguishing the two Calcutta cases mentioned, that the surety's liability was not discharged by the compromise. In Madras, it has been held in *Annadana Jadaya* v. *Konammal,*[3] that the effect of a compromise on the liability of the surety is a question of fact in each case, and that where the contract does not in terms exclude his liability in case of a compromise, the surety will not be discharged by the mere fact that the compromise was without his knowledge. Similarly, in *Appuni Nair* v. *Isaac*[4] in the case of a consent decree without the surety's knowledge or concurrence the Court observed that as the bond was given to the Court, the present section had no application at all and held the surety not discharged. In *Mayandi* v. *Raman Chetty,*[5] a Bench of the Rangoon High Court while affirming that a mere compromise by the creditor does not discharge the surety, observed that the importation of new terms outside the reasonable requirements of a settlement by consent may have that effect. The Allahabad High Court has however held the surety discharged, where, without the consent of the surety the creditor compromised with the debtor and gave him time for payment.[6]

Giving time.—This contemplates a subsequent contract between debtor and creditor whereby the time originally fixed is extended without the surety's consent[7] and the creditor thus precludes himself suing for a certain time.[8] What really constitutes "giving time" is the extension of the period at which by the contract between them the principal debtor was originally obligated to pay the creditor by substituting a new and valid contract between the creditor and the principal debtor to which the surety does not assent.[9] In such a case, the surety is discharged.[10] The Lahore High Court held in a case of a

1. *Jai Bai* v. *Joharmull,* (1932) 59 Cal.1450 : 36 CWN 749 : 139 IC 815 : (1932) Cal. 858. **But see** *Kurian* v. *C.C.M.s. Socy.,* AIR 1975 Kerala 44; *John Kuruvilla* v. *Parameswaran Pillai,* AIR 1980 Ker. 87 (the view expressed in *Mohan Lal* v. *Surajmani,* AIR 1973 J&K 92 dissented from).
2. (1931) 55 Bom. 97 : 128 IC 903 : 32 Bom. LR 1394 : (1931) Bom. 55.
3. (1933) 56 Mad. 625 : 64 MLJ 386 : (1933) MWN 45 : 37 LW 170 : 141 IC 852 : (1933) Mad. 309.
4. (1920) 43 Mad. 272 : 37 MLJ 435 : 53 IC 367 : 10 LW 533. **See also** *Bhagwandas* v. *Nabin Chandra,* (1933) Cal. 337 : 143 IC 322 : 56 CLJ 586; *Jang Bhadur* v. *Basdeo,* (1936) All. 549 : 164 IC 248 : (1936) ALJ 860.
5. (1937) Ran. 499; **see also** *Tatum* v. *Evans,* (1886) 54 LT 336.
6. *Kunji Lal* v. *Batuk Prasad,* (1929) 120 IC 552.
7. **See** *Behari Lal* v. *Allahabad Bank,* (1929) ALJ 1137 : (1929) All. 664.
8. **See** observations in *T.N.S. Firm* v. *Mahomed Hussain,* (1933) 65 MLJ 458 : (1933) MWN 1095 : 38 LW 481 : 146 IC 608 : (1933) Mad. 756.
9. *United Commercial Bank Ltd.* v. *Okara Grain Buyers Syndicate Ltd.,* AIR 1968 SC 1115 : 1968 (3) SCR 396 : 1968 (38) CC 636.
10. *Kunji Lal* v. *Batuk Prasad,* (1929) 120 IC 552.

surety bound under Sec. 55 (4) of the Civil Procedure Code that the mere consent by the creditor to the debtor being given time for payment does not discharge the surety.[1] So, too, in the case of a surety bond given to a court, the mere fact that the court grants time to the debtor to pay does not discharge the surety.[2] Again where, subsequent to the surety agreement, the principal debtor signed in the creditor's book for the balance that had been struck, the surety was held not discharged, in as much as the mere signing for the balance conferred to benefit on the debtor not discharged him in any manner.[3] In *Protap Chunder* v. *Gour Chunder,*[4] acceptance of interest in advance was held to amount to giving time, so as to discharge the surety. The *ratio decidendi* was that, as the surety can call upon the creditor to proceed against the debtor as soon as the debt falls due, any contract, which precludes the creditor from exercising such right, will be "inconsistent with the rights of the surety." [686]. Where the debt owed by the principal debtor became barred by limitation and the creditor bank obtained fresh pronotes from him without the concurrence of the guarantors, the contract of guarantee is deemed to have been determined unless the guarantors renewed the guarantee.[5]

In the English case of *Hulme* v. *Coles,*[6] it was remarked that "the principle of discharging the surety if the creditor gives time is a refinement of a Court of equity, which will not be refined upon, so as to include an arrangement by which the remedy is accelerated." In the case above, the creditor instituted an action against the debtor, and after getting an acknowledgment from him, undertook not to prosecute the claim for a certain period, which, however, fell short of the time, which would ordinarily have been taken to get a decree on the original action. As no question of prejudice to the surety arose it was held that he was not discharged similarly an agreement between a creditor Bank and principal debtor provided that the latter should be responsible for the quality and quantity of goods pledged with the Bank and also for the correctness of the statements and return furnished to the Bank from time to time. The goods pledged were further declared and agreed to be not actually weighed or valued in order to verify the returns furnished by the debtor. When on one occasion the Bank on actual weighment found some deficit in the quantity of goods, if granted some time for the principal debtor to make up the

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1. *Ramzan* v. *Khodija Sultan,* (1938) Lah. 472 : 40 PLR 755; *Dhari Mal* v. *Kanshi Ram,* (1927) Lah. 336 : 100 IC 762.
2. *Yusuf Moidu* v. *Haji Abdul Khadir & Bros.,* (1938) MWN 1131; *Samba Siva* v. *Muthuraman,* (1937) MWN 1165.
3. *Devi Das* v. *Sant Singh,* (1931) Lah. 627 : 133 IC 652.
4. (1877) 4 Cal. 132 : on appeal to the PC 6 Cal. 241; compare *Blake* v. *White,* (1835) 160 ER 171; *Kali Prosonno* v. *Umbica Charan,* (1872) 18 WR 416 : 9 Bom. LR 261.
5. *United Commercial Bank* v. *Lalitaben Jivarambhai,* 2001 (2) GCD 67 (UJ).
6. (1827) 57 ER 695 : 29 RR 52; *Midland Motor Show Rooms* v. *Newman,* (1929) 2 KB 256.

deficiency. It was held that the Bank's act of giving time to the principal debtor did not tantamount to giving of time within the meaning of this section so as could exonerate the surety.[1]

Promise not to sue.—The corresponding English rule, as was seen already is that it is open to the creditor in discharging the debtor, to reserve his rights against the surety. But in practical effect, such a discharge is more apparent than real, for as pointed out in *Bateson* v. *Gosling*,[2] the release is only qualified; there is no absolute release, no effacement of the debt as such, for it is being claimed against the surety, who, upon payment, is entitled to sue the principal debtor. So in such a case, there is no discharge of the principal debtor; but only promise not to sue.[3]

The Rangoon ruling in *Ma Kwi* v. *On May*[4] illustrates the position that there must be a binding contract, and not a bare statement of intention. In that case, a tradesman supplied goods to certain employees and the employer had stood surety for them. A statement by the trader that he did not intend to sue the employees was held not to discharge the surety.

Giving time to surety.—It may in this connection be mentioned that it has been held in English Law that a holder of a security who agrees with the principal to give time to the surety, by so doing discharges the surety. Lord Hatherley observes in *Oriental Finance Corporation* v. *Overend, Gurney & Co.*[5] "If the creditor agrees with the principal that he will not sue the sureties, the case is stronger than the usual case of an agreement to give time to the principal, which only involves by implication an engagement not to sue the surety."

Surety's assent.—Where the surety is a consenting party to the subsequent contract between the debtor and creditor, he continues to be bound.[6] Where a surety bond contained a clause that the surety's liability will not be affected by any dealings between debtor and creditor, the Judicial Committee held that there had been an antecedent assent on the part of the surety and so, he was not discharged.[7]

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1. *Amrit Lal* v. *State Bank of Travancore,* AIR 1968 SC 1432 : 1968 (3) SCR 724 : 1968 (38) CC 751.
2. (1871) 7 CP 9.
3. **See** *Kearsely* v. *Forbes,* (1846) 153 ER 1128.
4. (1929) Ran. 187 : 119 IC 749.
5. (1871)7Ch.Ap. 142; (Cf.) *Vyner* v. *Hopkins,* (1842) 6 Jur. 889 : 65 RR 806 (Time given to one co-surety discharges the others unless rights are reserved).
6. **See** *Gour Chandra* v. *Pratap Chandra,* (1880) 6 Cal. 241 (PC); *Dorothy Valentine Burnard* v. *Wihiams Douglas Lysnar,* (1929) 30 LW 456 : 120 JC 58 : (1929) PC 273.
7. *Hodges* v. *Delhi & London Bank,* (1900) 23 All. 137 : 27 IA 168 : 2 Bom. LR 967 : 5 CWN 1 : 10 MLJ 279 (PC); Compare also the Enlgish cases; *Greenwood* v. *Francis,* (1899) 1 QB 312; *Perry* v. *National Bank,* (1910) 1 Ch. 464. *Citibank NA* v. *Juggilal Kamlapat Jute Mills Co. Ltd.,* (1984) 56 Comp. Cas. 509.

There is English authority for the view that the principle of the section has no application to a case where time is given to the principal after recovery of judgment against both principal and surety.[1]

136. Surety not discharged when agreement made with third person to give time to principal debtor—Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration

C, the holder of an overdue bill of exchange drawn by *A* as surety for *B*, and accepted by *B*, contracts with *M* to give time to *B A* is not discharged.

Contract with third party.—A contract to give time to the debtor, to operate as a discharge of the surety, must be one made with the debtor himself. If the contract is made with a third party, the surety, will not be discharged.[2] The third person may be a co-surety; or he may be a stranger [See illustration to the section.] [688]

137. Creditor's forbearance to sue does not discharge surety.—Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Illustration

B owes to *C* a debt guaranteed by *A*. The debt becomes payable. *C* does not sue *B* for a year after the debt has become payable. *A* is not discharged from his suretyship.

Difference between Secs. 137 and 135.—The distinction between Sec. 135 and this section is that in the former, time is given by virtue of a positive contract between the creditor and the principal, while in the latter the creditor is merely inactive. In *Hajarimal* v. *Krishna Rao*,[3] Westropp, C.J.,

1. A *debtor, Re.*, (1913) 3 KB 11.
2. **See** *Clarke* v. *Bisley*, (1889) 41 Ch.D. 422 already cited, and *Frazer* v. *Jordan*, (1858) 120 ER 113 : 112 RR 572.
3. (1881) 5 Bom. 647. **See also** *Maharaja Bahadur* v. *Basanta Kumar*, (1913) 17 CWN 695 : 18 IC 876 (Merely giving time to debtor, without any binding contract for that purpose); (Cf.) *Bell* v. *Banks*, (1841) 133 ER 1140 : 60 RR 509 (Mere voluntary abstinence from suing is not such a giving of time as will discharge surety). **See also** *Punjab National Bank* v. *Mehra Brothers (P) Ltd.*, AIR 1983 Cal. 335.

observed that mere 'forbearance' means "a forbearance not resting upon or in consequence of such a promise to give time to, or not to sue the principal debtor, as is the subject of Sec. 135." In *Kalicharan* v. *Abdul Rahman,*[1] the judicial Committee said that a mere forbearance to sue the debtor does not discharge the surety. The effect of an omission or forbearance to sue till the period of limitation elapses has been already discussed in connection with Sec. 134. **[683-685]**

It may be mentioned that if the forbearance really gives an advantage to the creditor, the court will adjust the equities between the parties in such manner that the surety's liability is not enhanced. The case of *Ramanund* v. *Chowdhury Soonder*[2] already referred to is an illustration in point.

Where one of the two Co-guarantors has revoked his guarantee and asked the creditor bank to recover the loan from the principal debtor by serving a demand notice, he is discharged from liability but the other Co-guarantor who has not taken steps to revoke the guarantee continues to be liable.[3]

Merely because there was a delay on the part of the creditor Bank in recalling the loan or in filing suit after several defaults by the principal debtor, such failure cannot be deemed as a promise on the part of the creditor Bank to give time and the creditor Bank has a right to sue all the guarantors and the principal debtor since their liability is joint as well as several.[4]

Fidelity guarantees.—In the case of fidelity guarantees, the mere passive inactivity of the creditor or neglect to call the debtor to account in a reasonable time and to enforce payment against him does not discharge the surety. As the surety guarantees the honesty of the employee, he is not entitled to be relieved of his obligation merely because the employer fails to use all means in his power to guard against the consequences of dishonesty.[5] The creditor is not deemed to contract that he would supervise the work of the employee for the benefit of the surety.[6] But where the employer is guilty of gross neglect amounting to wilfully shutting his eves to the fraud of the employee[7] or condones any misconduct of the employee without notice to the

1. (1919) 23 CWN 545 : 10 LW 34 : 50 IC 651 (PC); *Ram Singh* v. *Gulab Rai,* (1921) IC 610 : 2 LLJ 316; *Abid Husssain* v. *Lachmi Narain,* (1935) Oudh 260 : 154 IC 814; *Makhan Singh* v. *Lachmi,* (1936) Pesh. 80.
2. (1878) 4 Cal. 331 (PC).
3. *Anil Kumar* v. *Central Bank of India,* AIR 1997 HP 5,11 : 1997 (2) Bank.LJ 207.
4. *Bank of Baroda* v. *Avdoot Bhagwant Naik,* AIR 2005 Bom 224 : 2004 (4) Bom. LR 641.
5. *Black* v. *Ottoman Bank,* (1862) 15 ER 573 : 137 RR 101.
6. *Allyan* v. *President, Wakema Municipality,* (1937) Ran. LR 405 : (1938) Ran. 90 : 1 IC 255; *Kingston-upon-Hull Corporation* v. *Harding,* (1892) 2 QB 494; Rather the duty of supervision lies with surety; see *Creighton* v. *Rankin,* (184) 7 ER 1092.
7. *Dawson* v. *Lawes,* (1854) 69 ER 119 : 101 RR 602.

surety[1] or in spite of the surety's calling upon him to dispense with the debtor's services[2] continues him, in such cases, the surety will be discharged.

138. Release on one co-surety does not discharge others.—Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.

Release of co-surety.—Since in Indian Law all joint liability is joint and several, the release of one co-surety will not have the effect of releasing the other co-sureties.[3]

The Report of the Law Commissioners stated, "From a wish to avoid subtleties, and the attaching of unforeseen consequences to men's actions, we have provided that where there are co-sureties, a release of one of them by the creditor shall not release the others, nor free that one from responsibility to them." This section is simply one application of the general principle of liability enunciated in Sec. 44.

In *Lakshminarasayya* v. *Venkatakrishnayya*[4] it was decided that where one co-surety executes a fresh security (promissory note) in discharge of the original debt due from the principal debtor, the other co-surety is discharged in respect of the original debt.

139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy.—If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Illustrations

(a) *B* contracts to build a ship for *C* for a given sum, to be paid by instalments as the work reaches certain stages. *A* becomes surety of *C* for *B's* due performance of the contract. *C*, without the knowledge of *A*, prepays to *B* the last two instalments. *A* is discharged by this prepayment.

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1. *Shepherd* v. *Beecher,* (1725) ER 733.
2. *Phillips* v. *Foxall,* (1872) 7 QB 666; *Burgess* v. *Eve,* (1872) 13 Eq. 450.
3. *Sri Chand & Ors.,* v. *Jagadish Parshad,* AIR 1966 SC 1427 : 1966 (3) SCR 491.
4. (1922) 15 LW 143 : (1922) Mad. 119.

(b) *C* lends money to *B* on the security of a joint and several promissory notes made in *C's* favour by *B*, and by *A* as surety for *B*, together with a bill of sale of *B's* furniture, which gives power to *C* to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, *C* sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realised. *A* is discharged from liability on the note.

(c) *A* puts *M* as apprentice to *B* and gives a guarantee to *B* for *M's* fidelity. *B* promises on his part that he will, at least once a month, see *M* make up the cash. *B* omits to see this done as promised, and *M* embezzles. *A* is not liable to *B* on his guarantee.

Impairing surety's remedy.—Sec. 139 is a residuary provision, its object being to ensure that no arrangement different from that contained in the surety's contract is forced upon him and that if the surety pays the debt he has the benefit of every remedy, which the creditor has against the principal debtor.[1] The present section deals with acts or omissions tending to impair the remedies, which the surety may have against the debtor. Illustration (a) which is *in pari materia* with the English case of *Calvevt* v. *London Dock Co.*[2] forcibly brings out the point of the section. Illustration (b) would suggest that the creditor must realise his securities as far as possible. The section deals with two classes of cases (1) act of the creditor inconsistent with the right of the surety, (2) omission of the duties he owes to the surety.

In either case, there is the further requisite, namely, that the eventual remedy of the surety against the principal must be impaired. The case of *Pogose* v. *Bank of Bengal* [3] draws attention to this aspect of the section.

Where the debtor sold the truck purchased with Bank loan with the permission of the creditor bank but without information to the surety and circumstances are such that the timely action of the debtor in selling the truck decreased the liability of the surety in view of market price having gone done, the surety is not discharged.[4]

Acknowledgement of the debt under Sec. 18 of the Limitation Act which provides for a fresh period of limitation would itself be sufficient, in the case of

1. *Venkata Brahma Rao* v. *Andhra Bank Ltd.*, AIR 1964 AP 555.
2. (1837) 48 ER 774 : 44 RR 300.
3. (1877) 3 Cal. 174.
4. *Bimal Singh Duggal* v. *Central Bank of India*, AIR 2001 Guj 340, 342.

a contract of guarantee, to keep the surety's liability alive. Surety's contract being separate and collateral could not be equated to that of a creditor or joint contractor within the meaning of Sec. 20(2) of the Limitation Act so that the surety could not plead that the written acknowledgement by the debtor could not keep his (surety's) liability alive. An acknowledgement does not impair the remedy of the surety against the debtor.[1]

In case of part payment and acknowledgment by the principal debtor, it only postpones the bar of limitation but the debt of the principal debtor remains the same and also the liability of the guarantor will remain the same.[2]

Analogous Law.—With this section may be compared Sec. 39 of the Negotiable Instrument Act, which discharges the indorser from liability in cases where the holder destroys or impairs the indorser's remedy against a prior party.

Acts of omissions.—In Mahomed *Ali* v. *Lakshmibai Anant*,[3] a surety to a debtor who had been directed to furnish security under Or. 38, R. 5 of the C.P.C., was held discharged when the creditor compromised the suit in a manner, which prejudiced the surety. But, where the defendant had guaranteed to the plaintiff full payment of any amounts which he (plaintiff) might place in current account with a certain bank, in the event of the bank going into liquidation and the plaintiff sued, after receiving from the liquidator of the bank certain dividends, it was held that by the fact of plaintiff having registered himself as a creditor and received dividends in such capacity, no remedy of the surety against the debtor had been impaired.[4]

Where a person stood surety to a bank for payment of a constituent's current account, the act of the bank in allowing such constituent to open a separate account in his own name, was held to discharge the surety.[5] Similarly, in case where one stands surety for several defendants and the decree-holder proceeds against one of them only, the surety will be discharged by virtue of the exoneration of the other defendants.[6] In a Madras case,[7] the surety had undertaken liability in respect of any amount that might be decreed against two defendants. The plaintiff compromised with one and suffered a dismissal of that suit as against the other. In a suit to enforce the surety bond, it was held that the dismissal of the suit as against one of the defendants operated as a

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1. *Wandoor Jupiter Chits (P) Ltd.* v. *K.P. Mathew*, AIR 1980 Ker. 190 : 1979 Ker.LJ 566.
2. *Syndicate Bank* v. *K. Prakash*, AIR 2007 Mad 307 : 2007 (4) CTC 313 : 2007 (4) Mad LJ 418.
3. (1930) 54 Bom. 118 : 31 Bom. LR 1442 : (1930) Bom. 122.
4. *Malwa Ram* v. *Swami Das*, (1922) Lah. 89 : 4 LLJ 183; *Sardar Tulza* v. *Natha Sihgh*, (1916) 15 IC 469.
5. *Ghuznavi* v. *National Bank of India*, (1916) 20 CWN 562.
6. *Sitaramaswamy Sastry* v. *Basavayya*, (1921) 60 IC 114 : 12 LW 536.
7. *Venkamma* v. *Sanyasayya*, (1938) Mad. 422 : (1938) MWN 68 : 47 LW 84.

release of the defendant and had the effect of extinguishing the principal debt and therefore the surety was not liable. In the case of *Ramanund* v. *Chowdhury Soonder Narain,*[1] where a decree-holder by postponing the sale of properties under a decree increased the burden of interest on the sureties who had guaranteed payment of any deficiency after sale, the sureties were held discharged from liability for interest subsequent to the court's order for sale.

Where loans are alleged to have been sanctioned on the hypothecation of goods and lost as a result of the negligence of the lending bank, though onus lies on the borrower to prove the negligence, the lending bank being a statutory body constituted to carry on the welfare activity of State in the field of banking must reveal all documents to satisfy the court that it has taken all possible steps to discharge its obligation both under fact and law.[2]

The defendant owner of the goods of the shop who has obtained loan from the plaintiff Punjab and Sind Bank by hypothecation of the goods cannot plead discharge of the loan liability on account of loss of goods by fire on the ground that the bank was holding constructive possession of goods and merely because the bank was deducting premium for insurance policy for the goods insured.[3]

Again, where the surety bond in respect of a decree payable in instalments provided that the decree-holder should execute the decree if default was made, and the decree-holder allowed the decree to become time barred, the surety was discharged.[4] The English cases of *Phillips* v. *Foxall* [5] and *Waltts* v. *Shuttleworth,*[6] are also in point.

But mere laches or acquiescence by the creditor in irregularities committed by the debtor (*e.g.*) in regard to accounts by an employee, whose fidelity is guaranteed, will not operate to discharge the surety.[7] Likewise the mere passive inactivity of the creditor to whom a guarantee in given or his neglect to call the principal to account in reasonable time and to enforce payment against him does not discharge the surety. There must be some

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1. (1878) 4 Cal. 331 (PC). **See also** *Ram Prashad* v. *Gordhan,* (1934) All. 616 : 149 IC 168 *(Ex. parte* decree-Attachrnent in execution-Surety for decretal arnount-Decree-holder withdrawing attachment-Surety discharged *pro tanto); Parvatibai* v. *Vinayak,* (1938) 40 Bom. LR 989. (Surety bond to Court pending suit-Subsequent decree-But execution against surety postponed by reason of appellate stay order, and fresh surety in appeal-Original surety discharged).
2. *Gopal Chandra Bagaria* v. *State Bank of India,* AIR 1994 Ori. 329,331.
3. *Suneel Kumar Gupta* v. *Punjab and Sind Bank,* AIR 2006 U'chal 26 : 2005 (4) CCC 499 (Uttr) : 2006 BankJ 196.
4. *Hazari* v. *Chunni Lal,* (1886) 8 All. 259 (Sureties held discharged byvirtue of Ss.l34, 137,139 and 141).
5. (1872) 7 QB 666.
6. (1861) 158 ER 510 : 126 RR 471;(Cf.) *Calvert* v. *London Dock Co.,* (1837) 48 ER 774 : 44 RR 300; *Wulff* v. *Allcock,* (1853) 43 ER 499 : 102 RR 109 (Neglect of statutory formalities, producing loss).
7. *Mayor of Durham* v. *Fowler,* (1889) 22 QBD 394.

positive act done to the prejudice of the surety or such degree of negligence as to imply connivance and amount to fraud.[1]

Where the guarantor specifically agreed to be liable jointly and severally in the event of failure on the part of the principal debtor to pay of the loan instalments, the plea of the guarantor that the contract of guarantee is discharged on account of frustration of contract owing to the failure of the business of the principal debtor disabling to repay the loan is not tenable.[2]

140. Rights of surety on payment or performance.—Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights, which the creditor had against the principal debtor.

Rights of surety.—This section, gives effect to the principle of subrogation of which the surety who has performed all the obligations on default of the debtor, is entitled to take advantage. It is a rule founded on natural justice and equity that the surety must be entitled to every remedy which the creditor had against the debtor.[3] The surety has a right to have conserved for him, all the securities which the creditor might have received, and which would ordinarily be dispensed with, when the obligation has been performed. But it is open to the surety to waive the right of subrogation, either expressly or by a course of conduct.[4] **[664]** The rights available to a surety can be waived by him and such waiving of right by the surety is neither intended to defeat nor does it defeat any provision of law.[5] A guarantor is entitled to waive rights of guarantor available to him under the Act and such waiver cannot said to be violative of public policy.[6]

The words "is invested with all the rights which the creditor had against the principal debtor" make it plain that even without the necessity for a transfer the law vests the rights in the surety.[7]

A surety who has paid a debt due to the Crown by the principal debtor will be entitled to the crown's priority regarding that debt over the other creditors of the principal debtor.[8]

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1. *Black* v. *Ottoman Bank,* (1862) 15 ER 573 : 137 RR 101.
2. *Florence Mabel R.J.* v. *State of Kerala,* AIR 2001 Ker 19, 20.
3. **See** *Craythorne* v. *Swinburne,* (1790) 33 ER 482 : 9 RR 264; *Stirling* v. *Forrester,* (1821) 4 ER 712 : 22 RR 69.
4. *Hope Ex. p.* (1844) 3 Mont. D. & De. G. 720; *Earle* v. *Oliver,* (1848) 154 ER 410; *National Provincial Bank of England, Ex. p.,* (1881) 17 Ch.D. 98; *Johnson, Ex. p.,* (1853) 43 ER 86 (Waiver implied from conduct).
5. *Anil Kumar* v. *Central Bank of India,* AIR 1997 HP, 5, 11.
6. *Central Bank of India* v. *Multi Block Private Ltd.,* AIR 1997 Bom. 109, 113.
7. *Amritlalv. State Bank of Travancore,* AIR 1968 SC 1432 : 1968 (3) SCR 724 : 1968 (38) CC 751.
8. *Moeramma* v. *Magadum Sheriff,* 43 Mys. HC 325.

Where the surety paid the entire amount of a decree passed against him and the principal from the debtor he is not barred by constructive *res judicata.*[1]

Rights before actual payment.—It may, however, be mentioned that a surety is entitled at any time to require the creditor to call upon the principal debtor to pay the debt or himself to pay off the debt, and when he has paid it off, he is at once entitled in the creditor's name to sue the principal debtor.[2] Similarly, in case of fidelity guarantees, in case of proved dishonesty on the part of the servant, the surety can call on the creditor or employer to dismiss the servant.[3]

Rights on demand of payment.—MARSHALLING.—The surety has also the rights to have the creditor's securities marshalled,[4] and to plead a set off as between creditor and debtor.[5] But he cannot demand the amount, which lay in deposit in case-credit account of the debtor.[6]

On payment of performance of all that he is liable for.—The wording of the section suggests that the surety must pay; up the *entire* debt before he can invoke the section.[7] It has however been held that Sec. 140 applies whether the guarantor has paid the whole or part of the liability guaranteed by him and in the latter case the guarantor *pro tanto* will be subrogated to the position of the creditor and as subrogee he will be entitled to all the rights which the creditor had against the debtor.[8] Where the principal debtor has satisfied the bank decree except a sum of Rs.10, 000/- which was paid by the surety under the decree, the right of the surety to be indemnified cannot be denied on the ground that the surety did not pay the entire debt amount since there is an implied promise on the part of the principal debtor to indemnify the surety for whatever amount which the surety has right fully paid.[9]

ASSIGNMENT UNNECESSARY.—In *Coorla Spinning and Weaving Mills* v. *Vallabhdas,*[10] the Bombay High Court, held on a construction of the section that the word "invested " shows that payment or performance of all

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1. *Ram Sagar Singh* v. *Yogendra Narain Pd. Singh,* AIR 1975 Pat. 239.
2. *Rouse* v. *Bradford, Banking Co.,* (1894) 2 Ch. 32; on appeal (1894) AC 586; *Dixon* v. *Steel,* (1901) 2 Ch. 602;
3. *Burgess* v. *Eve,* (1872) 13 Eq. 450; *Sanderson* v. *Aston,* (1873) 8,Ex. 73.
4. *Praed* v. *Gardiner,* (1788) 80 ER 40 : 2 RR 8; *Heyman* v. *Dubois,* (1871) 13 Eq. 158.
5. *Bechervaise* v. *Lewis,* (1872) 7 CP 372.
6. *Bank of Baroda* v. *Krishna Ballabh,* AIR 1975 Raj. 1 : 1974 Raj. LW 71.
7. *Phillips* v. *Mitchell,* (1930) 57 Cal. 764 : (1930) Cal. 17 : 50 CLJ 393 : 126 IC 138; **see also** *Re Beavan,* (1913) 2 Ch. 595; *Darbari Lal* v. *Mahbub Ali,* (1927) 49 All. 640 : 25 ALJ 497 : 101 IC 513 : (1927) All. 538.
8. *Hargopal Aganval* v. *State Bank of India,* (1976) 1 MLJ 250. See however *Goverdhandas* v. *Bank of Bengal,* (1890) ILR 15 Bom. 48.
9. *Aboobacker* v. *Ayishu,* 2000 (3) CCC 29 (Ker).
10. (1925) 27 Bom. LR 1168 : 94 IC 575 : (1925) Bom. 547.

that he is liable for, operates as a transfer to the surety of all the creditor's rights and that there is no necessity for an actual assignment of the creditor's rights in favour of the surety. But the latter Allahabad ruling in *Anand Singh* v. *Collector of Bijnor* [1] would appear to suggest that a mere transfer of the surety's estate will not pass to the transferee those rights which would accrue to the surety only on payment of the debt.

Extent of the right.—It has been held that a surety who pays off the debt for which he was surety is entitled to all the equities, which the creditor could have enforced as against the debtor and *persons claiming under him.*[2] The right extends to the recovering of dividends in insolvency.[3] This is, however, subject to the nature of the liability undertaken (*i.e.*) whether it is a guarantee of a limited amount for an ascertained debt, in which case it will be a guarantee of the whole or a guarantee limited in amount, to secure a floating balance. In English Law, the surety will have a line on the debtor's property pledged with the creditor.[4]

It may be mentioned, in passing, that the rights under this and the succeeding section are available to a person who has become a surety without the concurrence of the debtor, but the rights under Sec. 145 will not be available to such a person.[5]

141. Surety's right to benefit of creditor's securities.—A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Illustrations

(a) *C* advances to *B*, his tenant, 2,000 rupees on the guarantee of *A*. *C* has also a further security for the 2,000

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1. (1932) 54 All. 1007 : (1932) ALJ 868 : (1932) All. 610.
2. *Krishnaswami Pattar* v. *Gopalakrishna,* (1927) 25 LW 190 : 99 IC 676 : 1927 Mad. 421.
3. *Goverdhandas* v. *Bank of Bengal,* (1890) ILR 15 Bom. 48.
4. *Wilding* v. *Richards,* (1845) 63 ER 584 : 66 RR 234; (Cf.) *Imperial Bank* v. *London & St. Katherine Docks Co.,* (1877) 5 Ch. D. 195 (Broker who has guaranteed the performance of a contract can exercise right of stoppage in transit).
5. *Muthuraman* v. *Chinna Vallayan,* (1916) 39 Mad. 965 : 30 MLJ 369 : 3 LW 393 : 33 IC 508 : (1916) MWN 290.

rupees by a mortgage of *B's* furniture. *C* cancels the mortgage. *B* becomes insolvent, and *C* sues *A* on his guarantee. *A* is discharged from liability to the amount of the value of the furniture.

(b) *C*, a creditor, whose advance to *B* is secured by a decree, receives also a guarantee for that advance from *A*. *C* afterwards takes *B's* goods in execution under the decree, and then, without the knowledge of *A*, withdraws the execution. *A* is discharged.

(c) *A*, as surety for *B*, makes a bond jointly with *B* to *C*, to secure a loan from *C* to *B*. Afterwards, *C* obtains from *B* a further security for the same debt. Subsequently, *C* gives up the further security. *A* is not discharged.

Right to creditor's s ecurities.—The expression "security" is not used in any technical sense; it includes all rights, which the creditor has against, the property at the date of the contract.[1] The surety on payment of the debt is entitled to all the securities held by the creditor irrespective of his knowledge or ignorance of the existence of such securities, and if the creditor loses them or parts with any such security, the surety is discharged *pro tanto* to the value of the security.[2] See Illustration (a). Where the creditor and debtor agree between themselves to vary the original contract by reducing the amount to be advanced, and the number of properties to be given as security, there will be no *parting* with a security already given, and this section will have no application.[3]

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1. *State of Madhya Pradesh* v. *Kaluram*, AIR 1967 SC 1105 : 1967 (1) SCR 266; *Bank of Saurashtra* v. *Chitaranjan*, AIR 1980 SC 1528; *Amritlal Goverdhanlal* v. *State Bank of Trauancore*, (1969) 1 SCJ 162 : (1968) 3 SCR 724 : AIR 1968 SC 1432.
2. *Narayan* v. *Ganesh*, (1870) 7 B.H.C. A.C. 118 (Creditor (mortgagee) giving up claim against the property and suing debtor and surety together-Surety discharged) For English law, **see** *Wulff* v. *Jay*, (1872) 7 QB 756; *Darwen & Pearce, In re.*, (1927) I Ch.176(Acts tending to interfere with the right of the surety will discharge him); *Rainbow* v. *Juggins*, (1880) 5 QBD 422 (No duty to preserve securities which are in fact worthless); *Vasireddi Seetharamaiah* v. *Srirama Motor Finance Corporation Kakinada*, AIR 1977 AP 164 : 1976 (2) APLJ 337 : 1977 (1) An.WR. 114; *Amrit Lal* v. *State Bank of Travancore*, AIR 1968 SC 1432 : (1968) 3 SCR 924 : 1968 (2) SCW 508 : 1969 Ker. 345 : (1969) I SCJ 162; *State Bank of Saurashtra* v. *Chitranjan Rangnath*, AIR 1980 SC 1528; *State Bank of India* v. *Quality Bread Factory, Batala*, AIR 1983 P&H 244.
3. *Keshavalal Hiralal* v. *Pratap Singh*, (1932) 56 Bom. 101 : 34 Bom. LR 167; (1932) Bom. 168 : 137 IC 564; *Citibank* v. *Juggilal Kamlapat Jute Mills Co. Ltd.*, (1984) 56 Comp.Cas. 509.

Illustration (b) has been applied in a case in the Allahabad High Court. There a judgment-debtor had applied to set aside an *ex parte* decree in pursuance of which properties had been attached. A surety bond had been executed, and the attachment was withdrawn. Subsequently, a fresh decree was passed against the debtor and the decree-holder attached some property but withdrew the attachment. In these circumstances, the court held the surety was discharged to the extent of the properties released by the decree-holder from the fresh attachment.[1]

But where a mortgagee brought a suit on the mortgage, stating in the plaint that he was content to enforce the document as a simple bond, and the surety who had guaranteed payment pleaded discharge in view of the plaintiff's statement, it was held that as it was still open to the plaintiff under Or. 34 R. 14, C.P.C. to sue for sale, he cannot be deemed to have parted with any security to the surety's prejudice and the surety was not discharged.[2]

Under Sec. 141 the surety is discharged of his liability to the extent of the security lost. The security could be parted with not only be positive action of the creditor but even by his inaction.[3]

The section deals with the protection of the guarantor and the reduction of his liability in proportion to the security lost or parted with by the creditor without the guarantor's consent.[4] Mere passive inactivity or passive negligence of creditor by failing to realise the debt from a collateral security may not in itself be sufficient to discharge the surety since he can himself avoid the consequence of such passivity by himself paying the debt and becoming subrogated to the rights of the creditor.[5] The guarantor cannot insist that the creditor bank must proceed against the security furnished by the principal debtor when there was no contractual obligation to do so and as such the creditor has discretionary power to do so at the appropriate time and situation as it deems fit.[6]

In the case of two or more debts secured by separate securities, the surety for one of the debts will not be discharged if the creditor loses or parts with the security pertaining to the other debts.[7]

DIFFERENCE BETWEEN ENGLISH AND INDIAN LAW.— The right under the section is limited to the securities existing at the time of

1. *Ram Parshad* v. *Gordhan,* (1934) All. 616 : 149 IC 168.
2. *Mahappa* v. *Sidramappa,* (1937) Mad. 501 : (1937) MWN 132 : (1937) 1 MLJ 469 : 45 LW 602 : 169 IC 679.
3. *State of Madhya Pradesh* v. *Kaluram,* AIR 1967 SC 1105 : (1967) 1 SCR 266 : (1967) 2 SCJ 823 : *State Bank of India* v. *Quality Bread Factory Batala,* AIR 1983 P&H 244.
4. *Harigopal Agarwal* v. *State Bank of India,* AIR 1976 Mad. 217 : (1976) 1 MLJ 250.
5. *Karnataka Bank Ltd.* v. *G.S. Kulkarni,* AIR 1977 Kam. 14.
6. *Ibrahim Abdul Latif Shaikh* v. *Corporation Bank, Karwar,* AIR 2003 Kant. 98, 102.
7. *Bank of Baroda* v. *Krishna Ballabh,* AIR 1975 Raj. 1 : 1974 Raj.LW 71.

the formation of the suretyship contract.[1] See III. (c). The rule in English law does not place any such limitation on the rights of the surety. In *Forbes* v. *Jackson*,[2] it was held that the surety was entitled to have any security held by the creditor, irrespective of whether it was taken before or subsequent to the contract of suretyship. **[666]**

When arises.—This matter has been discussed in a carefully considered judgment of Farran, J., in *Goverdhandas* v. *Bank of Bengal*.[3] It was there laid down that the creditor's right to hold his security until his whole debt is paid is paramount to the surety's claim on such securities, which only arises when the creditor's claim against such securities has been fully satisfied.[4]

Where a guarantee has been given for a loan of Rs. 1 lakh for a period of one year and the loan amount having been repaid by the principal debtor, the defendant guarantors are discharged from their liability although they have executed letters of revival.[5]

It would appear that under English law, the right corresponding to that given by the present section, would extend even to claims of set-off between the debtor and creditor.[6]

142. Guarantee obtained by misrepresentation invalid.—Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Effect of misrepresentation.—The contract of suretyship is only one particular kind of contract and the general rules as to the formation of contracts and conditions of their validity are naturally applicable to the contract of guarantee. This section therefore enacts that any misrepresentation made by the creditor about a material part of the transaction will vitiate the contract, because the surety's assent is not in such a case, a genuine or real consent.[7] The

1. *Probodh Kumar Das* v. *Gillanders Arbuthnot*, (1934) Cal. 699 : 152 IC 571 : 59 CLJ 503; *Chanduri Panakala Rao* v. *Venkata Sarvesam*, (1936) Mad. 342 : 43 LW 631 : 162 IC 961 : (1936) MWN 258; *Goverdhan Lal* v. *Bank of Travancore*, AIR 1968 SC 1432 : 1968 (3) SCR 724.
2. (1882) 19 Ch.D. 615; *Pledge* v. *Buss*, (1860) 70 ER 585; *Pearl* v. *Deacon*, (1857) 53 ER 328.
3. (1890) ILR 15 Bom. 48.
4. **See also** *Duncan Fox* v. *North & South Wales Bank*, (1881) 6 AC 1; *Brett, Ex. p.*, (1871) 6 Ch. Ap. 838; *Fare-brother* v. *Wodehouse*, (1856) 53 ER 7 : 113 RR 10 (Mortgagee can consolidate his securities as against surety).
5. *State Bank of India* v. *Nagesh Hariyappa Nayak*, 2003 (3) Civil LJ 475 (Kant).
6. *Bechervaise* v. *Lewis*, (1872) 7 CP 372.
7. *Pendlebury* v. *Walker*, (1841) 160 ER 1072 : 54 RR 499 (Coercion and undue influence produce the like results); *Bank of Montreal* v. *Stuart*, (1911) AC 120; *Turnbull* v. *Duval*, (1902) AC 429. So, where a guarantee is given in respect of a debt described as secured by a charge on shares. The surety will not be liable, if it turns out that the debt is not so secured. **See** *Greer* v. *Kettle*, (1938) AC 156.

section bears a likeness to Sec. 19, except for the fact that the requirement as to the materiality of the misrepresentation is not found in Sec. 19. **[673-674]**

Suretyship contract if *uberrimae fidei*.—Under English law a contract of suretyship is not regarded as *uberrimae fidei*.[1] It is not on the same footing as a contract of insurance, in which there is an absolute duty to make full disclosure, and non-disclosure of a material fact will avoid the contract. But, nonetheless, the duty of the creditor is to give the surety information on all facts that may affect the surety's responsibility.[2]

As Lord Selborne said, "The surety is undoubtedly, and not unjustly, the object of some favour, both at law and in equity." So the contract will generally be strictly construed. As Lord Ellenborough, C.J. said, "The claim against a surety is *strictissimi juris*, and it is incumbent on the plaintiff to show that the terms of the contract have been strictly complied with."[3]

Material part of the transaction.—TEST.—The test for finding out whether the misrepresentation relates to a material part of the transaction is whether it would persuade a reasonable man to enter into the transaction.[4] The representations made by the creditor must necessarily have reference to circumstances concerning the rights or remedies, which are available to the creditor as against the debtor.

ILLUSTRATIVE CASES.—In *Secretary of State* v. *Nilamekam Pillai*[5] the English authorities have been carefully analysed and discussed. (See commentary to Sec. 143 for details). In *Lee* v. *Jones*,[6] the guarantee was in respect of an agent's future liabilities to his employer. In fact, at the date of the guarantee, the agent was already indebted to the employer. The creditor had made misleading assertions in the nature of *suppressio veri* and *suggestio falsi*. It was held that the contract was vitiated by material misrepresentation.

Misrepresentation by debtor.—The section requires that the misrepresentation must proceed from the creditor. Where it is the debtor that makes the misrepresentation this section cannot apply.[7]

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1. *Trade Indemnity Co.* v. *Workington Harbour & Dock Board*, (1936) 1 AER 454; *Seaton* v. *Burnand*, (1900) AC 135; *National Provincial Bank of England* v. *Glanusk*, (1913) 3 KB 335; *Hamilton* v. *Watson*, (1845) 8 ER 1339 : 69 RR 58.
2. **See** *Pidcock* v. *Bishop*, (1825) 107 ER 857 : 27 RR 430; *Davies* v. *London & Provincial Marine Insurance Co.*, (1878) 8 Ch. D. 469.
3. *Bacon* v. *Chesney*, (1816) 171 ER 443.
4. *Stone* v. *Compton*, (1838) 132 ER 1059 : 50 RR 639.
5. (1883) 6 Mad. 406.
6. (1864) 144 ER 194 : 142 RR 467.
7. *Debendranath* v. *Adm-General, Bengal*, (1906) 33 Cal. 713 : 3 CLJ 422 : 10 CWN 673 (FB).

143. Guarantee obtained by concealment invalid.—Any guarantee which the creditor has obtained by means of keeping silence, as to material circumstances is invalid.

Illustrations

(a) *A* engages *B* as clerk to collect money for him. *B* fails to account for some of his receipts and *A*, in consequence, calls upon him to furnish security for his duly accounting *C* gives his guarantee for *B's* duly accounting. *A* does not acquaints *C* with *B's* previous conduct. *B* afterwards makes default. The guarantee is invalid.

(b) *A* guarantee to *C* payment for iron to be supplied by him to *B* to the amount of 2,000 tons. *B* and *C* have privately agreed that *B* should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from *A*. *A* is not liable as a surety.

Duty of disclosure.—This section invalidates a contract obtained by the creditor by keeping silence as to a material circumstances. The previous section dealt with a case of active misrepresentation. This deals with cases of silence in circumstances, which would tantamount to a misrepresentation. The language of the section would appear to suggest that there is a duty cast on the creditor of *voluntary* disclosure of every material circumstance relating to the guarantee. The English rule is not so stringent and it is not invariably the duty of the creditor to disclose every circumstance, without inquiry by the surety.[1] "The criterion [as to] whether the disclosure must be made voluntarily is whether it is something which might naturally expected between the parties; if it is, the surety must put the question, if he wants the information: if it is not, the creditor is bound to disclose it without inquiry." The Illustration (a) to the section seems to be taken from the facts of *Railton* v. *Mathews,*[2] while Illustration (b) is modelled on *Pidcock* v. *Bishop.* [3] **[673-674]**

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1. *Davies* v. *London & Provincial Marine Insurance Co.,* (1878) 8 Ch. D 469. **See also** *Hamilton* v. *Watson,* (1845) 8 ER 1339 : 69 RR 58. (Guarantee for debtor'screditwith a banker-Debtor already overdrawn account—Failure to disclose—Guarantee not invalidated); *Wythes* v. *Labouchere,* (1859) 44 ER 1397 : 121 RR 238; (Cf.) *London General Omnibus* Co v. *Holloway,* (1912) 2 KB 72.
2. (1844) 8 ER 993 : 539 RR 308
3. (1825) 107 ER 857: 27 RR 430.

Silence as to material circumstance.—It will be noticed that the section requires (1) that the silence must relate to a material circumstance, and (2) the contract must have been entered into because of such non-disclosure.[1]

The Judicial Committee has pointed out that a contract of guarantee like any other contract is liable to be avoided if induced by material misrepresentation of an existing fact, even if made innocently.[2]

In *Imperial Bank* v. *Avanasi Chettiar,*[3] the Madras High Court has held that where a person stands surety for another for advances to be made by a bank, there is no obligation on the bank to disclose any existing indebtedness of the debtor, and that it is the duty of the surety to inform himself on the point. Their Lordships make a distinction between fidelity guarantees and guarantees made in respect of banking accounts. Another case illustrative of this matter is *Secretary of State* v. *Nilamekam.*[4] There, the highest bidder at a sale of an Bakari lease failed to furnish the necessary security with the result that a fresh auction had to be held at the risk of the original bidder and a loss ensued on the re-sale. At the re-sale, however, the original bidder himself managed to become the purchaser, and the defendant became a surety for the due fulfilment of the conditions of the lease. The surety made no inquiries and no information was given to him about the loss on the re-sale for which the bidder had rendered himself liable. In a suit to enforce the surety bond, the defence was that the contract had been induced by keeping silence as to a material fact. The Court held the guarantee did not cover the debt, which had been contracted by reason of the re-sale, that it was confined to the due performance of the terms of the lease, and the omission to mention the debt did not amount to a fraudulent misrepresentation.

In *Balakrishna* v. *Bank of Bengal,*[5] Seargent, C.J., observed: "The expression 'keeping silence' clearly implies intentional concealment as distinguished from mere non-disclosure, which no doubt is of itself a fatal objection in insurance polices and virtually expresses what is laid down in *North British Insurance C.* v. *Lloyd,*[6] that the withholding must be fraudulent, which necessarily must be the case when a material circumstance is intentionally concealed." In this case, the defendants had become sureties to the Bank of Bengal for the due discharge by one Krishnarav of the duties of the office of *Khajanchi* of the bank in Bombay. When the debtor committed defalcations, the bank sued the sureties, who contended that a material circumstance had been concealed from them,

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1. *Secretary of State* v. *Nilamekam,* (1883) 6 Mad 406.
2. *Jean Mackenzie* v. *Royal Bank of Canada,* (1934) ALJ 763 : 151 IC 981 : 40 LW 400 : (1934) PC 210.
3. (1930) 53 Mad. 825 : 32 Mad. 825 : 32 LW 745 : (I930) Mad 1174 : 59 MLJ 513.
4. (1883) 6 Mad 406.
5. (1890) 15 Bom. 585.
6. (1854) 10 Ex. 423 : 102 RR 686.

(*viz.*) that the debtor Krishnarav was to continue as second clerk in addition to the new office of *Khajanchi*. In repelling that contention, the Court said that there had been no intentional concealment and that there was nothing on record to show that the surety's readiness would have been in any way affected by the particular fact, which had not been communicated. In the English case above mentioned, it was held that the fact of the guarantee being merely in substitution of a prior guarantee by some other, was not a material circumstance which the creditor was bound to disclose. So too, the terms and conditions of the original contract between the creditor and the principal debtor have been held to be not material in the case of a guarantee of the solvency of the surety for such debt.[1]

Fidelity guarantees.—In these cases, the creditor must disclose any previous misconduct of the person whose fidelity is guaranteed.[2] where the creditor retains the services of the servant, even after proof of dishonest acts, and fails to disclose the same to the surety, the latter is discharged.[3]

Contract to the contrary—This duty of disclosure may however be contracted against and the creditor may cast the burden of making enquiries entirely on the surety.[4]

144. Guarantee on contract that creditor shall not act on it until co-surety joins.—Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

Conditional guarantee.—Where a guarantee is given on the distinct understanding that the creditor should not act upon it till another person has joined in the guarantee as a co-surety, the guarantee is not enforceable, if the other party does not join.[5] Such a term is usually inserted in contracts of guarantee in order to ensure the right of contribution from the co-surety. **[542]**

A guarantee drawn up in the plural number but signed by one surety only is binding on the surety who signed it, unless he can show that he was to be liable only if the other surety also signed.[6]

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1. *Seaton* v. *Burnard,* (1900) AC 135.
2. *London General Omnibus Co.* v. *Holloway,* (1912) 2 KB 72.
3. *Phillips* v. *Foxall,* (1872) 7 QB 666.
4. *Trade Indemnity Co. Ltd.* v. *The Workington Harbour and Dock Board,* (1936) 1 AER 454.
5. *(Cf.) Under hill* v. *Horwood,* (1804) 32 ER 824 : 149 RR 667; *Evans* v. *Bremridge,* (1855) 44 ER 327 : 110 RR 156; *Handard* v. *Lethbridge,* (1892) 8 TLR 346; *Bonser* v. *Cox,* (1841) 49 ER 385 : 55 RR 113; **see** *Cumberlege* v. *Lawson,* (1857) 140 ER 292 : 107 RR 869.
6. *Ayyanna* v. *Veerabhadran,* (1926) MWN 66 : 22 LW 639 : 91 IC 771 : (1926) Mad. 62.

Admissibility of oral evidence.—Though the guarantee is in writing, an oral agreement that the guarantee was not to be acted upon until another shall join it, may be proved. Such an agreement is not obnoxious to the terms of Sec. 92 of the Evidence Act; for it will come under proviso (3), (*viz.*) a separate oral agreement constituting a condition precedent to the attaching of the obligation under a written contract.

145. Implied promise to indemnify surety.—In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Illustrations

(a) *B* is indebted to *C*, and *A* is surety for the debt. *C* demands payment from *A*, and on his refusal sues him for the amount. *A* defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from *B* the amount paid by him for costs, as well as the principal debt.

(b) *C* lends *B* a sum of money, and *A*, at the request of *B*, accepts a bill of exchange drawn by *B* upon *A* to secure the amount. *C*, the holder of the bill *A*, demands payment of it from *A*, and on *A's* refusal to pay sues, him upon the bill. *A* not having reasonable grounds for so doing defends the suit, and has to pay the amount of the bill and costs. He can recover from *B* the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) *A* guarantees to *C*, to the extent of 2,000 rupees, payment for rice to be supplied by *C* to *B*. *C* supplies to *B* rice to a less amount than 2,000 rupees, but obtains from *A* payment of the sum of 2000 rupees in respect of the rice supplied. *A* cannot recover from *B* more than the price of the rice actually supplied.

Implied indemnity.—The principal debtor is deemed to have agreed with the guarantor impliedly that the guarantor shall have a right to recover

whatever money he has rightfully paid under the contract of guarantee.[1] The relation of surety and principal debtor gives rise to an implied promise on the part of the latter to indemnify the former,[2] and the various heads of indemnity that could be claimed are those mentioned in Sec. 125.

Where the plaintiff State Bank of India furnishing a guarantee for the second defendant to a foreign company in respect of performance of a contract in consideration of the first defendant Bharat Overseas Bank Ltd. giving a counter guarantee, the second defendant is under an obligation to indemnify the plaintiff bank for the rightful payment made by the plaintiff bank under the main guarantee.[3]

Extent of the right.—As the right is only to indemnity from the principal debtor, the surety can expect to be reimbursed only to the extent to which he has been damnified by the contract of guarantee. As was remarked in an English case.[4] "Where a surety gets rid of and discharges an obligation at a less sum than its full amount, he cannot as against his principal, make himself a creditor for the whole amount, but can only claim, as against his principal, what he has actually paid in discharge of the common obligation."

But the surety may, in proper cases, be entitled to compensation for damages caused to him by standing surety. If (*e.g.*) by reason of the principal's non-payment of the debt, the surety had suffered damage beyond the principal and interest, which he had been compelled to pay, he would be entitled to recover such damage from the principal debtor.[5]

Further, on the principle that it is unreasonable that a man should always have such a cloud hanging over him, the law allows the surety to seek the aid of equity to compel the principal debtor to pay what is due from him.[6]

Payment.—The payment may be in cash or by way of transfer of property.[7] But the mere incurring of a pecuniary obligation in the shape of a bond, promissory note or acknowledgement will not amount to payment.[8] In

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1. AIR 2000 NOC 29 (Ker) : 2000 AIHC 1229.
2. *Yonge* v. *Reynell,* (1852) 68 ER 744; *Leigh* v. *Dickeson,* (1884) 15 QBD 23; *Chadwick* v. *Manning,* (1896) AC 401.
3. *Ginpex Minerals Pvt. Ltd.* v. *State Bank of India,* 2003 (2) Civil LJ 246 (Mad).
4. *Read* v. *Norris,* (1837) 40 ER 678 : 45 RR 88.
5. *Badeley* v. *Consolidated Bank,* (1886) 34 Ch.D. 536 (556); *Ford* v. *Stobridge,* (1632) 21 ER 780; (Cf.) *Anand Singh* v. *Collector of Bijnor,* (1932) 54 All.1007 : (1932) ALJ 668 : (1932) All. 610.
6. *Ascherson* v. *Tredegar & Co.,* (1909) 2 Ch. 401.
7. *Mathura* v. *Sheikh Chotu,* (1920) 58 IC 123 (Execution of mortgage by surety); *Vinayak* v. *Shripatrao,* (1926) Nag. 429 : 97 IC 185; *Bur Singh* v. *Labhu Ram,* (1930) Lah. 399 : 123 IC 126.
8. *Putty Narayanamurti* v. *Marimuthu,* (1902) 26 Mad. 322; *Nur samand* v. *Fajia,* (1924) Lah. 657 : 76 IC 759;*Muthusamy* v. *Kayamboo Konar,* (1936) 14 Ran. 511 : 163 IC 668 : (1936) Ran. 235; *Anwarkhan* v. *Gulam Kasam,* (1919) 15NLR 78 : 50 IC 611; (Cf.) *Maxwell* v. *Jameson,* (1818) 106 ER 286. See however *Barclay* v. *Gooch,* (1797) 170 ER 459. (Pronote by surety accepted in payment by creditor amounts to payment by surety).

one English case, *Montagu Stanley & Co.* v. *Solomon Ltd.*,[1] it has been held that a contract of indemnity cannot be enforced except on proof of actual loss. Where the plaintiff had incurred loss but had not actually paid the money, it was held that a suit was not maintainable against the promisor under the contract of indemnity. But in *Sripatrao Sadashiv* v. *Sankar Rao*,[2] a single Judge of the Bombay High Court held that a suit for indemnity is maintainable at the instance of a surety who has not made actual payment but has become liable *in prasenti* to pay the debt. In a Madras case also, *Mohideen Batcha* v. *Sheikh Dawood*,[3] their Lordships said that, in appropriate cases, the surety can be indemnified, by an anticipatory action before actual payment.

WRONGFUL PAYMENT.—It has been held by the Lahore High Court that where the surety executes a bond in favour of the creditor and pays it only after having filed the suit against the debtor and with the object of assisting the suit to reach a successful termination, the surety cannot be held to have made the payment 'rightfully' within the meaning of the section.[4] But in *Raghavendra* v. *Mahipat*,[5] the Bombay High Court held that *bona fide* payment of interest by the surety is not wrongful, though such payment had been made at a time when the remedy against the principal was barred.

Costs.—Cost of defending a suit that should not have been defended have been held to be irrecoverable by the surety.[6] But costs which might reasonably be within the contemplation of the parties may be recovered.[7]

Surety's right to interest.—A surety is entitled to interest upon the sum, which he has been compelled by the default of his principal to pay.[8]

Surety's lien.—It has been held that a factor who becomes surety for his principal has a lien on the price of the goods sold by him for his principal to the amount for which he became surety.[9]

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1. (1932) 1 KB 611; (Cf.) *Freelove* v. *Mitchell*, (1913) 1 Ch. 201; *Morrison* v. *Banking Chemicals Co.*, (1919) 2 Ch. 325; *Bradford* v. *Gammon*, (1925) 1 Ch. 132.
2. (1930) Bom.331 : 32 Bom. LR 207. **See also** *Chiranji Lal* v. *Naraini*, (1919) 41 All. 395 : 17 ALJ 394 : 51 IC 158.
3. (1926) MWN 667 : 51 MLJ 203 : (1926) Mad. 1035 : 97 IC 491; *Ramarayaningar* v. *Venkatalingam*, (1933) MWN 486 : 38 LW 818; (Cf.) *Chand Bibi* v. *Santosh Kumar*, (1933) 60 Cal. 761 : 146 IC 863 : (1933) Cal. 641. **See also** *In re. Richardson*, (1911) 2 KB 705.
4. *Jowala* v. *Mt. Raj Kaur*, (1930) Lah. 812 : 31 PLR 329.
5. (1925) 49 Bom. 202 : 27 Bom. LR 178 : 86 IC 883 : (1925) Bom. 243; per contra, *Suja* v. *Phalwan*, (1878) 30 PR.
6. *Fisher* v. *Fallows*, (1804) 170 ER 775 : 8 RR 843; ***But see*** *Baxendale* v. *L.C. & Dover Ry.*, (1874) 10 Ex. 35.
7. *Agius* v. *Great Western Colliery*,(1899) 1 QB 413; *Hammond* v. *Bussey*, (1887) 20 QBD 79.
8. *Petre* v. *Duncombe*, (1851) 20 LJ QB 242.
9. *Drinkwater* v. *Goodwin*, (1775) 98 ER 1070; *Imperial Bank* v. *London & St. Katherine Docks Co.*, (1877) 5 Ch.D. 195.

146. Co-sureties liable to contribute equally.—Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Illustrations

(a) *A*, *B* and *C* are sureties to *D* for the sum of 3,000 rupees lent to *E*. *E* makes default in payment, *A*, *B* and *C* are liable, as between themselves, to pay 1,000 rupees each.

(b) *A*, *B*, and *C* are sureties to *D* for the sum of 1,000 rupees lent to *E*, and there is a contract between *A*, *B* and *C* that *A* is to be responsible to the extent of one quarter, *B* to the extent of one-quarter, and *C* to the extent of one-half. *E* makes default in payment. As between the sureties, *A* is liable to pay 250 rupees *B* 250 rupees, and *C* 500 rupees.

Liability of co-sureties.—This section is analogous to Sec. 43. That section dealt with co-promisors in general: this deals with co-sureties. As under that section, joint promisors are bound *inter se* to contribute equally to the payment, so co-sureties guaranteeing one and the same obligation or debt must contribute equally. **[672]**

The right to contribution does not depend on any express agreement or contract.[1] Any co-surety who has paid the whole or more than his share of the debt is, in the absence of any contract to the contrary, entitled to recover the excess over his share.[2]

Co-sureties for distinct parts of the same debt.—If there are several sureties and each undertakes by a separate instrument to pay a fraction

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1. *Dering* v. *Earl of Winchelsea*, (1787) 29 ER 1184 : 1 RR 41; *Ramskill* v. *Edwards*, (1885) 31 Ch.D. 100; *Shepherd* v. *Bray*, (1906) 2 Ch.D. 235.
2. *Kamal Chuhder* v. *susila Bala*, (1938) Cal. 405 : 42 CWN 1258; *Ibu Husan* v. *Brijbukan*, (1905) 26 All. 407 (FB). **See also** *Ex parte Inowdon*, (1881) 17 Ch.D. 44; *Davies* v. *Humphreys*, (1840) 151 ER 361 : 55 RR 547.

of a debt, these are distinct obligations, and the suretyship of each is a distinct transaction. In such a case, therefore, no question of contribution can arise.[1]

Insolvency of co-surety.—Where one co-surety becomes insolvent, the other sureties must pay the whole amount between them.[2]

Theory of money had and received, applicability of—Where there is an express contract and the document is hit by the provisions of Sec. 35, Stamp Act and Section 91 Evidence Act, Section 70 of the Contract Act cannot be invoked on the theorise of implied promise money had and received, quasi contract and just and reasonable or unjust enrichment or any other equitable doctrine.[3]

Actual payment, if condition precedent.—Though, ordinarily, the right to contribution arises only on actual prior payment, it has been held that surety against whom judgment has been obtained by the principal creditor for the full amount of the guarantee, but who has paid nothing in respect thereof, can maintain an action against a co-surety to compel him to contribute towards the common liability.[4]

Right to securities.– The principle of Sec. 141 is certainly applicable to co-sureties. So, they will all be entitled equally to the benefit of such securities.[5] Thus in *Muthuswami* v. *Rayalu*,[6] it was, held following *Steel* v. *Dixon*,[7] that a co-surety who has received a counter-security from the debtor must bring it in for the benefit of his co-sureties.

147. Liability of co-sureties bound in different sums.—Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations

(a) *A*, *B* and *C*, as sureties for *D*, enter into three several bonds, each in a different penalty namely, *A* in the penalty of 10,000 rupees. *B* in that of 20,000 rupees, *C* in that of

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1. See *Coope* v. *Twynam*, (1823) 37 Ex. 1164 : 24 RR 89; *Craythorne* v. *Swinburne*, (1790) 33 ER 482 : 9 RR 264. But if bound by different deeds for the same engagement there will be a right to contribution. See *Dering* v. *Earl of Winchelsea*, (1787) 29 ER 1184 : 1 RR 41; *Pendlebury* v. *Walker*, (1841) 160 ER 1072.
2. *Hitchman* v. *Stewart*, (1855).61 ER 907 : 106 RR 341; (Cf.) *Lowe* v. *Dixon*, (1885) 16 QBD 455.
3. *Lothamasu Sambasiva Rao* v. *Thadwarthi Balakotiah*, AIR 1973 AP 342.
4. *Wolmer Hausen* v. *Gullick*, (1893) 2 Ch. 514.
5. See *Steel* v. *Dixon*, (1881) 17 Ch. D.825; *Berridge* v. *Berridge*, (1890) 44 Ch.D. 168.
6. (1924) Mad. 848 : 20 LW 385 : 82 IC 395.
7. (1881) 17 Ch.D. 825.

40,000 rupees, conditioned for *D's* duly accounting to *E*. *D* makes default to the extent of 30,000 rupees. *A, B* and *C* are each liable to pay 10,000 rupees.

(b) *A, B* and *C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees *B* in that of 20,000 rupees, *C* in that of 40,000 rupees conditioned for *D's* duly accounting to *E*. *D* makes default to the extent of 40,000 rupees *A* is liable to pay 10,000 rupees and *B* and *C* 15,000 rupees each.

(c) *A, B* and *C* as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees conditioned for *D's* duly accounting to *E*, *D* makes default to the extent of 70,000 rupees. *A, B* and *C* have to pay each the full penalty of his bond.

Scope.—This section contemplates cases where several sureties make themselves responsible for a debt, but up to a certain limit fixed by each. The section says that each surety must contribute equally subject to the limit given by each. It may be noted that the contribution under the section *equal* and not *rateable* of proportionate to the maximum liability of each as in English Law.[1] **[672]**

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1. *Ellismere Brewery* Co. v. *Cooper,* (1896) 1 KB 75; *Davies* v. *Humphreys,* (1840) 151 ER 361 : 55 RR 547; *Stirling* v. *Burdett,* (1911) 2 Ch. 418.

CHAPTER IX

OF BAILMENT

148. "Bailment," "bailor" and "bailee" defined.—A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor." The person to whom they are delivered is called the "bailee."

Explanation:—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

Bailment—Definition—With the definition given in the section, may be compared the following by Sir William Jones, cited in an English case,[1] "A delivery of goods on a condition express or implied, that they shall be restored by the bailee to the bailor or according to his directions as soon as the purpose for which they are bailed shall be answered." **[693]**

The essential feature of bailment is thus a delivery of an article on a condition or trust: and such delivery creates in the person to whom it is delivered a special property, recognised and protected by the law—a property, however, which is not absolute, but subject to defeasance, so to say, on the fulfilment of the condition. Thus, delivery of gold and precious stones to a goldsmith for making into a jewel is a bailment so far as the stones are concerned;[2] so is delivery of goods for carriage.[3] But the mere despatch of documents of title, to a bank, which is to pass them on to the consignee on payment of a sum of money, does not constitute the bank a bailee of the goods represented by the documents.[4]

A bailment may well exist without the creation of a contract between the parties and it essentially gives rise to remedies, which in truth and

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1. *The Queen* v. *McDonald*, (1885) 15 QBD 323 (328).
2. *Maung San* v. *Maung Po*, (1913) 15 IC 431.
3. *Sheik Mohamed* v. *B.I.S.N. Co.*, (1908) 32 Mad. 95 : 18 MLJ 497 (Shipowner is a bailee in respect of the goods entrusted to him).
4. *Duli Chand* v. *Jwala Prasad*, (1934) All. 568 : 148 IC 644. See *Official Liquidator* v. *Swarup Cold Storage*, AIR 1976 All. 88. (Partnership agreement between individual and company partner in possession of assets of company by virtue of agreement—No bailment).

substance cannot be said to be contractual.[1] There can well be a bailment without an enforceable contract [2] Section 148 however postulates the presence of a contract.

Elements of the definition.—

1. DELIVERY.—There must be change of possession. Bare custody does not constitute a bailment. The Explanation suggests that where the original delivery was not by way of bailment, it may be possible to constitute the relation of bailor and bailee by subsequent agreement. In a Lahore case,[3] the Explanation to the section was relied upon in support of the proposition that the effect of an order by a court for redelivery of the subject matter of the suit, was to make the judgment-debtor a bailee for the decree-holder. But, where the police authorities have custody of stolen property recovered from the thief, pending orders of the Magistrate as to delivery, they are not bailees in relation to the true owner, and will not be liable to him if it is lost.[4] **[694]**

Where the bailee received something, which he never intended to receive there, is no bailment.[5]

A railway receipt is a document of title relating to the goods covered by it; hence a transfer of it for consideration effects a constructive delivery of the goods.[6]

Where a bailor by letter requested the bailee to permit him to keep the pledged goods to remain in his possession and promised to hold the same for the bailee and to render possession whenever demanded it was held there was constructive delivery or delivery by attornment to the bailee.[7]

Where the plaintiff's excavator hired to the defendant was in the custody of the Chief Engineer in connection with the excavation work, the Chief Engineer cannot refuse to return the excavator to the plaintiff since he has no right of lien on the property of the plaintiff who is the owner and never parted with the legal position, at best it can be considered as a constructive bailment.[8]

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1. *Trustees of the Port Trust of Bombay* v. *Premier Automobiles Ltd.* (1981) 1 SCC 228 : (1981) Bom. LR 28 (SC).
2. *State of Gujarat* v. *Memon Mahomed Haji Hasan,* AIR 1967 SC 1855 : (1967) 3 SCR 938.
3. *Fazal* v. *Salamat Rai,* (1929) Lah.386 : 120 IC 421; **see also** *Parakh* v. *Mackenzie & Co. Ltd.,* (1934) Oudh 380 : 11 OWN 958 : 151 IC 117 (Seller of goods can become bailee only if he contracts to hold them as bailee).
4. *Oma Parshad* v. *Secy. of State,* (1937) 18 Lah. 380 : (1937) Lah. 572. Cf. *Ram Gulam* v. *U.P. Government,* AIR 1956 All. 206; *U.P.* v. *Kasturi Lal Ratia Ram,* 1960 All. LJ 529.
5. *Appa Rao* v. *Salem Motors,* AIR 1955 Mad. 505 : (1955) 2 MLJ 188.
6. *Morvi Mercantile Bank* v. *Union of India,* AIR 1965 SC 1954 : (1966) 2 SCJ 6.
7. *Bank of Chittoor* v. *Narasimhulu Naidu,* AIR 1966 AP 163 : (1965) 2 An. WR 518.
8. *Dinesh Pai* v. *Chief Engineer, Naval Academy, Kochi,* AIR 2003 Ker. 280, 282.

Where a deposit was made by a German firm in a German Bank in the name of an Indian resident by way of final settlement of his claim for compensation in respect of certain contracts for supply of machinery by the firm on compensation in respect of certain contracts for supply of machinery by the firm on condition that the money was to be repaid only to the firm as and towards the price of future supplies of machinery by the firm on production by the appellant of an import licence from the Indian Government and that the appellant was not to operate on the account except for that purpose, it was held that the bank was not a bailee *vis-a-vis* the appellant.[1]

Where the Jewellery kept in the bank locker is alleged to have been stolen from the locker, Sec. 148 of the Act cannot apply unless exclusive position of the property has been given by the bailor to the bailee although the property is deposited in the locker is undoubtedly in the custody and position of the bank, the locker can be operated only in the presence of the hirer but can always be opened by the banker with the master key does not amount to joint position.[2]

2. FOR SOME PARTICULAR PURPOSE.—There is no absolute transfer. It implies the reservation of the bailor's right. "Where there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of the identical subject-matter in its original or an altered form, this is a transfer of property for value—a sale, and not a bailment."[3] But it is not necessary that the bailee must make some use of the property bailed.[4] In a transaction of sale of beer in bottles where the deposit money is to be refunded on the return of empty bottles, there is no element of bailment and the deposit money is also liable to Sales Tax. [5]

3. TO BE RETURNED OR DISPOSED OF ACCORDING TO DIRECTIONS.—Where, as in *Secretary of State* v. *Sheo Singh,*[6] Government promissory notes are delivered to the treasury for cancellation and consolidation into one note, there is no bailment, for they are not and delivered over for any temporary purpose, but are surrendered unconditionally. There is no question of return of the identical notes or dealing with them according to the directions of the owner. Seizure of goods under Section 176, Sea Customs Act, 1878, cannot fall under definition of bailment either voluntary or involuntary. There is no obligation to return identical subject matter either in its original or in an altered form.[7] In the case of Port. Trust accepting delivery

1. *Shanti Prasad Jain* v. *Director of Enforcement,* AIR 1962 SC 1764 : 1963 (2) SCR 297 : 1963 (33) CC 231.
2. *Atul Mehra* v. *Bank of Maharashtra,* AIR 2003 P&H 11.
3. *Shouth Australian Insurance Co.* v. *Randell,* (1869) 3 PC 101.
4. *Sheik Khanoo* v. *Jasoda Bai,* (1935) 18 NLJ 97.
5. *Kalyani Brewaries Ltd.* v. *State of W.B.,* AIR 1998 SC 70, 73.
6. (1880) 2 All. 756.
7. *Hira Lal Jain* v. *Union of India,* AIR 1968 Tripura 63.

of goods from the ships, the Port Trust becomes a bailee of the ships-owner or consignor and not of the consignee.[1]

A contract for the carriage of goods by a carrier is not equitable with a contract of bailment, nor is the carrier a bailee. There is in-built in such contracts the element of insurance contract.[2] But where goods are entrusted to a factor for sale, there is a bailment. On the contrary, an agent who receives money on behalf of the principal is not a bailee, for he is not expected to hand over the actual coins received by him.[3]

Bailment and deposit.—The distinction between bailments proper and transactions constituting merely the relation of debtor and creditor is a rather important one. Where money is paid into a bank to be credited in the current account of the person making the payment, it does not constitute a case of bailment.[4] Following the English precedents, it has been held that the relationship between a banker and the person depositing money with him in the ordinary way of business that of creditor and debtor.[5] This distinction becomes important under the Limitation Act, for according to Article 59, if it is money payable on demand, limitation commences from the date when the loan is made; but if it is a deposit, then under Article 60; limitation commences only when the demand is made. It is a question depending upon the circumstances of each case, whether the transaction is an ordinary loan to which Article 59 will be applicable or a deposit falling within Article 60.[6] **[697]**

Classification of bailments.—In the case of *Coggs* v. *Bernard*,[7] which is the *locus classicus* in English law upon the subject of bailments, Holt, C.J., classified bailments as follows:—

(1) *Depositum (e.g.,)* where a person takes goods of another, to keep for the used of the latter.

(2) *Commodatum (e.g.,)* a gratuitous loan for use by the bailee.

(3) *Locatio Rei (e.g.,) loan* for hire.

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1. *Union of India* v. *Ravi Brothers Ltd.*, (1968) 2 MLJ 199.
2. *Bandi Chalapathi Rao* v. *Official Assignee*, AIR 1978 Mad. 112 : (1978) 1 MLJ 316 : ILR (1978) 2 Mad. 73.
3. (Cf.) *Knatchbull* v. *Hallet*, (1881) 13 Ch. D. 696. **See also** *Bridges* v. *Garrett*, (1870) 5 CP 451.
4. **See** *Foley* v. *Hill*, (1844) 9 ER 1002 : 81 RR 14; *Pott* v. *Clegg*, (1847) 155 ER 1212 : 73 RR 517. **See also** *Official Assignee* v. *Smith*, (1908) 32 Mad. 68 : 1 IC 712.
5. *Ichha Danji* v. *Natha*, (1888) 13 Bom. 338.
6. **See** *Sohan Pal* v. *Mustafa*, (1932) ALJ 261 : 140 IC 96; *Ishur Chunder* v. *Jibun Kumari* (1888) 16 Cal. 25; *Perundevitayar* v. *Nammalwar*, (1895) 18 Mad. 390.
7. (1704) 1 Sm. LC 187 : 92 ER 107; *State of Gujarat* v. *Memon Mahomed Haji Hasan*, AIR 1967 SC 1885 : (1967) 2 SCWR 387 : (1968) 1 SCA 34 : (1968) 1 SCJ 273 : (Government was held to be in position of bailee in respect of goods seized and liable to return).

(4) *Vadium (e.g.,)* pawn or security for money borrowed by the bailor.

(5) *Locatio epris faciendi (e.g.,)* delivery goods to be carried or for something to be done about them, in consideration of payment.

(6) *Mandatum (e.g.,)* delivery of goods for carriage or for something to be done about them, gratuitously. **[699]**

Involuntary bailment.—Instances of this kind of bailment are seen in cases of finders of goods, or of goods sent to the wrong place or in excess of the quantity ordered, or in cases where the bailee dies and the subject of the bailment comes into the hands of the bailee's heirs.[1]

Sub-Bailment by the Carrier:—Where a carrier entrusted with the goods of the owner, for the purpose of carriage, sub-bails to another carrier with the consent of the owner, the conditions of such sub-bailment shall be binding on the owner.[2]

149. Delivery to bailee how made.—The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

Delivery.—As to the modes of delivery, see Section 33 and 34 of the Sale of Goods Act, *infra*. As pointed out by the Calcutta High Court in *Co-operative Hindusthan Bank* v. *Surendra Nath De*,[3] it may be (i) actual *(e.g.,)* manual, as where the goods are not bulky, (ii) symbolical or constructive, as where the key of a warehouse is delivered over to the pledgee.

The question of delivery assumes importance in cases of gratuitous bailment, where the delivery of the article is condition precedent to the formation of the contract.

ILLUSTRATIVE CASES.—Where the loading clerk of a Railway Company filled up a serial number in a forwarding note, but did not mark the goods consigned, with the corresponding number, it was held there was no sufficient delivery for the purposes of this section[4] : similarly, where goods were merely left at the Railway premises, it was held that there was not

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1. *Promotha Nath Mullick* v. *Prodyumno Kumar Mullick*, (1921) 26 CWN 772 : (1921) Cal. 416 : 69 IC 900.
2. *K.H. Enterprise (Cargo Owners)* v. *Pioneer Containers (Owners)*, (1994) All. ER 250.
3. (1932) 59 Cal. 667 : 36 CWN 263 : 138 IC 852 : (1932) Cal. 524; **see also** *Henderson* v. *Williams*, (1895) 1 QB 521 **(Attornment by warehouseman).**
4. *Lachmi Narain* v. *B.B. & C.I. Railway*, (1923) 45 All. 235 : 74 IC 248 : (1923) All 449.

delivery.[1] So too, the mere leaving of a box in the defendant's house, the key of the room being with the plaintiff, will not constitute delivery within the meaning of the section.[2]

150. Bailor's duty to disclose faults in goods bailed.—The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults of the goods bailed.

Illustrations

(a) *A* lends a horse, which he knows to be vicious, to *B*. He does not disclose the fact that the horse is vicious. The horse runs away. *B* is thrown and injured. *A* is responsible to *B* for damage sustained.

(b) *A* hires a carriage of *B*. The carriage is unsafe, though *B* is not aware of it, and *A* is injured. *B* is responsible to *A* for the injury.

Duty to disclose faults.—This section enunciates the duty of the bailor to disclose known faults in the goods bailed, which may either interfere with the use of the goods or expose the bailee to risks. On failure of such duty, the bailor will be responsible for the damage directly traceable to such faults.[3]

The section para throws a greater degree of responsibility on the bailor, where the bailment is for hire. In such a case, ignorance of the fault is no defence or excuse. See Illustration (b). In *Lyell* v. *Ganga Dai,*[4] where explosives were delivered to a carrier without any warning as to their dangerous character, the bailor was held responsible for the damage, which ensued. **[718]**

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1. *Hardayal* v. *B. & N.W. Ry C.,* (1929) 8 Pat. 808 : (1929) Pat. 296 : 117 IC 311; *Banna Mal* v. *Secy of State,* (1901) 23 All. 367.
2. *Kallaperumal* v. *Visalakshi Achi,* (1938) Mad. 32 : (1937) MWN. 1042 : 175 IC 343.
3. **See** Notes 1 to 3.
4. (1875) 1 All. 60. **See also** *Farrant* v. *Barnes,* (1862) 142 ER 912 : 132 RR 667.

ENGLISH LAW.—The rule in English law would appear to be that if *specific* goods are hired, no implied warranty arises and the bailor is not responsible for defects not within his knowledge,[1] but if a thing is ordered for a specific purpose, an implied warranty of fitness will arise, and in such a case, the bailor will be liable, irrespective of his knowledge.[2] But, a gratuitous lender will not be liable for defects, which were not within his knowledge.[3] It would also appear that the implied warranty will not extend to a case where the immediate case of an accident is a hidden defect in the chattel let out on hire, which no reasonable amount of care would have discovered.[4]

151. Care to be taken by bailee.—In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would. under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

Scope and object of the section.—The Law Commissioners remark in regard to this matter, "In our rules on the subject of bailment, we have disregarded the complicated system of gradation which the English law applies to the amount of care which a bailee is to be expected to exercise, and the responsibility which is to attach to him; and we have framed our proposed law on the principle that in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would take of his own goods, and that more should not be required of him in any case."

The object of the section is professedly to sweep away the distinctions between the degrees of care required of bailees—distinctions which were at one time very prominent in English law. It may be mentioned that, in modern times the tendency in English law has been to simplify the matter, and enunciate a principle similar in most respects to the present section.[5] **[700]**

Contract to the contrary.—The section lays down a general rule applicable to all kinds of bailments, whether gratuitous or for hire.[6] Again, the section does not provide that it may be open to parties to make a contract to

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1. *Robertson* v. *Amazon Tug & Lighterage Co.*, (1881) 7 QBD 598.
2. *Hyman* v. *Nye*, (1881) 6 QBD 685; *White* v. *Steadman*, (1913) 3 KB 340 (Horse jobber deemed to warrant capacity and docility of horse); *Mowbray* v. *Merryweather*, (1898) 2 QB 640; *Fowler* v. *Lock*, (1872) 7 CP 272.
3. *Mc Carthy* v. *Young*, (1861) 158 ER 136 : 123 RR 541.
4. *Red Head* v. *Midland Ry. Co.*, (1864) 4 QB 379.
5. *Searle* v. *Laverick*, (1874) 9 QB 122; *The William*, (1806) 165 ER 945; (Cf). *Pratt* v. *Patrick*, (1924) 1 KB 488.
6. *Secy of State* v. *Ram Dhan*, (1933) 37 CWN 1109 : 58 CLJ 98 : 150 IC 189 : (1934) Cal. 151.

the contrary as is possible in English law.[1] It would therefore appear to be the intention of the Legislature to lay down an irreducible minimum of care required from bailees in general.[2] In *Bombay Steam Navigation Co.* v. *Vasudev,*[3] however, it has been held that it is competent to a ship owner to protect himself, by express contract, from liability for the negligence of himself or his servants, in spite of Sec. 151. In *Lakhaji* v. *Boorugu Mahadeo,*[4] the same Court has affirmed the rule with reference to an ordinary bailee.[5]

Care to be taken by bailee.—The section says that the standard of care required of a bailee is that of a man of ordinary prudence, under similar circumstances, in respect of his own goods of the same bulk and value.[6] No inflexible standard can be laid down for the measure of the care due from him, and the nature and amount of care must vary with the facts of each case.[7] In *Lakshimi Narain* v. *Secy. of State,*[8] the Court said that the degree of care required of a carrier in dealing with the goods depends upon and varies with the nature and condition of the goods carried. Thus, in the case of perishable articles bailed, the bailee may have to take special care.[9] Shortly, he must take *reasonable* care of the goods bailed. The fact that the particular bailee is generally negligent in respect of his own goods may not be a defence to an action, for the standard is that of a man of *ordinary* prudence.

ILLUSTRATIVE CASES.—A bailee who keeps money entrusted to him, with his own money in a box unlocked, is liable for the loss of the money.[10] But where the defendant deposited money given to him for safe custody (by plaintiff) into a bank in his own name, and the bank failed subsequently, it was held that the bailee had taken reasonable care and was not liable.[11] Where the goods bailed deteriorated on account of an unprecedented flood in the locality, the bailee was held *ceteris paribus,* for responsible for such

1. *Brice* v. *Christianti,* (1928) 44 TLR 332.
2. See the observations of Sankaran Nair, J., in *Sheik Mahomed* v. *BI.S.N Co,* (1909) 32 Mad. 95 (FB) : 18 MLJ 497 : 1 IC 977; *Allibhai* v. *B.I.S.N. Co., Natraj,* AIR 1970 Mys. 154; *Lily White* v. *R. Munuswami,* AIR 1966 Mad. 13.
3. (1928) 52 Bom. 37 : 106 IC 470 : 29 Bom. LR 1551 : (1928) Bom. 5. **See also** *Trustees, Port of Bombay* v. *Premier Automobile Ltd.,* AIR 1981 SC 1982 (overruling *G.H. Ahmed Ali & Co.* v. *Bombay Port Trust,* AIR 1963 Bom. 45; and reversing AIR 1971 Bom. 317).
4. (1939) 41 Bom. LR 6; *State Bank of India* v. *Quality Bread Factory Batala,* AIR 1983 P & H 244; *Chhitarmal Anandlal* v. *Punjab National Bank Ltd.,* ILR (1969) 10 Guj. 481.
5. *Fut Chong* v. *Maung Po Cho,* (1929) 7 Ran. 339 : 120 IC 899 : (1929) Ran 145.
6. *Volkart Bros.* v. *Vettivelu,* (1887) 11 Mad 459; *Holloway* v. *Holland,* (1933) Oudh 518 : 145 IC 1001 : 11 OWN. 1105.
7. *Shanti Lal* v. *Tara Chand,* (1933) All. 158 : 142 IC 691.
8. (1924) Cal. 92 : 27 CWN 1017 : 80 IC 279.
9. *The Commissioners for Port of Rangoon* v. *Moolla Dawood Sons & Co.* (1911) 9 IC 470.
10. *Nagalinga* v. *Kayarohana,* (1914) 25 IC 939; reversed on LP appeal on another point **See** (1916) 2 LW 628 : (1915) MWN 533 : 30 IC 493.
11. *Saraswati Kunwar* v. *Badri Prasad,* (1916) 36 IC 31.

deterioration.[1] Similarly, a bailee who has shown due care in the selection of servants is not liable in case the servant steals the article bailed.[2] But a bailee will certainly be liable for damage caused by his servant's negligence, provided the servant was acting in the course of his employment.[3]

The fact that the bailee's goods were lost at the same time along with the goods bailed is no ground for discharging the bailee from liability.[4]

A railway company, which carried the goods consigned in an unlocked van, was held liable under this section, as it is inconceivable that a person of ordinary prudence would let similar goods of his own be carried in such a manner.[5]

In keeping with the provision of Section 151 and 152 a bailee is excused from returning the subject matter of the bailment to the bailor or his agent where the subject matter is taken away from him by authority of law exercised through regular and valid proceedings.[6]

A launderer's liability under Section 151 imposing duty of minimum care in bailee cannot be defeated by a clause on the receipt stipulating that the launderer shall not incur any liability in respect of any damage to the articles left with him for cleaning.[7]

Where the plaintiff father entrusted a locked wrapped and sealed box containing jewellary and ornaments to the defendant bank for safe custody and when produced and opened before the court the contents were found missing, the bank was held to be liable as bailee as it has failed to take as much care as a reasonable man would in similar circumstances of his own goods of the same bulk and value.[8]

In a suit for the recovery of the loan, where the goods deposited by the borrower with the creditor bank as security are alleged to have been stolen, the liability of the Bank will not be absolved unless it is shown by it that it has taken all possible care as a prudent owner could have taken.[9]

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1. *Shanti Lal* v. *Tara Chand,* (1933) All. 158 : 142 IC 691 (Cf.) *Maharaja of Pithapuram* v. *Thomas Cook & Sons* (1936) Mad. 977 : 71 MLJ 425.
2. *Jobson* v. *Palmer,* (1893) 1 Ch. 71.
3. *Sanderson* v. *Collins,* (1904) 1 KB 628.
4. *Doorman* v. *Jenkins,* (1884) 111 ER 99 : 41 RR 429; *Arjun Das* v. *Secy of State,* (1925) Cal. 737 : 85 IC 786 (Pressure of work is no plea in mitigation of statutory liability).
5. *Karali Prasad* v. *E.I. Ry.,* (1928) 48 CLJ 32 : 111 IC 792 : (1928) Cal. 498.
6. *Juggilal Kamlapat Oil Mills* v. *Union of India,* AIR 1976 SC 227 : (1976) 1 SCC 893.
7. *M. Siddaliingappa* v. *T. Nataraj,* AIR 1970 Mys. 154.
8. *Jagdish Chandra Trikha* v. *Punjab National Bank,* AIR 1998 Del. 266.
9. *Punjab National Bank* v. *Lakshmi I & T Company Pvt. Ltd,* AIR 2001 All 28, 30 (DB).

Where the respondent borrower hypothecated the goods with the appellant banker and they were lost for want of sufficient care on the part of the bank, the plea of the bank that the respondent borrower has agreed to the liability exclusion clause stating that the goods stored in the bankers godown will be at the risk and responsibility of the respondent borrower cannot be sustained because it has discharged its duty by taking sufficient care of goods.[1]

Where a vehicle hired by the plaintiff to the first defendant under a hire purchase agreement met with an accident, the first defendant who occupies the position of a bailee cannot be made liable for the loss provided he has taken sufficient care but the second and third defendants who are the guarantors and who are severally and jointly liable cannot shirk the responsibility on the ground that the plaintiff should first try to recover the amount from the principal and later from the guarantor.[2]

Special skill.—The section is silent as to cases where the bailment is for a purpose requiring special skill. In such a case, the test of the man of average prudence may not be satisfactory. The rule of English law would appear to be that while a gratuitous bailee in such circumstances is bound to use the skill he possesses, a borrower is deemed to represent that he has the necessary skill.[3]

Sudden emergency.—Again, both good sense and policy of the law impose some limit on the amount of care and skill which are required of a person who has to encounter a sudden emergency. As the Judicial Committee pointed, out in *Dwarkanath* v. *Rivers Steam Navigation Co.*,[4] if, in a sudden emergency, a man does something of which he might reasonably think proper in the circumstances, he ought not to be held guilty of negligence because, upon a review of the facts it can be seen that the course adopted was not in fact, the best.

Common carriers.—NOT WITHIN THE ACT.—Under English law, there were two classes of bailees upon whom the law imposed a greater degree of liability than that imposed on ordinary bailees. They were, (i) the common carriers, and (ii) the inn-keepers. These two classes of bailees were held liable for all accidents or loss traceable to any cause other than Act of God or King's enemies. They were thus liable as insurers of goods therefore responsible for loss or damage to the goods, even without proof of negligence.

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1. *Canara Bank* v. *Bhavani Oil Co., Chemmnnur,* AIR 2004 Ker 273 : 2004 (1) CCC 343 (Ker) : 2005 (1) CTLJ 314 (Ker) (DB) : 2004 (2) BankCas 192 : 2004 (1) Ker LJ 473.
2. *Shiva Texyarn Ltd.* v. *Smt. Lalitha Krishnan,* AIR 2007 (NOC) 2645 (Mad).
3. **See** *Wilson* v. *Brett,* (1843) 152 ER 737 : 63 RR 528.
4. (1918) MWN 435 : 20 Bom. LR 735 : 8 LW 4 : 46 IC 319 : 27 CLJ 615 (PC).

Till the passing of the Carriers' Act of 1865, the rules and principles of the English law were being followed in India. But that Act, however common carriers were enabled to limit their liability by special contract in particular cases, subject however, to the rule that they could not contract themselves out of liability for negligence.

The effect to the Contract Act on the liability of common carriers has been considered in a number of cases. The question has arisen this way: if the provisions of this chapter of the Contract Act were to apply to common carriers, their liability will be considerably lessened, for they will be answerable only for negligence. In an early Bombay case[1] the court was of opinion that 'Bailment' as defined in Sec. 148 was wide enough to cover a case of bailment for carriage and therefore held that in cases not met by the special provisions of the Act relating to railways and carriers, the liability of carriers for loss or damage to goods entrusted to them is prescribed by Section 151 and 152 of Contract Act. But the Calcutta High Court in *Moothora Kanth Shaw* v. *I.G.S.N. Co.*[2] took the opposite view. The matter was however settled by a decision of the Judicial Committee in *Irrawaddy Flotilla Co.* v. *Bhagwandas,*[3] where the Calcutta view was approved, and it was definitely laid down that the duties and liabilities of a common carrier are not within the ambit of the Contract Act, but are regulated by the Carriers' Act, and the general principles of the English law relating to carriers. Their Lordships observed:

> "No doubt, it [the Contract Act] treats of bailments in a separate chapter. But, there is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or sub-division of the law relating to contracts. On the other hand, it is to be borne in mind that at the time of the passing of the Act, there was in force a statute relating to common carriers, which, in connection with the common Law of England, formed a code at once simple, intelligible and complete. Had it been intended to codify the Law of Common Carriers by the Act of 1872, the more usual course, would have been to have repealed the Act of 1865 (Carriers' Act) and to re-enact its provisions with such alteration or modification as the case might seem to require. It is scarcely conceivable that it could have been intended to sweep away the Common Law by a side wind, and by way of codifying the law, to leave the law to be gathered from two Acts, which proceed on

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1. *Kuverji* v. *G.I.P. Ry. Co.,* (1878) 3 Bom. 109.
2. (1883) 10 Cal 166.
3. (1891) 18 Cal. 620; **see also** *British & Foreign Marine Insurance Co.* v. *India General Navigation and Railway Co.,* (1910) 38 Cal. 28 : 15 CWN 226 : 9 IC 364.

different principles and approach the subject, if the subject be the same from different points of view."

On the language of the Contract Act also, their Lordships proceeded to observe that, as the Carriers Act has not been expressly repealed by the Contract Act, nothing in the latter Act can 'affect' the provisions of the Carriers Act and that the effect of including common carriers in Secs. 151 and 152 will be to displace the whole foundation of the Carriers' Act, and render its provisions nugatory. On this line of reasoning, their Lordships decided that the rights and duties of common carriers were outside the scope of the Contract Act.

Common carriers.—EXTENT OF LIABILITY.—Common carriers other than Railway Companies are in the position of insurers with regard to the goods entrusted to them. They will therefore be responsible for loss or damages to goods entrusted, irrespective of whether they were guilty of negligence or not. But it is open to them to limit their liability by special contract. *In India General Navigation & Railway Co.* v. *Dekhari Tea Co.*,[1] the Privy Council said that the nature of the contract entered into, must either have the limitation of the liability made expressly in writing or the facts of the case must show that for the contract in question, the contracting party was departing from his usual business and engaging in a different type of business from that of common carrier.

Carriers by rail.—The Railways Act, Sec. 72, fixes the liability of Railway Companies. Ordinarily, the responsibility of Railways for the carriage of animals or goods is not that of common carriers but only of bailees under the Contract Act.[2] But it is possible for them to cut down their liability still further by agreements in writing, in forms, which have the sanction of the Governor-General in Council. These latter are familiarly called "Risk notes." There are many forms of these risk notes. Their chief feature is that in consideration of the reduced rate of freight, the consignor agrees to exempt the

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1. (1924) 51 Cal. 304 : 26 Bom. LR 517 : 22 ALJ 173 : 19 LW 277 : (1924) MWN 158 : 28 CWN 302 : 80 IC 1038 : (1924) PC 40.
2. *Moolji Sicka* v. *B.N. Ry. Co.*, (1931) 35 CWN 1242 : *Surendra Lal* v. *Secretary of State*, (1917) 25 CLJ 37 : 38 IC 702; *Begraj* v. *E.I. Ry.*, (1928) Cal. 697 : 47 CLJ 611 : 112 IC 197; *M. & S.M. Ry.* v. *Subba Rao*, (1920) MWN 198; *Khirji Khetsey* v. *B.B. & C.I. Ry Co.*, (1915) 39 Bom. 191 : 16 Bom. LR 467 : 25 IC 241; *Sohan Pal* v. *E.I. Ry Co.*, (1922) 44 All. 218 : 65 IC 109 : (1922) All. 9 (FB); *Seshan Pattar* v. *L.S. Moss*, (1894) 17 Mad. 445; *Forbes, Forbes Campbell & Co.* v. *Secy of State*, (1935) Sind 218 : 159 IC 591; **see** *J.K. Oil Mills* v. *Union of India*, AIR 1976 SC 227 : 1976 UJ (SC) 94 : (1976) 1 SCC 893; *Union of India* v. *Steel Stock Holders Syndicate, Poona*, AIR 1976 SC 879 : 1976 (3) SCR 504 : (1976) 3 SCC 108. (The amendment of the Railways Act in 1961 noticed and the scope of the provisions of the Amendment Act considered); *Union of India* v. *U.I.F & G. Insurance Co.*, AIR 1981 Mad. 162 : 94 LW 7 : 1980 (2) MLJ. 128.

company from all liability for the loss of, or damage to, the goods[1] except that which is due to the wilful negligence of the railway servants.

Carriers by sea.—The Carriers' Act refers only to carriers by land and by inland navigation. Carriers by sea [or air][2] are therefore not common carriers within the meaning of the Act as has been decided in *Bombay Steams Navigation Co.* v. *Vasudev*,[3] as to the liability of carriers by sea, the question has therefore arisen whether it is to be determined with reference to the present and the next succeeding section or whether the principles of the English common law are to apply.[4] In *Ramjash Agarwal* v. *Indian General, Navigation & Railway Co.*,[5] it has been held that the liability of a steamship company in respect of goods delivered to it for carriage is that of an insurer, and that it will be liable far shortage during transit. But carriers by inland navigation or by river steamers are within the Carriers Act.[6]

Inn-keepers.—Under the common law, they were liable as insurers of goods entrusted to them.[7] But for various reasons, this higher degree of responsibility does not appear to have been recognised and applied in India. In *Jan and Sons* v. *Cameron*,[8] the Allahabad High Court remarked that it would be impossible to apply the common law rule as to inn-keeper's liability in the mofussil in India, because hotels in India, unlike hotels in England, are open and unconfined and are easily accessible to the public. But in a Bombay case[9] decided before the Indian Contract Act was passed, the court had held that the rule of the Common Law was applicable. In view of the fact that there is no special enactment in India in regard to innkeepers, there may be sufficient justification for the view that the present section will govern their liability in

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1. **See** *Arunachalam* v. *Madras Railway Co.*, (1909) 33 Mad. 120 : 3 IC 931; *Narain* v. *E.I. Ry. Co.*, (1912) 34 All. 656 : 16 IC 369; *Balaram* v. *Southern Mahratta Ry Co.*, (1894) 19 Bom. 159; *Toonya Ram* v. *East India Ry.* (1902) 30 Cal. 257 ; *East India Ry. Co.* v. *Nilakanta Ray*, (1914) 41 576 : 19 CLJ 142: 22 IC 679 : 19 CWN 95.
2. **See** *Aslan* v. *Imperial Airways*, (1933) 49 TLR 415.
3. (1928) 52 Bom. 37 : 29 Bom. LR 1551 : 106 IC 470 : (1928) Bom. 5. **See** ***also*** *Kumber* v. *B.I.S.N. Co.*, (1913) 38 Mad. 941 : (1913) MWN 558 : 20 IC 546 : 25 MLJ 162; *Boggiano and Co.* v. *Arab Steamers Co.*, (1916) 40 Bom. 529 : 18 Bom. LR 126 : 33 IC 536.
4. **See** *Mackillican* v. *Compagnie des Messageries Maritimes, De France*, (1880) 6 Cal. 227; *Contra, Haji Ismail Sait* v. *The Company of the Messageriest Maritimes of France*, (1905) 28 Mad. 400; *Haji Shakoor Gani* v. *Volkart Bros.*, (1931) Sind 124 : 133 IC 77.
5. (1918) 22 CWN 310 : 41 IC 387.
6. *India General Navigation Co.* v. *Eastern Assam Ry. Co.*, (1920) 47 Cal. 1027 : (1921) Cal. 315; *Dekhari Tea Co.* v. *Assam Bengal Railway Co.*, (1920) 47 Cal. 6; *I.G.S.N. Co.* v. *Bhagwan Chandra* (1913) 40 Cal 716 : 17 CLJ 639 : 19 IC 245 : 17 CWN 633.
7. *Calye's case.* (1584) 77 ER 520; *Morgan* v. *Ravey*, (1861) 158 ER 109 : 123 RR 494. **But see** *Inn-keepers Liability* Act of 1863.
8. (1922) 44 All. 735 : 68 IC 679 : 20 ALJ 728 : (1922) All. 471.
9. *Whateley* v. *Palanji*, (1866) 3 BHCOC 137.

the absence of any special agreement. Accordingly, in the Allahabad case abovementioned, a hotel manager was held liable for the loss of his guest's suit case in circumstances which showed that the manager had Allahabad High Court, in the converse case of a guest's liability for goods given for his use by the hotel-keeper, has held that the standard of liability was that of a prudent person under Secs. 151 and 152 of the Contract Act.[1]

Proof of Negligence.—A bailee is responsible for proper care of goods entrusted to him. Where are goods are lost, there arises an initial presumption of negligence which will have to be rebutted by proof of such care as a man of ordinary prudence would have exercised.[2] As Strachey, C.J., said in *Rampal* v. *Murray & Co.*[3]:

> "If the damage caused were such that in the ordinary course of events it would not happen to goods of the kind in question, if used with ordinary prudence, it would be for the hirer to prove that he had exercised such prudence: otherwise, the owner must give evidence of negligence."

The above rule applies to bailment of goods. But in case of animals, the rule may require qualification, as for instance where a court is called upon to presume that the death of an animal must be the result of negligence on the part of the bailee. In such a case, if at least the manner of death is known, it may be possible for the court to say whether or no it would lead to a *prima facie* inference that the animal died because of the negligence of the bailee.[4] And so in a case the bailee must prove the facts within his knowledge. **[701]**

Where the goods pledged are of perishable quality on account of natural decay, no liability can be imposed on the pledgee for the damage to the goods provided it is shown that the pledgee has taken reasonable care and not negligent.[5]

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1. *Rampal Singh* v. *Murray & Co.*, (1899) 22 All 164.
2. *Trustees of the Harbour, Madras* v. *Best & Co.*, (1899) 22 Mad. 524 (Goods delivered for safe custody); *Shields* v. *Wilkinson*, (1887) 9 All. 398 (Hire of horse-Death of horse while in custody of bailee); *Lakhi Chand* v. *G.I.P. Ry. Co.*, (1913) 37 Bom. 1 : 14 Bom. LR 165 : 14 IC 793 (2) (Goods entrusted to Railway—Duty to prove due care); *Firm Gaurimal* v. *Secy. of State*, (1926) Lah. 217 : 91 IC 963 (Entrustment of goods Railway Loss while goods in their control—Burden of proving absence of negligence is on the company); *Maung Po* v. *Maung Tha*, (1923) Ran. 74 : 74 IC 18; *Cochin Port Trust* v. *Associated Cotton Traders Ltd.*, AIR 1983 Kerala 154.
3. (1899) 22 All. 164.
4. *Ponnappa* v. *Parakkalati*, (1937) Mad. 411 : (1937) 2 MLJ 329 : (1937) MWN 150 : 45 LW 158 : 171 IC 21, (contains full discussion as to burden of proof).
5. *P.N. Melina Mutt* v. *Canara Bank*, (2003) 10 ILD 41 (Kant).

RAILWAYS.—The same rule as to burden of proof applies to the case of a railway administration.[1] But where the goods are covered by a risk note,[2] absolving the company from liability for all loss or damage except that traceable to wilful negligence of the company's servants, the company has, in the first instance, only to prove that the loss was such as was contemplated by the risk note. The burden is then on the consignor to prove wilful neglect.

Where the railway administration having shown that sufficient care has been taken in respect of consignment and also in view of plaintiffs failing to take delivery of consignment within seven days of transit and goods reaching the destination, railways cannot be made liable.[3]

Negligence of bailee's servants.—A bailee is ordinarily liable for damage caused by the negligence of his servants acting in the course of their employment in regard to the thing bailed,[4] but not for acts unauthorised or beyond the scope of the servants' employment.

In *Gopal Singh Hira Singh* v. *Punjab National Bank,*[5] *goods* were pledged with the bank as security for loan consequent on partition of India, the bank employees being mostly Hindus forseek their duty and got back to India. The pledged goods were left behind uncared for. It was held that in the circumstances the bank would not be liable for the loss of the pledged goods or their value as it cannot be said that the bank had not acted as a prudent owner in regard to one's property in the extraordinary situation that developed in Pakistan after the partition of India. Where a pawnee kept the goods after the tender of the debt amount and the goods were stolen he would be liable for the loss since to keep the goods after tender of the amount is at his peril.[6]

It is a settled principle of law that in a case governed by Secs. 151 and 152 the loss or damages to goods entrusted to a bailee is *prima facie* evidence of his negligence. The onus is therefore on the bailee to disprove negligence when

1. *Secretary of State* v. *Kesho Prasad,* (1932) ALJ 788 : 139 IC 381 : (1932) All. 584 : *Hirji* v. *B.B. & I.C Ry.* (1915) 39 Bom. 191; *Nanka Ram* v. *Indian Midland Ry. Co.,* (1900) 22 All 361; *Surendra Lal* v. *Secy. of State,* (1917) 25 CLJ 37 : 38 IC 702; *Manager Central Railway* v. *Lakshmi Ratan Cotton Mills Ltd.,* AIR 1971 All. 531; *Union of India* v. *Ranganayakulu,* AIR 1964 AP 477; *Kanakaiah Chetty & Co.* v. *Union of India,* AIR 1961 Mad 398 : (1961) 1 MLJ 348; *Union of India* v. *Udho Ram,* AIR 1963 SC 422 : 1963 (2) SCR 702; *Purshottam Das* v. *Union of India,* AIR 1967 All. 549; *Union of India* v. *Sugauli Sugar Works (P) Ltd.,* AIR 1976 SC 1414. : 1976 (3) SCR 614 : (1976) 3 SCC 32.
2. *Sheo Narain* v. *East Indian Ry,* (1927) 50 All. 246; *G.I.P. Ry Co.* v. *Gitan Ram,* (1922) 2 Pat. 442 : 72 IC 440; *Sheobarut Ram* v. *Bengal N.W. Ry. Co.,* (1912) 16 CWN 766; *Firm Gaurimal* v. *Secretary of State,* (1926) Lah. 217 : 91 IC 963.
3. *Union of India* v. *M/s. Sattur Nataraja Traders,* AIR 1992 Kant. 301.
4. *Hollandia Pinmen* v. *H. Oppenheimer,* (1924) Ran. 356 : 84 IC 274; *Secretary of State* v. *Ramdhan,* (1933) 37 CWN 1109 : 58 CLJ 98.
5. AIR 1976 Delhi 115.
6. *Rampal* v. *Gourishankar,* 1951 Nag. LJ 570.

damage or loss is established.[1] Thus in a case of goods entrusted to the railway the initial burden lies on it to show that it took the requisite care and if it shows that the onus of proving negligence or misconduct on the part of the railway would then shift to the plaintiff.[2] Merely because when the machinery was pilferred, they were in the custody of port commissioner does not indicate that they had taken such care as an ordinary man of prudence would take under similar circumstances and in the absence of any evidence to that effect the port commission is under an obligation to make good the loss.[3]

Measure of damages.—In English Law, if the chattel is injured by the negligence of the bailee or hirer, the owner can recover the loss sustained by him for its reparation.[4]

152. Bailee when not liable for loss, etc., of thing bailed.—The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151.

Bailee when not liable.—The bailee will not be responsible for the loss or destruction or deterioration of the thing bailed, provided he proves that he had taken the amount of care prescribed by the previous section.[5] The minimum care of bailee under Sec. 151 cannot be avoided by a stipulation to the contrary.[6] The criterion in Sec. 151 of the care to be taken by a man of ordinary prudence does not imply any heroic measure or responsibility.[7] Thus, the railway administration is not liable in respect of loss caused by the looting of goods in open wagon in large-scale raids by thieves.[8]

A clause in a bill of lading providing for non-liability of carrier as soon as the goods were free from shop's tackle cannot relieve the carrier or his agent

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1. *Trustees Madras Port Trust* v. *Home Insurance Co. Ltd.*, AIR 1980 Mad. 48 : (1978) 2 MLJ 497 : *Narasimhaswami Nainagiri Devasthanam* v. *Muthukrishna Iyengar*, AIR 1962 Mad. 244.
2. *Calcutta Credit Corporation Ltd.* v. *Prince Peter*, AIR 1964 Cal. 374; *N.R. Srinivasa Iyer* v. *New India Assurance Co. Ltd.*, AIR 1983 SC 899 : (1983) 3 SCC 459 : 1983 (3) SCR 479 : 1983 Arb. LR 443 : 1983 UJ 778.
3. *I.T.C. Ltd.* v. *Board of Trustees for the Port of Calcutta*, AIR 1990 Cal. 129.
4. *Hughes* v. *Quentin*, (1838) 173 ER 681; *The Mediana*, (1900) AC 113.
5. *E.I. Ry. Co.* v. *Piyare Lal*, (1928) 10 Lah. 360 : 112 IC 736 : (1928) Lah. 774 (Meaning of " Loss" in this section).
6. *Siddalingappa* v. *Nataraj*, AIR 1970 Mys. 154, see however, *Jellicoe* v. *B.I.S.N. Co.*, ILR 10 Cal. 489; *Central Bank of India* v. *Grains & Gunny Agencies*, AIR 1989 MP 28.
7. *Kanakayya Chetty & Co.* v. *Union of India*, AIR 1961 Mad. 398 : (1961) 1 MLJ 348.
8. *Ibid*, **see also** *Union of India* v. *Ranganayukulu*, AIR 1964 AP 477 : (1964) 1 An. WR 171.

from the primary obligation of delivering the gods to the consignee in the absence of a custom in the port to the contrary.[1] Where the goods bailed had deteriorated owing to unprecedented floods, and it appeared that the bailee had not failed to take due care, the court held the bailee was not liable.[2] In one Punjab case, the bailee was held not liable where the goods were stolen from his shop and the evidence showed he had taken due care.[3] It may be mentioned that the English rule casts a duty on the bailee to take reasonable steps to recover the goods.[4]

When a receipt was issued by the defendant for safekeeping of the vehicle of the plaintiff at their parking place, it establishes the relationship of bailor and bailee making the defendants liable for the loss of vehicle for having failed to take reasonable care.[5]

When an insured car is damaged in accident and delivered for repairs at work shop under policy of insurance, is destroyed by fire at workshop, the Insurance Co. and the repairer as bailee and sub-bailee shall have the burden of proving that they have taken such case as was expected of a prudent man in respect of his own goods.[6]

Special contract—The section contemplates a special contract by which the ordinary liability of the bailee may be qualified. The Rangoon High Court has held distinguishing a Madras case, that the contract mentioned need not necessarily be one which increases the bailee's responsibility, and that it is open to the bailee to contract himself out of liability altogether.[7]

In a contract of bailment the receipt given by the bailee containing printed condition on its reverse cannot be said to form part of the bailment in the absence of the signature of the bailor on the receipt and the onus will be on the bailee to prove that he has drawn the attention of the bailor to such printed condition and that the bailor assented expressly or impliedly.[8]

153. Termination of bailment by bailee's act inconsistent with conditions.—A contract of bailment is voidable

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1. *Govardhandas Kalidas* v. *New Dholera Steamships Ltd.*, AIR 1965 Ker. 51 : ILR (1964) 1 Ker, 607.
2. *Shanti Lal* v. *Tara Chand*, (1933) All. 158 : 142 IC 691.
3. *Lakshmi Das* v. *Babu Megh Raj*, (1900) 90 PR.
4. *Coldman* v. *Hill*, (1919) 1 KB 443.
5. *New India Assurance Co. Ltd.* v. *Delhi Development Authority*, AIR 1991 Delhi 298, 302.
6. *N.R. Srinivasa Iyer* v. *New India Assurance Co. Ltd.*, AIR 1983 SC 899 : (1983) 3 SCC 458 : (1983) 54 Com. Cas. 711.
7. *Fut Chong* v. *Maung Pocho*, (1929) 7 Ran. 339 : 120 IC 899 : (1929) Ran. 145; distinguishing *Sheik Mahomed* v. *B.I.S.N. Co.*, (1909) 32 Mad. 95; *Chhitarmal Anandilal* v. *Punjab National Bank Ltd.*, (1969) 10 Guj. 481; *State Bank of India* v. *Quality Bread Factory Batala*, AIR 1983 P&H 244.
8. *R. S. Deboo* v. *M.V. Hindlekar*, AIR 1995 Bom. 68.

at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Illustration

A lets to *B*, for hire, a horse for his own riding. *B* drives the horse in his carriage. This is, at the option of *A*, a termination of the bailment.

Termination of bailment.—Where the bailee does an act with respect to the goods bailed, inconsistent with the conditions of the bailment, it is open to the bailor to avoid the contract, and get back the goods bailed.[1] See Illustration to the section. But the mere fact that the bailee exercises his rights under the bailment in an unauthorised manner will not avoid the contract.[2]

Rights of third parties.—The question may arise in case of hire-purchase agreements, whether the owner (who is in the position of bailor) may avoid the contract in cases where the hirer (bailee) parts with the property in favour of innocent third parties. The answer would seem to be that he can.[3]

154. Liability of bailee making unauthorised use of goods bailed.—If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Illustrations

(a) *A* lends a horse to *B* for his own riding only. *B* allows *C*, a member of his family, to ride the horse. *C* rides with care. But the horse accidentally falls and is injured. *B* is liable to make compensation to *A* for the injury done to the horse.

(b) *A* hires a horse in Calcutta from *B* expressly to march to Benares. *A* rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. *A* is liable to make compensation to *B* for the injury to the horse.

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1. See Note 6, page 382 ante.
2. *Neckram Dobay* v. *The Bank of Bengal*, (1891) 19 Cal. 322 (PC) (Pledgee taking over the property; crediting the value as if sold to himself).
3. *Consolidated Co* v. *Curtis & Sons*, (1892) 1 QB 495.

Unauthorised use of goods bailed.—Where the bailee makes an unauthorised use of the goods bailed, he is liable to make compensation for the resultant damage. Illustration (a) bears a close resemblance to the English case of *Bringloe* v. *Morrice.*[1] Where a car entrusted for safe custody is used by the bailee for his own purposes in breach of the agreement, the bailee is liable for any ensuring damage.[2] **[710]**

Where the petitioner bailor delivered the possession of a lorry to the defendant mechanic for the purpose of repairs and the mechanic permitted a person without driving licence to drive the lorry leading to an accident, the defendant mechanic is liable to compensate the petitioner bailor for having made an unauthorised use of the goods bailed.[3]

155. Effect of mixture, with bailor's consent of his goods with bailee's—If the Bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

Mixing by consent.—This section deals with cases where the bailee, with the consent of the bailor, mixes the bailor's goods with his own. In such cases, the bailor and bailee have an interest in the mixture, proportioned to their respective shares. **[711]**

156. Effect of mixture without bailor's consent, when the goods can be separated.—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Illustration

A bails 100 bales of cotton marked with a particular mark to *B*. *B* without *A's* consent mixes the 100 bales with other bales of his own bearing a different mark; *A* is entitled to have his 100 bales returned, and *B* is bound

1. (1678) 85 ER 834 : *Burnard Haggies,* (1863) 143 ER 360 : 135 RR 593; *Lilly* v. *Doubleday,* (1881) 7 QBD 510; *Burerger* v. *Cunard Steamship Co.,* (1925) 2 KB 646; *Bull & Co.* v. *West African Shipping Agency,* (1927) AC 686.
2. *Hafizullah* v. *Montague,* (1934) 35 PLR 705.
3. *Alias* v. *E.M. Paul,* AIR 2004 Ker 214 : 2004 (2) CTLJ 344 (Ker) (DB).

to bear all the expenses incurred in the separation of the bales, and any other incidental damage.

Mixing without consent where goods separable.—Where the bailee without the bailor's assent, mixes the bailor's goods with his own, and where the goods are separable, then the bailor and bailee are entitled in the proportion of their shares, but the bailee is bound to bear the cost of such division.

157. Effect of mixture, without bailor's consent' when the goods cannot be separated.—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Illustration

A bails a barrel of Cape flour worth Rs. 45 to *B*. *B*, without *A's* consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. *B* must compensate *A* for the loss of his flour.

Effect of mixing, where goods not separable.—The present section differs from the stringent rule in English law that, where by the wrongful act of the bailee, the goods are mixed so as to become undistinguishable, the bailee loses the property in the goods, and cannot recover any portion form the bailor.[1]

Under the present section, where there has been a wrongful mixing, and where separation is impossible, the bailor is only entitled to compensation for the loss of the goods.

Analogous law.—Under Sec. 66 of the Trusts Act, where the trustee wrongfully mingles trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.

158. Repayment, by bailor, of necessary expenses.—Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor and the bailee is to receive no remuneration, the bailor

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1. *Lupton* v. *White,* (1808) 33 ER 817 : 10 RR 101. **See also** *Spence* v. *Union Marine Insurance Co.,* (1868) 3 CP 427 (mixture by accident) : *Sandeman* v. *Tyzack,* (1913) AC 680.

shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

Bailor liable for necessary expenses.—This section enacts that where the bailment is gratuitous, the bailor is under a duty to bear the necessary expenses of the bailment. The bailment under this section being for the benefit of the bailor, it is but just, that the bailee must be reimbursed for any expense incurred by him. **[719]**

159. Restoration of goods lent gratuitously.—The lender of a thing for use may at any time require its return, if the loan was gratuitous even though he lent it for a specified time or purpose. But if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

Termination of gratuitous bailment.—The general rule deducible from Sec. 148 is that the thing bailed must be returned, when the purpose is accomplished. The first part of the section creates an exception to the rule in cases where the bailment is gratuitous, by providing that the bailor may ask for the return of the articles even before the specified time has expired or the purpose has been fulfilled. Where, however, such a termination of the bailment, before the stipulated period, causes loss in excess of the benefit derived from the bailment, the bailor must compensate the bailee.

160. Return of goods bailed on expiration of time or accomplishment of purpose.—It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

Duty to return goods bailed.—This section lays down an obligation on the part of the bailee to return the article bailed as soon as the period of bailment expires or the object of the bailment has been achieved. The directions mentioned in the section must be reasonable.[1] The obligation is to return "without demand."

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1. *Bhullan Mal* v. *Secy of State*, (1929) ALJ 1169 : (1929) All 960; *Tekchand* v. *Mahadeo*, (1922) Nag. 127 : 65 IC 65.

But in *Isufali Hassanally* v. *Ibrahim*,[1] it was held that in cases where the article bailed or hired, does not serve the purpose, the bailee may leave the article where it is, and give notice to the bailor that it is unfit for the purpose and that the bailee is not bound to return it. But if by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, the bailee will be responsible to the bailor for loss or deterioration.[2] **[713]**

As stated earlier, in keeping with the provisions of Sections 151 and 152, a bailee is excused from returning the subject-matter of the bailment to the bailor where it has been taken away from him by authority of law exercised through regular and valid proceedings.[3]

The liability to return the goods bailed may, in particular cases, be subject to any right, which the bailee may have for recovery of remuneration in the matter of the bailment. Section 170 *infra* makes provision for a lien in favour of the bailee.

Where a bailee entrusted with a chattel for a particular purpose finds some property concealed within it, such property belongs to the owner.[4]

Deliver according to bailor's directions.—In *Orient Longman Ltd.* v. *Jayati Laila Kabir*,[5] *Late Moulana Abdul Kalam Azad*, the great freedom fighter and Statesman had during his life time dictated notes of his varied experiences to Prof. Humayun Kabir as to how India attained freedom. On the basis of the above notes Prof Kabir composed a book, which was approved by Maulana Azad. Maulana Azad, however, directed that a copy each of the completed text be deposited under sealed cover in the National Archives, New Delhi and the national Library, Calcutta and opened 30 years after his death. On the acceptance of the National Archieves of India and the National Library, Prof. Kabir sent copies of the text under sealed cover to them. The Government decided to open both the texts at New Delhi at a function arranged for the purpose. It was decided that the provisions of Section 160 of the Act as the opening of the sealed covers of text was not in accordance with the directions of the bailor *viz.* one of the texts was to be opened at Calcutta.

Remedy of bailor.—The section is silent as to the remedies open to the bailor in case of failure by the bailee to return the goods. There is no doubt that the bailor will have an action for damages: but in addition, he has the

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1. (1921) 45 Bom. 1017 : 61 IC 570 : 23 Bom. LR 403 : (1921) Bom. 191; *Chew* v. *Jones*, (1847) 10 LT 231.
2. *Kush Kanta* v. *Chandra Kanta*, (1924) Cal. 1006 : 28 CWN 1041.
3. *Juggilal Kamlapat Oil Mills* v. *Union of India*, AIR 1976 SC 227 : 1976 UJ (SC) 94 : (1976) 1 SCC 893.
4. *Cartwright* v. *Green*, (1803) 32 ER 412 : 7 RR 99.
5. AIR 1988 Cal. 410.

right, in case of sale by the bailee, to trace the proceeds as long as they can be distinguished.[1]

161. Bailee's responsibility when goods are not duly returned.—If by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

Responsibility absolute if goods not returned.—The bailee's liability to return the bailed articles presupposes delivery of the articles to the bailee.[2] Non-return of the articles on demand by the bailor gives the latter at his choice either to sue for wrongful conversion or wrongful detention.[3] The bailor will become entitled to compensation calculated on the value as on the date of the judgment in his favour.[4] As in the case of a bailee making an unauthorised use of the goods bailed, so here in case of default in returning the goods on the due date, the bailee becomes responsible for loss, destruction or deterioration of the article as from the date fixed for return. Thus, a Railway company will be responsible for delay in the delivery of goods at the proper time.[5] Refusal to grant delivery except upon an unjust or unreasonable condition may amount to default within the meaning of the section.[6]

Where the depositor of goods in a warehouse endorses the warehouse deposit receipt in favour of a bank to obtain a loan, the bank is entitled to sue the warehouse for the debt and recover the amount in view of the bank being a transferee of the receipt.[7]

"Deterioration".—In *G.I.P. Ry. Co.* v. *Jugal Kishore,*[8] it was held that the word 'deterioration' will include depreciation in value because of falling prices.

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1. *Re : Hallet's Estate* (1879) 13 Ch. 696. Writ will not available *Orient Longman Ltd.* v. *Jayati Laila Kabir,* AIR 1988 Cal 410.
2. *Radheyshyam Agarwal* v. *Union of India,* 1979 MPLJ 793.
3. *Badrilal* v. *Chandrakunwarlal,* 1962, MPLJ (Notes) p. 53; **see also** *Dhian Singh Sobha Singh* v. *Union of India,* AIR 1958 SC 274 : 1958 SCR 781 : 1958 SCJ 363.
4. *Badrilal's case,* supra; *Samu* v. *Presidency Talkies,* AIR 1966 Mad. 184 : (1966) 1 MLJ 154.
5. *E.I. Ry.* v. *Inderman,* (1922) All 63 : 20 ALJ 114 : 65 IC 771 ; *Moolla & Sons* v. *Commissioner for Rangoon Port Trust,* (1931) Ran. 95 : 132 IC 545; **see** *Trustees, Port of Bombay* v. *Premier Automobiles,* AIR 1981 SC 1982 (This section compared with Sec. 61-B of the Bombay Port Trust, Act, 1879); *Cochin Port Trust* v. *Associated Cotton Traders,* AIR 1983 Ker. 154.
6. *G.I.P. Ry. Co.* v. *Manickchand Premji,* (1931) Nag. 29 : 130 IC 82; *Hafizullah* v. *Montague,* (1934) 35 PLR 705 (Detention of motor car given for safe custody).
7. *Central Warehousing Corporation, New Delhi* v. *Central Bank of India,* AIR 1974 AP 8.
8. (1930) ALJ 297 : 121 IC 828 : (1930) All. 132; **but see** *Union of India* v. *S.S.H. Syndicate Poona,* AIR 1976 SC 879 at page 885. (S.C. preferred the view in *E.I.P. Rly. Co. Ltd* vs *Diana,* AIR 1925 Lahore 255 to the view expressed in AIR 1930 All. 132 and in *Union of India* v. *Sheo Bux Satyanarayana,* AIR 1963 Orissa 68).

Presumption about value.—Where the bailee does not return the article, the court may on the principle of *Armori* v. *Delamirie,*[1] make the strongest presumption against the bailee, consistent with the facts admitted or proved.[2]

Default of bailor.—The section says nothing about default by the bailor in the matter of taking back goods bailed; but it is conceived that he will be liable to pay the bailee all expenses for the safe custody of the goods from the time when they were returnable.[3]

162. Termination of gratuitous bailment by death.—A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

Liability of heirs.—In *Municipal Board Lucknow* v. *Abdul Razzaq,*[4] the Court observed that the object of the section is simply to bring out the general principle of law that in cases of gratuitous bailment the heir of the bailee, is not *ipso facto* invested with the character of a bailee, but that the section does not abrogate the principle of law that such heir may in particular cases, occupy the character of a constructive trustee in regard to the subject of the bailment.

163. Bailor entitled to increase or profit from goods bailed.—In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Illustration

A leaves a cow in the custody of *B* to be taken care of. The cow has a calf, *B* is bound to deliver the calf as well as the cow to *A*.

Increase or profit.—The bailor, being the owner, bears the risk of loss, destruction or deterioration of the thing bailed not due to any negligence of the bailee. So, it is but just that he should also have the advantage of any increase or profit. And this section simply enunciates the rule of commonsense that the bailee is bound, in the absence of a contrary agreement, to deliver any increase or profit, which may have accrued from the goods, bailed. See

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1. (1722) 93 ER 664.
2. *Ramaswami* v. *Palaniappa,* (1930) Mad. 364 : 30 LW 898 : 122 IC 37; **see** *Nyberg* v. *Handelaar,* (1892) 2 QB 202 (Gratuitous bailee liable for loss of use during period of detention after demand). Cf. *K.K. Barkakati* v. *C.K. Kakaiti,* (1923) 23 Cal. WN 1047.
3. *G.N.R. Co.* v. *Swaffield,* (1874) 9 Ex 132.
4. (1929) 5 Luck. 220 : (1931) Oudh 15.

Illustration. Similarly as the Privy Council observed in *Motilal* v. *Bai Mani*,[1] *fresh* shares allotted by a company in respect of shares, which have been pledged, will be increase or profit within the meaning of the section. **[716]** Where a bailee entrusted with a chattel for a particular purpose finds some property concealed in it, such properly belongs to its owner and not to the bailee.[2] In case of shares and securities pledged with the bank, the bonus shares, securities and interest being accretions in respect of pledged property need not be returned to the pledgor except when the pledgor discharges the obligation and redeems the property.[3]

Indemnity to bailee.—This section practically creates a warranty of title in case of bailment, and provides that the bailor shall indemnify the bailee.

Analogous law.—In the Transfer of Property Act, Secs. 63 and 70, there are corresponding provisions relating to accretions to immovable property.

In a case before the Judicial Committee of the Privy Council, the question arose as to the rights as between a wool-grower and a woolbroker in respect of moneys collected by the latter under insurance policies effected on the wool belonging to the former, which had lain in the broker's store at the time when it was destroyed by fire. The broker claimed to deduct expenses incurred and commission for services rendered before the fire and prospective profits, such as commission lost by him, and charges which but for the fire would have been earned or expended and would have been deductible from the proceeds, if the wool had been sold in the normal course. The Judicial Committee held that as the condition of the policy stated that the loss or damage, which might be incurred, did not include profit of any kind, the broker could not deduct the sale commission or other charges not actually earned. The argument that the grower got the gross selling value of the goods, whereas if the goods had not been destroyed, he would have got only the net value, and that thus the principle of indemnity underlying insurance was infringed as answered by the observation that insurance does not necessarily give a perfect indemnity.[4]

164. Bailor's responsibility to bailee.—The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions respecting them.

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1. (1925) 49 Bom. 233; 30 CWN 5 : 86 IC 368 : 27 Bom LR 455 : (1925) PC 86 : 48 MLJ 648 (PC); **see also** *Langton* v. *Waite*, (1868) 6 Eq. 165.
2. *Carturight* v. *Green* (1807) 32 ER 422 : 7 RR 99.
3. *Standard Chartered Bank* v. *Custodian*, AIR 2000 SC 1488, 1501 (DB) : (2000) 6 SCC 427 : 2000 (3) Supreme 413 : 2000 (102) CC 314 : 2000 (6) SRJ 178.
4. *Maurice* v. *Goldsborough Mort & Co.*, (1939) 3 All. ER 63.

Indemnity to bailee—This section practically creates a warranty of title in case of bailment, and provides that the bailor shall indemnify the bailee against any loss or damage caused by his (bailor's) want of title. [719]

165. Bailment by several joint owners.—If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

Bailment by joint owners.—The possession of one joint owner is in law the possession of all the co-owners: this section applies this principle and provides that the bailee may in the absence of specific agreement, deliver the goods to any one of the joint bailors.

If would appear that in English law one joint bailor alone cannot demand goods jointly bailed.[1]

166. Bailee not responsible on re-delivery to bailor without title.—If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

Analogous law.—Sec. 28 of the Indian Trusts Act says, "Where any beneficiary's interest becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust property to the person who would have been entitled thereto, in the absence of such vesting, the trustee is not liable for the property so paid or delivered."

Delivery by bailee in good faith.—Where the bailee, acting in good faith and having no reasonable ground for suspicion, delivers the goods bailed to his bailor, or according to his directions, the bailee will be protected, though it might turn out actually that the bailor was not the real owner of the goods. This principle was illustrated in the Privy Council case. *Bank of Bombay* v. *Nandlal Thackerseydass*.[2] There a certain person had entrusted goods to a warehouseman who pledged them to an innocent third party and subsequently redeemed them. In an action by the owner against the pledgee

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1. *May* v. *Harvey*, (1811) 104 ER 345 : 12 RR 322; *Harper* v. *Godsell*, (1870) 5 QB 422; *Brandon* v. *Scott*, (1857) 119 ER 1234 : 110 RR 574; *Broadbent* v. *Ledward*, (1839) 113 ER 395 : 52 RR 321; *Atwood* v. *Ernest*, (1853) 138 ER 1449 : 93 RR 788 (Bailee can refuse delivery to one co-owner demanding return).
2. (1912) 37 Bom. 122 : (1913) MWN 29 : 15 Bom. LR 1 : 24 MLJ 176 : 17 CLJ 146 : 17 IC 663 : 17 CWN 358 (PC).

and the warehouseman, it was held that the *bona fide* re-delivery by the pledgee saved him from liability. Similarly, in *Bank of Bombay* v. *Fazulbhai,*[1] where an executor had pledged with a bank certain Government bonds that had been bequeathed to the plaintiff and the bank delivered the bonds in good faith to a third person, according to the executor's directions, it was held that the bank was not liable to the plaintiff in respect of such delivery. In *Chennani Gopalam* v. *Union of India,*[2] it was held by the A.P. High Court that (i) where the Railway Administration now proviso to Sec. 76 of Railway Act, 1989 delivers goods in absence of receipt to a person, who in their opinion is entitled thereto, they cannot have immunity from claim of rightful owner; and (ii) that the section does not protect the railway administration from consequence of delivery to a wrong person. **[720]**

Estoppel.—Sec. 117 of the Evidence Act provides that a bailee shall be estopped from denying the title of the bailor at the time of making such bailment. The Explanation adds that where a bailee has delivered the goods to a person other than the bailor, it will be open to the bailee to prove the paramount title of such person as against the bailee.[3] The corresponding common law rule is that the bailee cannot deny the bailor's title, or refuse to redeliver unless under force of paramount title. The law was laid down in *Biddle* v. *Bond,*[4] by Lord Blackburn that, as between a bailee and his bailor, under an ordinary contract of bailment; the bailee must, if he desires to defend an action for the non-delivery of the goods upon the demand of the bailor, show that he has already delivered them upon a delivery order authorised by the bailor, or he may ask for an interpleader order, by he may at his own risk as regards the plaintiff say, "I defend the action on behalf of A, B, and I say he is the person really entitled to the goods." If he adopts the latter course, and defends on behalf and with the authority of a third party he must allege and prove the title of such third party. On the application of the principle of election, it has been held that a bailee accepting goods with knowledge of disputed title, cannot afterwards fall back on the title of a third party, as a defence.[5] In *Bhanwari Lal Podar* v. *Road Transport Corp.,*[6] the Patna High Court while considering as to when the plea of estoppel as against the bailee ceases

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1. (1923) 24 Bom. LR 513 : 67 IC 761 : (1923) Bom. 155.
2. AIR 1959 AP 331.
3. (Cf.) *Raja Bhawani Singh* v. *Maulvi Misbanuddin,* (1929) 56 IA 170 : 10 Lah. 352 : (1929) PC 119 : 56 MLJ 799 : 33 CWN 609 : 31 Bom. LR 762 : 30 LW 21 : (1929) MWN 449 : 115 IC 729; *Henderson* v. *Williams* (1895) 1 QB 521 (Wharfinger who has attorned to a purchaser, cannot deny the purchaser's title).
4. (1865) 22 ER 1179 : 141 RR 387; **see also** *Rogers, Sons & Co.* v. *Lambert & Co.,* (1891) 1 QB 318 (325); (Cf.) *Laurie* v. *Dudin,* (1926) 1 KB 223; *Blaustein* v. *Maltz, Mitchell & Co.,* (1937) 2 KB 142 : (1937) 1 AER 497 (*Biddle* v. *Bond* applied to Agency).
5. *Ex Parte Davies,* (1881) 19 Ch.D. 86.
6. AIR 1989 Pat. 303,

held that in cases where bailment is determined by what is equivalent to an eviction by a title paramount, the course open to the bailee is to file an interpleader petition and that in the facts and circumstances of the case, such an occasion never arose, as a suit had already been filed and the bailee acted in terms of an orders of injunction by the Court.

Where however, the bailor has, to the knowledge of the bailee, assigned the goods to a third party, the bailee is not bound to deliver them back to the bailor.[1] However, in a Rangoon case reported in AIR 1940 Rang. 249, it was held that if a bailee delivered goods bailed to him back to the bailor knowing that the bailor had sold to another person and again was going to sell it to a third person, the bailee was guilty of conversion and liable for consequent damages.

167. Right of third person claiming goods bailed.—If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

The party's rights.—Where a person other than a bailor lays claim to goods bailed, it is open to such person to apply to the court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

The section is silent as to what the bailee must do. The proper course for him will be to take an indemnity from the person to whom he delivers the goods or file an interpleader suit.[2] In England, it is settled that in such cases interpleading is the proper course.[3]

168. Right of finder of goods; may sue for specific reward offered.—The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation, and where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

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1. *European & Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.*, (1861) 30 LJCP 247. **See also** *Kingsman* v. *Kingsman*, (1880) 6 QBD 122.
2. See Sec. 88 and Or. 35, CPC.
3. *Rogers Sons & Co.* v. *Lambert & Co.*, (1891) 1 QB 318. **See also** *Glyn Mills Co.*, v. *East & West Indian Dock Co.*, (1882) 7 AC 613.

Finder of goods—Right to sue.—The finder of goods is, by virtue of Sec. 71, subject to the responsibilities of a bailee. With regard to his rights, the section says that he had *no right of suit* against the owner for compensation for expense and trouble voluntarily incurred by him to preserve the goods or find the owner. But if the owner has offered a specific reward for the return of the goods, the finder may sue for it.

Lien.—In either case, the finder has the right to retain the goods and refuse to deliver them up except on payment of compensation or the reward as the case may be. This important right is called a 'lien'. The Act treats of other kinds of lien also. (*Cf.*) Secs. 171, 173, 174 etc. The essence of the lien is that it depends on actual possession and so is sometimes called "possessory lien'. It is available only so long as the person has not parted with possession. [For details, see commentary under Secs. 170, 171.]

Where, after the finding of the lost property, the owner makes a promise of compensation, it would be a promise enforceable under Sec. 25(2). See Illustration (c) to the section.

It would appear that in English law, the finder will not be entitled to compensation, because the service itself, (*viz.,*) the act of finding the article, is one done without previous request from the owner.[1] Of course, the position will be different where reward has been offered, and the finder has knowledge of the reward.

Title of finder.—As against every one but the true owner, the property in a chattel found in a public or quasi public place vests in the finder on his taking possession of it.[2] The property found in a private building (*e.g.,*) a residential house vests in the owner of the place.

169. When finder of thing commonly on sale may sell it.—When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

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1. *Nicholson* v. *Chapman,* (1793) 126 ER 536 : 3 RR 374; *Clayton* v. *Le Roy,* (1911) 2 KB 1031 (True owner can recover from any one except buyer in market overt).
2. *Bridges* v. *Hawkesworth,* (1851) 21 LJQB 75 (Finder of bank notes on floor of a shop is entitled to keep them against all but the true owner); *Jeffries* v. *G.W. Ry.,* (1856) 119 ER 680 : 103 RR 753; (Cf) *Elwes* v. *Briggs Gas Co.,* (1886) 33 Ch. D. 562 (Goods found on demised property belong to the lessor though ignorant of their existence); *Merry* v. *Green,* (1841) 151 ER 916 : 56 RR 819 (Finder of hidden article in property purchased is not entitled to it).

(1) When the thing is in danger of perishing or of losing the greater part of its value, or,

(2) When the lawful charges of the finder in respect of the thing found, amount to two-thirds of its value.

Right of finder to sell.—Ordinarily, the finder, being a bailee in respect of the goods found, has no power to sell them: for it will be an act of conversion.[1] But under the circumstances and conditions described in this section, the finder is authorised to sell the goods. The conditions are:

(i) The thing must be an ordinary object of sale,

(ii) The owner could not be found with reasonable diligence or when found, refuses to pay the lawful charges incurred by the finder, and

(iii) The goods must be of a perishable nature or likely to loss the greater part of their value or the charges incurred already must amount to two-thirds of the value of the goods. **[732]**

170. Bailee's particular lien.—Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Illustrations

(a) *A* delivers a rough diamond to *B*, a jeweller, to be cut and polished, which is accordingly done. *B* is entitled to retain the stone till he is paid for the services he has rendered.

(b) *A* gives cloth to *B*, a tailor, to make into a coat. *B* promises *A* to deliver the coat as soon as is finished, and to give a three months credit for the price. *B* is not entitled to retain the coat until he is paid.

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1. *Hallins* v. *Fowler,* (1875) 7 HL 757.

Lien.—NATURE AND SCOPE.—In *Hammonds* v. *Barclay*,[1] a lien has been defined as "the right of one man to retain that, which is in his possession, belonging to another, till certain demands of him the person in possession are satisfied." The essential requisite of a lien is therefore possession obtained previously. The word 'retain' implies prior possession. The possession must have been lawfully acquired. So, if it is obtained by misrepresentation or fraud, no lien attaches to such possession. Again, the lien subsists only so long as possession lasts. If possession is voluntarily parted with, the lien is lost. Where, however, the person is deprived of possession by fraud or forces, the lien will continue. Again, if the person entitled to the lien parts with the goods for a specific purpose, the lien is not lost.

The lien is, in its very nature, a right accessory to another right (*e.g.*,) a right to receive payment. But though accessory in its nature, it is distinct from the right in enforcement of which it is called in aid. It therefore followed that the lien may continue to exist though the right to payment may be barred for various reasons (*e.g.*,) limitation bankruptcy. etc.

The lien consists only in the right to retain. It does not extend to a right to sell.[2] As the Lahore High Court pointed out in *Alliance Bank of Simla* v. *Ghamandi Lal Jaini Lal*,[3] there is an important distinction between the general lien of a bailee and the right of a creditor who advances money to accommodate his customers who buy goods and deposit them with him. The former confers only a mere right to retain the goods until payment, but the latter means that the security shall, if necessary, be made effectual to discharge the obligation.

The lien will terminate (i) on payment, or (ii) on giving possession, or (iii) by waiver of the lien, as for example, by making a contract inconsistent with the existence of the lien.

General and particular lien.—This section deals with a bailee's particular lien as distinguished from the general lien, dealt with in Sec. 171. The former is confined to the very goods in respect of which labour or skill has been expended and for which labour or skill the bailee seeks remuneration. But a general lien is not thus restricted. "A general lien is the right to retain the property of another for a general balance of accounts; but a particular lien is a right to retain it only for a charge on account of labour employed or expenses bestowed upon the identical property detained." **[720]**

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1. (1801) 102 ER 356.
2. *Mulliner* v. *Florence*, (1878) 3 QBD 484; *Jafferbhoy* v. *Charlesworth*, (1893) 17 Bom. 520; *Scindia Steam Navigation Co.* v. *Trustees of the Port of Karachi*, (1930) Sind 36 : 122 IC 388.
3. (1927) 8 Lah. 373 : 101 IC 725 : (1927) Lah. 408; **see also** *Mercantile Bank* v. *Shegle & Co.*, (1930) Lah. 576 : 31 PLR 365; *Tejpal* v. *Ernest David* (1928) 32 CWN 1146 : 48 CLJ 415 : 28 LW 204 : 111 IC 240 : (1928) PC 219.

Particular lien—When available.—At the outset, it may be mentioned that the section applies only to cases where the goods have been given to a bailee for some purpose in relation to which he has to exercise special skill. It therefore follows that the case of a seller of goods keeping the things sold because of non-payment of price does not fall without this section at all.[1] —(1) For a particular lien to be available, the bailee must have acted in accordance with the purpose of the bailment. In *Skinner* v. *Jager,*[2] a bailee who undertook certain repairs to a musical instrument for a fixed sum claimed a lien not in respect of that sum, but for some other repaid work done to the instrument. The Court held that no lien could be had in regard to such work. This case was followed in a ruling in Calcutta, *Judah* v. *King-Emperor.*[3] There, A had given an electric kettle to B an electric repairer, on the condition that the article must be returned completely repaired within a fixed period. Only part of the work was done within the time fixed, but the repairer claimed a lien. The Court rightly observed that it would be preposterous to lay down as a general rule of law that a person who is entrusted with the repair of an article can refuse to part with it after doing a part of the work, which perhaps makes no improvement of any kind.

Where goods are delivered to the bailee under a single contract the bailee will have a lien on all the goods, though they may be delivered at different times in different parcels.[4] Similarly, a bania may retain the whole quantity of goods as security for his claim, and will be justified in refusing to deliver up a part on payment of the value of that part.[5]

(1) Again, it will not be open to a bailee to retain goods bailed for one purpose, as security for claims arising out of different and distinct matter.

In order to exercise the right of lien by the bailee the conditions to be fulfilled are (1) labour and skill must have been spent in accordance with the purpose of bailment (2) such labour and skilled must have been so spent so as to improve the goods and (3) it applies only to such goods over which the bailee has bestowed his labour and expense and not to other goods.[6]

(2) The service must involve the exercise of labour or skill on the goods bailed. As Baron Prarke observed in *Scarfe* v. *Morgan* [7]:

"Where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus

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1. **See** *Parakh* v. *Mackenzie & Co.,* (1934) Oudh 380 : 151 IC 117 : 11 OWN. 958.
2. (1883) 6 All. 139.
3. (1926) 53 Cal. 174 : 29 CWN 1011 : 90 IC 289 : (1926) Cal 464.
4. *Miller* v. *Nasmyth's Patent Press Co. Ltd.,* (1882) 8 Cal. 312. **See also** *Chase* v. *Westmore,* (1816) 105 ER 1016 : 17 RR 301.
5. *Mohari Bibi* v. *Shyama Bibi,* (1903) 30 Cal. 937.
6. *Kalloomal Tapeshwari Prasad & Co.* v. *M/s. Rastriya Chemicals and Fertilizers Ltd.,* AIR 1990 All. 214 : 1990 All.WC 973.
7. (1838) 150 ER 1430 : 51 RR 568.

the artificer to whom the goods are delivered for the purpose of being worked up into form or the farrier by whose skill the animal is cured of a disease, or the horse-breaker by whose skill he is rendered manageable, have liens on the chattles in respect of their charges."

It would follow that a bailment for mere custody confers no lien, because no labour or skill is expended. Thus, a person receiving cattle to graze is not entitled to a lien for the stipulated charges.[1]

(3) There must be no contract to the contrary. Illustration (b) to the section is an instance of a contract to the contrary.

(4) The right is only to retain the particular goods bailed and in respect of which labour or skill has been employed. The right does not extend to a right to sell the goods.[2]

It would appear, that, under English law, the lien cannot be transferred to a sub contractor without the authority of the bailor.[3]

171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers.—Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

General lien.—As observed already, the lien dealt with in Sec. 170 relates to services done in respect of the very goods retained. The 'general lien', which is the subject matter of this section, is for a general balance of account. Section 171 operates in the absence of a contract to the contrary. The contract to the contrary may be express or implied.[4] It will be noticed that the present section positively enacts that this general lien is restricted to the classes of persons mentioned therein and that other persons are not entitled to a lien unless there be an express contract providing for it. In a Bombay case, In *re. The Bombay Saw Mills Co., Ltd.*,[5] the secretaries and treasurers of a company which went into liquidation claimed to be creditors of the company in respect of advances made to it by them, and being in possession of all the property of the company, they claimed a lien for the amounts advanced by them. The

1. *Jackson* v. *Cummins*, (1839) 151 ER 145 : 52 RR 737.
2. *Jafferbhoy* v. *Charlesworth*, (1893) 17 Bom. 520.
3. *Pennington* v. *Reliance Motor Works*, (1923) 1 KB 127.
4. *Lalchand* v. *Pyare*, 1971 MPLJ 672 : 1971 Jab. LJ 601.
5. (1889) 13 Bom. 314.

Court held they were not entitled to a lien. They could not claim a general lien, because they were not within the description of the several persons mentioned in Sec. 171: nor could they claim any of the particular liens dealt with in the Act.

Bankers.—In England, general liens of the kind contemplated in the section were first recognised in favour of bankers by the usages of trade, which crystallised into the Law Merchant. Where goods are pledged for any debt Sec. 174 contemplates that in the absence of a contract to the contrary the pawnee is under an obligation to return the goods, but Sec. 171 providing for Banker's lien which is a specific provision has an overriding effect on the general provision of Sec. 174 and as such Banker's lien is extended to the pledged goods also.[1] Where a customer deposited securities with a bank, the banker was given a general lien over all the securities, except in cases where the deposit was for a particular purpose or where there was an agreement or contract inconsistent with the lien. Thus, if securities are deposited for safekeeping or if a particular purpose is mentioned as the object of the deposit, the banker cannot claim a lien on the securities in respect of the general balance that may be due.[2] In *Mercantile Bank of India* v. *Rochaldas Gidumal,*[3] *where* money was handed over to a bank for transmission to another place and the bank had issued a demand draft, it was held the money must be deemed to be held by the bank under a special contract which excluded the banker's lien. But, where a customer already indebted to a bank, deposits jewels to secure a further debt, he is not entitled to pay the secured debt and ask for a return of the jewels, unless he can prove that the bank had agreed to give up its general lien.[4] When monies are held in one account and the payer in respect of those moneys owes the bank on another account, the banker's lien gives the bank a charge on all the monies of the payer in its hands, so that they may be transferred to whatever account the bank chooses, to set-off or liquidate the debt. But money in a trustee account at a bank cannot be used to set-off debts on a private account in the trustee's name.[5]

Where the contract between the customer (judgment-debtor) and a bank was that the bank was to furnish guarantee for a certain amount on the understanding that the bank was to hold the fixed deposit receipts given by

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1. *State Bank of India, Kanpur* v. *Deepak Malviya,* AIR 1996 All. 165, 168 : 1996 All.LJ 493.
2. *Brandao* v. *Barnett,* (1846) 8 ER 1622 : 69 RR 204; *Cuthbert* v. *Roberts, Lubbock & Co.,* (1909) 2 Ch. 226; **see** *Vijay Kumar* v. *Jullunder Body Builders,* AIR 1981 Delhi 126 : 1981 Rajdhani LR 229 : (1981) 83 Pun. LR 166. (Distinction between general lien and particular lien discussed).
3. (1926) Sind 225 : 21 SLR 385 : 95 IC 358.
4. *Kunhan Mayan* v. *Bank of Madras,* (1895) 19 Mad. 234 (236).
5. *Lloyds Bank* v. *Administrator-General, Burma,* (1934) 12 Ran. 25 : (1934) Ran. 66 **see also** *Re. London & Globe Finance Corporation* (1902) 2 Ch. 416.

the customer as security for the guarantee and the liability under the guarantee was discharged by the court, the bank cannot hold he fixed deposit receipts for the general balance due to the customer in the customer's overdraft account, when the endorsement of the bank manager on the reverse of the letter given by the customer in connection with the guarantee on the usual printed form indicated that the fixed deposit receipts were given in connection with the bank guarantee only. The letter had to be read with the endorsement and so read it would constitute a contract to the contrary to the general lien of the bank.[1] In the absence of any documents in the hands of bank or any of its claim against the depositor, there cannot be a banker's lien on a fixed deposit created by the depositor.[2]

To claim lien the banker must be functioning *qua* banker under Section 6 of the Banking Companies Act. A Bank acting as an ordinary foreman of a Chitty conducted by it cannot claim any banker's lien.[3]

EXTENT OF LIEN.—The lien extends generally over all securities deposited with the banker such as cheques or bills. It has been held that a lien may be had even over money deposited.[4] The banker cannot exercise the right of lien over fixed deposit of joint account in the name of the defaulter and his wife.[5] In *Union Bank of India* v. *K. V. Venugopalan,*[6] the Kerala High Court clarified as to when the doctrine of "Bankers Lien" would be pressed into service in these words. "Money lodged in the banks as fixed deposit is a loan to the Bank. The banker in connection with the "fixed deposits" is a debtor. Money put in fixed deposit therefore constitutes a debt in the hands of the banker and a debt cannot be a suitable subject for a lien, because a lien is a right recognised in a creditor to retain another man's property until the debt is paid. The bank being a debtor in respect of the money in fixed deposit had no right to press into service the doctrine of banker's lien and retain the money in fixed deposit.

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1. *Vijay Kumar* v. *M/s. Jullundur Body Builders,* AIR 1981 Delhi 126 : 1981 Rajdhani LR 229 : (1981) 83 Pun. LR 166.
2. *R.K. Agencies Ltd.* v. *Central Bank of India,* AIR 1992 Cal. 193 & 199 : 1991 (2) CHN 536.
3. *State Bank of Travancore* v. *Bhargavan,* 1969 Ker. LR 572.
4. *Mercantile Bank of India* v. *Rochaldas Gidumal,* (1926) Sind 225 : 21 SLR 385 : 95 IC 358 following *Misa* v. *Currie,* (1876) AC 554. **See also** *London Chartered Bank* v. *White,* (1879) 4 AC 413 See for full discussion *Krishna Kishore* v. *UCO Bank,* AIR 1982 Cal.62.
5. *State Bank of India* v. *Javed Akhtar Hussain,* AIR 1993 Bom. 87, 91 : 1993 (1) Civ.LJ. 563 : (1993) 1 Bank Cas. 76 : 1993 (1) Bom.CJ. 128.
6. AIR 1990 Ker. 223 : 1990 (1) Ker. LJ 183 : 1990 (1) Ker LT 262; **see also** for similar view *Halesowen Press Work and Assemblies Ltd* v. *West Minister Bank Ltd,* 1971 (1) QB 1; *Brahmayya & Co.* v. *K. P. Thangarelu Nadar,* AIR 1956 Mad. 570; *N. Mohammed Hussain Sahib* v. *Chartered Bank, Madras,* AIR 1965 Mad. 266; *Syndicate Bank* v. *Vijaya Kumar,* AIR 1992 SC 1066: (1992) 2 SCC 330 : 1992 (1) Bank CLR 547:1992 (1) BC 324 : 1992 (1) UJ 494 : 1992 (74) Comp. Cas 597.

A banker cannot extend the right of lien over the fixed deposits of the customer since fixed deposits are basically loan in the hand of the banker which have been handed over by the customer and accepted by the banker for a specified purpose.[1] Subject to the condition of acting in good faith, the banker will not be affected by the customer's infirmity of title,[2] where the securities are negotiable, though, where they are non-negotiable, he will have to take them subject to equities.[3] In the absence of a contract to the contrary, the banker is entitled to appropriate the fixed deposit amount of its customer towards loan amount by exercising the right of banker's lien.[4]

Where two fixed deposits were made by the petitioner company with the respondent bank with instructions that they were not to be encashed by its Executive Director and when the respondent bank permitted overdraft as against the security of fixed deposits in view of an agreement between the Managing Director and the Executive Director of the company to borrow from the respondent bank, the petitioner company cannot disown the liability and the respondent bank is entitled to adjust the liability of the overdraft from the fixed deposits money.[5]

Application of Sec. 171 of the Contract Act should be properly confined to cases where the papers securities and other goods belonging to a debtor are kept with the bank for creating relationship of bailor and bailee.[6]

The distinction between a banker's lien and the banker's right to set-off is that a lien is confined to securities and property in banks custody where as set-off is in relation to money and may arise from a contract or from mercantile usage or by operation of law.[7]

Where the respondent Bank issued performance bank guarantees on securities furnished by the petitioner company and after the completion of the performance of the contract the bank guarantees were returned, the respondent bank has no legal right to exercise lien over the securities on the ground that one of the Directors of petitioner company also stood as guarantor in a transaction relating to another company of which he is also a Director

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1. *Tilendranath Mahantha* v. *United Bank of India,* AIR 2002 Gau 1, 2.
2. *Bank of New South Wales* v. *Goulburn Butter Factory,* (1902) AC 543; (Cf.) *Solomon* v. *Bank of England,* (1810) 104 ER 319 : 12 RR 341.
3. *London & County Bank* v. *Ratcliff,* (1881) 6 AC 722.
4. *K.S. Nagalambika* v. *Corporation Bank, Virajpet,* AIR 2000 Kant. 201, 202.
5. *Mahajan Chit Fund and Finance (P) Ltd.* v. *Punjab and Sind Bank, Hyderabad,* 2003 (5) ALD 75.
6. *State Bank of India* v. *M.P. Iron & Steel Works (P) Ltd., Raipur,* AIR 1998 MP 93.
7. *Indian Bank, Rasipuram* v. *Sri Annapoorna Finance,* AIR 2002 Mad. 180 : 2002 (1) Arbi. LR 315 : 2002 Bank CLR 799 : 2002 (2) Bank Cas 340 : 2002 (1) Mad. LJ 125.

where the recovery proceedings were pending before Debt Recovery Tribunal in the absence of any clause in the contract to that effect.[1]

Where the husband and wife have opened a fixed deposit containing 'either or survivor clause', the fixed deposit cannot be pledged by one account holder without the consent of the other and further the bank has no right to set-off its claim as against one of the account holders of the joint fixed deposit. The Supreme Court of India in this regard observed :

> "A fixed deposit in the joint names of two persons is nothing but a joint account which, as the name itself suggests, is repayable on the expiration of the agreed period. The fixed deposit receipt is merely a written acknowledgement by the Bank that it holds a certain sum to the use of its customers. The Bank is thus a debtor to the account holders in respect of the amount deposited – a debt, which is repayable by the Bank to account holders with interest on the expiry of an agreed period. An 'either or survivor' clause in such an account means that the amount payable by the Bank on maturity of the fixed deposit may be paid to either of the account holders by the Bank in order to obtain a valid discharge. In other words under a tripartite agreement between the joint account holders *inter se* and the Bank, the Bank may, on maturity, make payment only to either of them. The tripartite agreement cannot be bilaterally modified by one of the joint account holders for example by pledging the account with any third party including the Bank itself in its capacity of creditor, so that the amount becomes payable to such third party, without the consent of the joint account holder".[2]

Where a company borrowed loan from the bank and defaulted, exercise of right of set off from the plaintiff's current account to the loan account by the bank in pursuance of the contract with the plaintiff cannot be denied on the ground that transfer of the amounts from current account will result in the negation of the activities of publication business.[3] Where the appellant bank has exercised the right of general lien over the individual bank account of the respondent who was the Managing Director of a company and given a guarantee in respect of the loan borrowed by the company, the appellant by virtue of being a banker is conferred with a right of general lien under Sec. 171 and the bank account of the respondent is subject to the general lien.[4]

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1. *Vijaya Bank* v. *Naveen Mechanised Construction (P) Ltd.*, AIR 2004 Kant 199.
2. *Anumati* v. *Punjab National Bank*, AIR 2005 SC 29 : (2004) 8 SCC 498.
3. *Canara Bank* v. *Tharaka Prabha Publishers (Pvt.) Ltd.*, AIR 1991 AP 258.
4. *Syndicate Bank* v. *Wilfred D'souza*, AIR 2003 Karn 337 : (2003) 6 ILD 274 (Karn).

A bank cannot exercise the right of lien over the money belonging to one company in respect of the money due from another company merely on the ground that the Directors in the two companies are common.[1]

A bank cannot exercise the right of general lien over the amounts deposited in the saving bank account as against any outstanding loan in the absence of the deposits in saving account being offered as security for the loan.[2]

Where the petitioner pledging the gold ornaments with the respondent bank has cleared the outstanding cash credit loan borrowed by the principal debtor, the refusal on the part of the respondent bank to return the gold ornaments on the ground that he stood as guarantor for the loan borrowed by another debtor is not justified.[3]

Where the owner of a boat obtained a loan from the appellant bank by hypothecating the same and subsequently sold it to claimant, the appellant bank on the discharge of loan by the claimant, cannot exercise the right of general lien in respect of the loan obtained by the owner from a different branch of the same bank.[4]

In the case of a joint deposit, the bank cannot credit the amount due on it to a debt owing by one only of the joint depositors.[5]

The defendant banker who agreed to be tenant of the plaintiff's property has no right to exercise banker's lien over the property in respect of outstanding dues from the plaintiff, since there is no contract between them creating the relationship of bailor and bailee.[6]

It may be added that, in *Official Assignee, Madras* v. *Ramaswami Chetty*,[7] it was recognized that Nattukottai Chetties are bankers within the meaning of the section, and can claim the lien provided by it.

In *C.R. Narasihma Setty* v. *Canara Bank*,[8] the Karnataka High Court held that provisions of Sec. 171 apply only in the absence of an express contract to

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1. *Vijaya Bank* v. *Naveen Mechanised Construction (P) Ltd.*, 2004 (1) CTLJ 598 (Karn) (DB).
2. *Narendra Singh* v. *The State of Bihar*, 2002 (1) Civil LJ 531 (Pat).
3. *Alekha Sahoo* v. *Puri Urban Co-operative Bank Ltd.*, AIR 2004 Ori 143 : 2004 (2) CTLJ 357 (Ori) (DB) : 2004 (3) CCC 382 (Ori).
4. *Syndicate Bank* v. *Devendera Karkera*, AIR 1994 Kant. 1 : 1994 (3) Cur. CC 457.
5. *Simla Banking & Industrial Co.* v. *Bhagwan Kuar*, (1928) Lah 316 : 111 IC 554.
6. *Central Bank of India* v. *Keshaorao Narayanrao Patil*, 2005 (1) CCC 504 (Bom).
7. (1920) 43 Mad. 747 : 12 LW 89 : 59 IC 475 : 39 MLJ 135.
8. 1990 (1) Kar. LJ 81,

the contrary. An express contract between the parties creating a lien or security would exclude operation of the statutory general lien under Sec. 171 of the Contract Act.

Factor.—In *Stevens* v. *Biller*,[1] Cotton, L.J., described a factor as "an agent entrusted with the possession of goods for the purpose of sale". A factor has a lien over the goods entrusted, for money advanced. But he cannot sell the goods, for recovery of his dues, without a special agreement to that effect with the principal.[2]

EXTENT AND SCOPE OF FACTOR'S LIEN.—It extends to all debts due to him in his character as factor.[3] The factor can claim no lien over goods given to him otherwise than in his character as factor,[4] or over goods given to him for a specific purpose.[5] Nor can he claim the lien unless he gets possession of the goods.[6]

Wharfinger.—In the case of a wharfinger the lien is available against the owner of goods only and not against subsequent buyers of the goods also. In *Miller* v. *Nasmyth's Patent Press Co.*,[7] the owner of a screw house with a wharf as an accessory was held not to be a wharfinger.

In *Board of Trustees of the Port of Bombay* v. *Sriyansh Knitters*,[8] the question whether the right of general lien of a wharfinger is limited only to cases of contractual bailment or also extends to possessory bailment has been raised but left open.

Attorney.—Under the English law, a solicitor has three kinds of liens to protect his rights to recover his costs from his client (1) a passive or retaining lien, (2) a common law lien on property recovered or preserved by his efforts, (3) a statutory lien enforceable by a charging order.[9] In Indian law, there is no provision corresponding to the third kind of lien.

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1. (1883) 25 Ch D 31.
2. *Jafferbhoy* v. *Charlesworth*, (1893) 17 Bom. 520; *Emperor* v. *Parakh*, (1926) 1 Luck. 133: 92 IC 744 : (1926) Oudh 202.
3. *Hammonds* v. *Barclay*, (1802) 102 ER 356; *Drinkwater* v. *Goodwin*, (1775) 98 ER 1070.
4. *Dixon* v. *Stansfield*, (1850) 138 ER 160 : 84 RR 631.
5. *Spalding* v. *Ruding*, (1843) 63 ER 120: 49 RR 871.
6. *Bryans* v. *Nix*, (1839) 150 ER 1634 : 51 RR 829; *Kinloch* v. *Craig*, (1790) 100 ER 858 : 1 RR 664.
7. (1882) 8 Cal. 312; **see** as to rights of *wharfinger, Barry* v. *Longmore* (1840) 113 ER 956: 54 RR 654; *Richardson* v. *Goss*, (1802) 127 ER 65 : 6 RR 727; *Board of Trustees, Bombay Port* v. *Sriyansh Knitters*, AIR 1983 Bom. 88. (General lien of a wharfinger and the receipt isued by Port u/s 42(2) of the Major *Port Trusts Act*, 1963 considered).
8. AIR 1983 Bom. 88.
9. *Damodar* v. *Morgan*, (1933) 60 Cal. 1442 : (1934) Cal. 341 As to English cases, **see** *Re. Taylor Stileman & Underwood* (1891) 1 Ch. 590. *Sheffield* v. *Eden*, (1878) 10 Ch. D. 291. **See also** *Bhijili Saheb* v. *Dadhamia Balambai*, (1936) Mad. 48 : (1936) MWN 73.

In *Tyabji Dayabhai & Co.* v. *Jetha Deoji & Co.*,[1] a solicitor was held to have a lien over property recovered or the proceeds of any judgment obtained for the client. Any attachment of a decree by any creditor of the decree-holder will be subject to the lien, if any, of the solicitor by whose efforts the decree was obtained. But, as pointed out in *Narayandas* v. *Narayandas*[2] and *Damodar* v. *Morgan*[3] the lien is a particular and not a general lien and is restricted to costs incurred in the recovery of the property or money under that particular decree. But, in addition to the particular or active lien which the attorney has over monies recovered in the suit, the attorney has a general or passive or retaining lien upon all moveables, deeds, documents etc., that come into his hands, unless they come for a specific purpose inconsistent with the right of retainer.[4] This passive lien is not effected or curtailed by this section.[5]

The lien continues, though the client may have discharged the attorney,[5] but not if the attorney discharges himself.[6] Where some other security is given, the lien is deemed to be waived. "The lien is gone by the effect of the intention to substitute the special contract for the implied one."[7]

Where it is expressly stipulated that the attorney will have no lien in respect of a particular document, Section 171 will not be operative.[8]

Advocate's lien on client's files—Litigation files entrusted to an advocate by the client in the course of his profession cannot be equated to the goods as referred to in Sec. 171 and consequently does not create the relationship of pledgor and pledgee between them entitling the advocate to exercise the right of lien over such files in respect of fee due to him.[9]

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1. (1927) 51 Bom. 155 : 29 Bom. LR 1196 : 105 IC 383 : (1927) Bom. 542. **See also** *Ghulam Mohideen* v. *Md. Oomer*, (1931) 60 MLJ 133 : 33 LW 430 : (1931) Mad. 183 : 131 IC 158; *Kumara Krishna* v. *Hari Narayan*, (1916) 43 Cal. 676; *Harnandroy* v. *Gootiram*, (1919) 46 Cal. 1070, (Solicitor's lien enforced by directing the opposite party to pay the solicitor direct); *In Re Ibrahim Ahmed*, (1930) 32 Bom. LR 1076 : (1930) Bom. 516; (Cf.) *Bhupendra* v. *Sassoon*, (1916) 43 Cal. 932.
2. (1932) 34 Bom. LR 703.
3. (1933) 60 Cal. 1442 : (1934) Cal. 341.
4. **See** Per *Rankin, J., in Narendra Lal* v. *Tarubala Dasi*, (1921) 48 Cal 817 : 66 IC 209 : 25 CWN 800: (1921) Cal. 67; (Lien enforceable though right of suit may be barred).
5. *Bai Kessarbai* v. *Naranji Walji*, (1880) 4 Bom. 353.
6. *Re : Mc Corkindala*, (1880) 6 Cal. 1; **see also** *Re : Moss*, (1866) 2 Eq. 345; (CF) *Atool Chandra* v. *Shoshee Bhushan*, (1904) 6 CWN 215.
7. **See** *Cowell* v. *Simpson*, (1809) 33 ER 989 : 10 RR 181; *Stevenson* v. *Blakelock*, (1813) 105 ER 200 : 14 RR 525; *Re : Douglas Norman & Co.*, (1898) 1 Ch. 199.
8. *Lalchand* v. *Pyare*, 1971 MPLJ 672 : 1971 Jab. LJ 601.
9. *R.D. Saxena* v. *Balarama Prasad Sharma*, AIR 2000 SC 2912, 2914 (DB) : (2000) 7 SCC 264 : 2000 (5) Supreme 582 : 2000 (3) SCJ 299.

Pleader.—The position of a pleader is different from that of an attorney and he has no general lien and cannot retain moneys realised in one suit against dues in another.[1]

Other cases.—The enumeration of liens in the Act is not exhaustive. Thus an arbitrator has been allowed a lien over his award for payment of his charges.

BAILMENTS OF PLEDGES

172. "Pledge" "Pawnor" and "pawnee" defined.—The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee".

Pledge.—This and the succeeding sections deal with a special class of bailment, where goods are bailed as security for payment of a debt or performance of a promise.[2] **[733]**

The three essential requisites of a pledge are: (1) there must be a bailment of goods, *i.e.*, delivery of goods, (2) the bailment must be by way of security, and (3) the security must be for the payment of a debt or the performance of a promise.[3]

As a pledge is one species of bailment, delivery is one of its essential requisites.[4] In this respect a pledge differs from a mortgage. In *Halliday* v. *Holgate*,[5] *Willes*, J., said:

> "There are three kinds of security: the first, a simple lien; the second, a mortgage passing the property out and out; the third, a security intermediate between a lien and mortgage, namely a pledge, where by contract, a deposit of goods is made security for a debt and the right to the property vests in the pledgee so far as is necessary to secure the debt."

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1. *Narayanswami* v. *Chellapalli Hanumanulu*, (1911) 33 Mad. 255; *Muthu Krishna Yachendra* v. *W.H. Nurse*, (1921) 44 Mad. 978 : 41 MLJ 213; 69 IC 695 : (1921) Mad. 320; *Krishnamachariar* v. *Official Assignee of Madras*, (1932) 55 Mad. 455 : 62 MLJ 185 : 137 IC 571 : (1932) Mad. 256.
2. For several definitions of the word, **see** *Donald* v. *Suckling*, (1866) 1 QB 585; *S.B.I.* v. *Quality Bread Factory, Batala Batala*, AIR 1983 P & H 244. (Difference between key loan and open credit systems pointed out).
3. *Shatzadi Begum Saheba* v. *Girdharilal Sanghi*, AIR 1976 AP 273 : (1976) 1 APLJ 85 : (1976) An LT 90 : (1976) 1 An. WR 410. **See** *Lalian Prasad* v. *Dahmat Ali*, (1967) 2 SCR 233.
4. *Ex. parte Parsons*, (1886) 16 QBD 532. (A mere licence to take possession is not a pledge). *Simla Banking Co.* v. *M/s. Pritaas*, AIR 1960 Punjab 42; *Ideal Bank Ltd.* v. *Pride of India Pictures Ltd.*, AIR 1983 Delhi 546.
5. (1868) 3 Ex. 290. **See also** *Jyoti Prakash* v. *Mukti Prakash*, (1918) 22 CWN 297 : 33 IC 891; **see also** *Shatzadi Begum* v. *Girdharilal*, AIR 1976 AP 273.

Thus the pledgee has a special property in the goods pledged by virtue of the fact of possession.[1] It is delivery of possession, which distinguishes a pledge from a hypothecation.

Where an agreement provided that the commission agent shall be in possession of the goods purchased and dispose of the same in accordance with the directions of the principal, it was held that the agent's possession was not that of a pledgee of goods.[2]

Where specific movable and immovable properties are given possession by one party to the other under a contract and the right of realisation of the dues is not confined to the specific movable properties of which possession has been given but extends to other assets also, the transaction does not amount to a pledge.[3]

Pledge without delivery of possession.—In English by the Bills of Sale Act, provision has been made for mortgage or hypothecation of movables without delivery of possession. The Rangoon High Court has held that an oral or written hypothecation of movables is permissible under Indian law;[4] and the validity of hypothecation of movables, (unaccompanied by delivery) has been reaffirmed by the Calcutta High Court.[5]

As possession is not delivery, the present and the succeeding sections will not be applicable to such cases. Chief among such pledges are those where the subject matter has not yet come into existence or consists of floating charges (*e.g.,*) under the Companies Act.

Pledge and hypothecation distinguished.—In the case of pledged goods the goods are stored in the godown under the lock and key of the bank under the bank's supervision. Thus the pledged goods remain under the physical possession of the bank and no withdrawals or addition of the stock in the godown are permissible without the bank's permission.

The position with regard to the hypothecated goods is, however, different because the goods are strictly speaking not under the lock and key of the bank

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1. *Co-operative Hindustan Bank* v. *Surendra Nath De,* (1932) 59 Cal. 667 : 36 CWN 263 : 138 IC 852 : (1932) Cal. 524; *Bank of Bihar* v. *State of Bihar,* (1971) Supp. SCR 294.
2. *Ram Prasad* v. *State of Madhya Pradesh,* AIR 1970 SC 1818 : (1970) 2 SCR 677.
3. *Official Liquidator* v. *Swarup Cold Storage,* AIR 1976 All. 88.
4. *Moosa Abdul Habid* v. *Maung Tun,* (1931) 9 Ran. 182 : 131 IC 723 : (1931) Ran. 201; *State Bank of India* v. *Quality Bread Factory,* AIR 1983 P & H 244.
5. *Co-operative Hindustan Bank* v. *Surendra Nath De,* (1932) 59 Cal. 667 : 36 CWN 263 : 138 IC 852 : (1932) Cal 524; *Haripada* v. *Anath Nath,* (1918) 22 CWN 758; *Damodar* v. *Atma Ram,* (1906) 8 Bom. LR 344 (Boat hypothecated without possession); (Cf.) In the matter of *Ambrose Summers,* (1896) 23 Cal. 592; *Punithavelu* v. *Bhashyam,* (1901) 25 Mad. 406.

but allowed to be kept at the premises of the borrower without any lock and key of the bank as such but are supposed to be under the constructive possession of the bank by virtue of deed of hypothecation under which the borrower is obliged to submit regular returns to the bank indicating the increase and decrease of the value of the said goods to enable the bank from time to time to determine the drawing of the borrower with regard to it. While in the case of pledge the goods are in actual possession of the bank in hypothecation they are in actual possession of the borrower subject to the restrictions mentioned above.

Where the respondent borrowing money hypothecated the car as security and agreed with the petitioner lender authorizing him of the repossession of the vehicle, the insertion of the clause relating to such authorization is unconscionable and void.[1]

Thus the distinction between pledge and hypothecation is, that in case of hypothecation the hypothecator can be in possession of the goods hypothecated and enjoy the same without causing any damage to the rights of the hypothecatee whereas in the case of pledge the possession of moveables will be transferred to the pawnee and he will not be able to enjoy the same as the possession has already been parted[2]

The petitioner lending money to the respondent for purchase of car on its hypothecation cannot take away the possession from the respondent borrower without his consent or knowledge in the absence of court's intervention, but however he can do so through the court or to serve notice on the borrower to enforce the security of hypothecated property.[3]

Pledge of future goods.—The Calcutta High Court held in *Low Co.* v. *Pulinbihari Lal,*[4] that a hypothecation of movable to be subsequently acquired is valid, although such a transaction will not be governed by the Contract Act or the Transfer of Property Act. Where a question of priority arises between a prior hypothecatee and a subsequent pledgee, it is incumbent on the former to prove that the latter had notice of the hypothecation.[5]

Delivery.—The delivery may be actual or constructive (*e.g.,*) by delivery of a key or delivery order.[6] Again the delivery and the loan need not

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1. *Tarun Bhargava* v. *State of Haryana,* AIR 2003 P&H 98, 112 : 2003 (1) Civ. CR 758 (P&H).
2. *State Bank of India* v. *S. B. Shah Ali,* AIR 1995 AP 134, 138.
3. *Tarun Bhargava* v. *State of Haryana,* AIR 2003 P&H 98, 105 : 2003 (1) Civ. CR 758 (P&H).
4. (1932) 59 Cal. 1372; **see also** *Misri Lal* v. *Mozhar Hussain,* (1886) 13 Cal. 262 (Mortgage of future indigo crop is valid).
5. *Moosa Abdul* v. *Maung Tun,* (1931) 9 Ran. 182 : 131 IC 723 : (1931) Ran. 201; (Cf.) *Chartered Bank of India* v. *Imperial Bank,* (1933) 60 Cal. 262 : (1933) Cal. 366.
6. *Jyoti Prakash* v. *Mukti Prakash,* (1918) 22 CWN 297 : 33 IC 891.

be simultaneous.[1] The fact that the pledgee re-delivers the goods to the pledgor for certain purposes does not terminate the pledge;[2] but in such cases, the pledgee will be bound by any fraudulent dealing by the pawnor.[3]

Subject-matter of pledge.—Generally speaking any kind of goods or documents may be pledged. A document of title could be pledged by transfer of the same.[4] A railway receipt is document of title and a pledge of it operates as a pledge of the goods.[5] Government securities cannot be pledged except by endorsement by the owner.[6] It has been held that title deeds of property are not 'goods' that may be pledged under Sec. 172 of the Act.[6] In *Tejpal* v. *Ernest David,*[7] the Privy Council ruled that when monies are advanced to importers for the purpose of their trade and the goods are placed in the godown of the lenders, it would be a likely course of business that the goods should be regarded as security for the advances. Where a partnership firm pledged the oil seeds stacked in a godown not belonging to him with the defendant bank and obtained an injunction order from the court against the removal of the goods, the defendant bank being the pledgee is liable to pay the rent to the plaintiff owner of the goods for the space occupied by the goods.[8]

173. Pawnee's right of retainer.—The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest, of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

Right to retain goods pledged.—The pawnee may retain the goods pledged till the debt and interest, if any and necessary expenses incurred by him are paid. But if he refuses a proper tender, he becomes a wrongdoer, and the pawnor may recover the goods.[9] **[737]** Where the pawnee bank was not in a position to redeliver the gold ornaments on the debt being discharged on

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1. *Co-operative Hindustan Bank* v. *Surendra Nath De,* (1932) 59 Cal. 667 : (1932) Cal. 524 : 138 IC 852 : 36 CWN 263; *Hilton* v. *Tucker,* (1888) 39 Ch. D 669.
2. *North Western Bank* v. *Poynter,* (1895) AC 56.
3. *Babcock* v. *Lawson,* (1880) 5 QBD 284.
4. *Banking Syndicate Ltd. Udipi* v. *R.G. Prabhu,* AIR 1968 Mys. 133 : (1967) 1 Mys. LJ 490.
5. *Mercantile Bank of India* v. *Central Bank of India,* (1938) 65 IA 75 : ILR (1938) Mad. 360: 42 CWN 321 : (1938) ALJ 273 : 19 Pat LT 147 : 40 Bom. LR 713 : 66 CLJ 510 : 172 IC 745: 47 LW 329 : (1938) MWN 552 : (1938) PC 52 : (1938) 1 MLJ 268.
6. *Jyoti Prakash* v. *Mukti Prakash,* (1918) 22 CWN 297 : 33 IC 891; *Neckran Dobay* v. *Bank of Bengal,* (1981) 19 Cal. 322 (PC).
7. (1928) 28 LW 204 : 111 IC 240 : 32 CWN 1146 : (1928) PC 219.
8. *Bank of India* v. *Lakshimani Dass,* AIR 2000 SC 1172, 1179 (DB) : 2000 (3) SCC 640 : 2000 (2) Supreme 299 : 2000 (102) CC 350 : 2000 (1) CLT 386 (SC).
9. *Bank of New SouthWales* v. *O'Connor* (1889) 14 AC 273.

account of they being seized by police, the bank cannot claim any interest from the date on which the pawnor wanted release of the goods pledged by satisfying the debt.[1]

Where the respondent purchasing a car under hire-purchase scheme from the appellant finance company and alleged to have cleared the loan amount by paying all the installments, seizure of the vehicle by the appellant without furnishing the details of the installments due and serving a notice amounts to breach of contract and as such the trial courts order in awarding damages of Rs. 50,000/- is upheld.[2]

174. Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances.—The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

Right re: subsequent advances.—Ordinarily, the pawnee cannot claim to retain the goods pledged towards any other debt that may be owing to him. But he may be entitled to do so, if there is a contract to that effect. And in cases where the pawnee makes further advances to the pawnor, the law will presume such a contract. This presumption cannot, be made where the subsequent advances are made on pledge of articles other than those originally given.[3] [738]

175. Pawnee's right as to extraordinary expenses incurred.—The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

Right to extraordinary expenses.—This section gives the pawnee the right to recover extraordinary expenses incurred by him for the preservation of the goods pledged. It will be noticed that only a *right of action* is provided. There is *no lien* as in the case of necessary expenses. [738]

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1. *Aratibala Mohanty* v. *State Bank of India*, AIR 1991 Orissa 260, 263.
2. *Muthoot Leasing & Finance Ltd.* v. *M/s. Vasudeva Publicity Service*, AIR 2003 Delhi 372, 374 (DB).
3. *Cowasji* v. *Official Assignee*, (1928) 30 Bom. LR 1310 : 115 IC 389 : (1928) Bom. 545.

176. Pawnee's right where pawnor makes default.—If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

Pawnee's right to sue.—In default of payment at the time fixed, the pawnee is at liberty to file a suit on the debt, retaining the pledged goods as security or to sell the goods after reasonable notice to the pawnor. In the latter case, the pawnor will be liable for any deficit, or entitled to any surplus, as the case may be on the sale.[1] A pawnee has no right of foreclosure since he has no legal title to the goods pledged.[2]

On the default of the pawnor, the pawnee having two avenues either to bring a suit or to sell the goods pledged after giving a reasonable notice to the pawnor, cannot be prevented to resort to the second remedy merely because there was a period fixed for filing the suit since such time limit will not extend to the second remedy.[3]

The pawnee has discretion either to bring a suit against the pawnor to recover the debt while retaining the pledged goods as collateral security or in the alternative to sell the goods by giving a reasonable notice to the pawnor and the pawnor cannot compel the pawnee to sell the goods.[4]

When the pawnor commits default, the pawnee has the dual right to sue the defaulting pawnor as well as the right to sell the pawned property with the intervention of the court. [5]

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1. For the English law as to pawnee's rights, **see** *Jones* v. *Marshall,* (1889) 24 QBD 269 : *Re, Morritt,* (1886) 18 QBD 222; *Carte* v. *Wake,* (1877) 4 Ch. D. 605, **see** *Prabhat Bank* v. *Babu Ram,* AIR 1966 All. 134 (Agreement between Bank and the customer to sell the securities without notice was held to be void u/s 23).
2. *Balkishan Gupta* v. *Swadeshi Polytex Ltd.,* (1985) 2 LLJ 1 (SC).
3. *K. M. Hidayathullah* v. *Bank of India,* AIR 2001 Mad. 251,252.
4. *Bank of Maharashtra* v. *M/s. Racmann Auto (P) Ltd.,* AIR 1991 Delhi 278, 280.
5. *Hindustan Development Corporation* v. *Modiluft Limited.,* 2006 (1) CTLJ 356 (Cal) (DB).

Where no time is originally stipulated, the default will date from the times fixed for payment in the pawnee's notice of demand.[1]

Where the appellant bank advanced loan to the respondent sugar manufacturing company as against the pledging of the stock of sugar, the appellant bank shall have priority over the claim of the Cane Commissioner in respect of payments to the cane growers and the workmen of the company.[2]

Right to sell.—In case of pledge, the creditor has three rights, which are concurrent, (1) a right to proceed against the property, (2) a right to proceed against the debtor personally and (3) a right of private sale of the goods pledged without reference to court.[3] It might, in some instances, happen that may be barred.[4] Where possession is with the pledgee, he cannot maintain a suit for recovery of the debt as well as to retain the pledged property.[5] If the pawnee sells he must appropriate the proceeds of the sale towards the pawnor's debt, for the sale proceeds are the pawnee's monies to be so applied and the pawnee must pay to the pawnor any surplus after satisfying the debt. Under Art. 19 of the Limitation Act, a suit on the loan or for deficit after sale has to be brought within three years of the loan,[6] but a suit for sale is governed by Art. 113, and the limitation is seven years form the date of the pledge. Where the pawnor defaults, the pawnee has discretionary right to sell the goods pawned to realise the loan amount, but it is not obligatory on him to exercise such discretionary power and his right to bring a suit is not lost. Merely because the bank with whom the FDRs are pledged as collateral security has not adjusted the instalment money becoming due every month in respect of FDRs, the right to sue for recovering the loan is not lost.[7]

Where the respondent delivered certain precious stones to the appellant Bank of Rajasthan Ltd., towards the security of its liability of Rs. 58.07 lakhs

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1. *Alliance Bank of Simla* v. *Ghamandi Lal Jaini Lal,* (1927) 8 Lah. 373 : 101 IC 725 : (1927) Lah. 408.
2. *Central Bank of India* v. *Siriguppa Sugars and Chemicals Ltd.,* AIR 2007 SC 2804 : 2007 (9) SCALE 641 (reversing the Karnataka High Court Judgment).
3. *Mahalinga Nadar* v. *Ganapathi Subbien,* (1902) 27 Mad. 528 (FB); *Nim Chand* v. *Jagabandhu,* (1894) 22 Cal. 21 : *Debidin* v. *Gaya Pershad,* (1927) Nag. 346 : 104 IC 641; *Jyoti Prakash* v. *Mukti Prakash,* (1918) 22 CWN 297 : 33 IC 891.
4. *Gulam Hussein* v. *Clara D'Souza,* (1929) 53 Bom. 819 (827) : 31 Bom. LR 988 : 120 IC 834 : (1929) Bom. 471; *Mahalinga Nadar* v. *Ganapatni Subbien,* (1902) 27 Mad. 528 (FB).
5. *Lallan Prasad* v. *Rahmat Ali,* AIR 1967 SC 1322 : (1967) 2 SCR 233 ; **see also** *State Bank of India* v. *Quality Bread Factory Batala,* AIR 1983 P & H 244; *Trustee of the Property of Ellis & Co.* v. *Dixon Johnson* 1925 AC 489.
6. *Debidin* v. *Gaya Pershad,* (1927) Nag. 346 : 104 IC 641; *Yellappa* v. *Desayappa,* (1906) 30 Bom. 218; *Saiyid Ali* v. *Debi Prasad,* (1906) 24 All. 251.
7. *State Bank of India* v. *Neela Ashok Naik,* AIR 2000 Bom 151, 154 : 2000 (1) Cur. CC 258 : 2000 (1) Civ. LJ 253 : 2000 (1) Bank CLR 27 : 2000 (2) Bom. CR 719 : 2000 (1) Mah. LJ 801.

and also agreed that the appellant can sell them if the respondents failed to sell within the period of six months, this can be considered as a right of the pledgee under Sec. 176 but the goods cannot be said to be delivered in full and final settlement.[1]

NOTICE OF SALE.—The power of sale is conferred on the pawnee to be exercised for his benefit, according to his discretion, for the realisation of the debt. In order to exercise the right, all that he need do is to give reasonable notice of the intended sale.[2] The notice must refer to the debt for which the goods were pledged and for recovering which the goods are to be sold.[3] Mere intimation that "failing payment by certain date we shall arrange for sale" is not notice and has been held to be insufficient.[4] The object of giving notice is simply to give the pawnor an opportunity to redeem for the right of redemption can be exercised till the moment of sale. The right to sell is perfected with the giving of the notice of sale, and it is open to the pawnee to sell at any time thereafter.[5] It is not incumbent on the expiry of the time fixed in the notice of sale. The pawnee in; such cases is not put to exercise his judgment at his peril as to what is the proper and reasonable time for him to sell.[6]

Where the pawnor failed to redeem the silver articles pledged by him within the agreed period, the pawnee after giving a notice of sale to the pawnor has a right to put the goods on sale.[7]

The defendant bank with whom certain shares were pledged towards the cash credit loan advanced by it were sold by it without giving any notice to the plaintiff pledger exposes want of *bonafide* on the part of the defendant bank and also retaining the balance of shares certificate even after discharge of liability is unwarranted.[8]

PURCHASE BY PAWNEE.—Though a pawnee is not prevented from buying the pledged property himself in a *bona fide* sale, yet, if, in effect, he

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1. *Bank of Rajasthan Ltd.* v. *Hajarimal Milap C. Surana,* 2006 (1) CTLJ 414 (SC).
2. *Allahabad Bank* v. *Firm of Madan Mohan,* (1917) 39 IC 169 : 14 PLR 1917; *Makhan Lal* v. *Ghulam Hussain,* (1933) Lah. 536 : 146 IC 194; *Ma Me Shin* v. *R.M.R.N. Chettiyar Firm,* (1933) Ran. 76. (Sale of jewels pledged without notice).
3. *Cooverji Umersey* v. *Mawji Vaghji,* (1936) 38 Bom. LR 982. **See** *Prabhat Bank* v. *Babu Ram,* AIR 1966 All. 134.
4. *Co-operative Hindustan Bank* v. *Surendra Nath De,* (1932) 59 Cal. 667 : 36 CWN 263 : 138 IC 852 : (1932) Cal. 524.
5. *Kesarimal* v. *Suryanarayana Murthy,* (1926) Mad. 1012 : 114 IC 820; (Cf.) *Kunj Behari* v. *Bhargava Commercial Bank,* (1918) 40 All. 522 : 16 ALJ 390 : 45 IC 462 (Information of actual date of sale not necessary).
6. *Mannargudy Chamapaka Rice Mill* v. *Ramaswami Pillai,* (1929) MWN 167.
7. *Sunderlal Saraf* v. *Subhas Chand Jain,* AIR 2006 MP 35 : 2006 AIHC 1323 (MP) : 2005 (4) CivLJ 563 : 2005 (3) MPLJ 73 : 2005 (3) JabLJ 353.
8. *Dr. K.V. Pathi* v. *Lakshmivilas Bank, Malkajgiri,* 2007 (4) ALD 612.

takes over the pledged property himself without the pledgor's authority, the pawnee will be guilty of conversion. In *Neckram* v. *Bank of Bengal,*[1] the Judicial Committee said that the effect of a sale to himself by the pawnee contract of pledge so as to entitle the pawnor to recover the article without payment of the debt. This ruling has been followed in a Madras case.[2] It was also observed in the last mentioned case that the pawnor will be entitled to damages in case of an improper sale.[3]

EFFECT OF IMPROPER SALE.—The pawnee is liable for conversion but the sale is not liable to be set aside.[4]

In *Gurbax Rai* v. *Punjab National Bank,*[5] a cash credit account was opened in the name of the firm with the branch of the Punjab National Bank and the firm had pledged certain goods of the firm with the bank as security for availing of cash credit facility. Goods pledged were destroyed by fire and the bank recovered the claim from the insurer; but no credit was given to the cash credit account for the amount received from the insurers. The court held that as the goods were destroyed in fire and the amount was recovered from the insurer that would be substitution of the pledged goods and to that extent it would be payment in case credit account. The bank cannot be absolved from accounting for the value of the pledged goods to the pledgor *i.e.*, the firm as the goods were lost or destroyed on account of the negligence of the pledgee, the bank.

177. Defaulting pawnor's right to redeem.—If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

Right to redeem.—This section gives a right to the defaulting pawnor to redeem the goods before actual sale; but in such a case, he must bear any expenses that the other party might have incurred.

Under Art. 70 of the Limitation Act, 1968, the pawnor may redeem at any time within 33 years of the pledge from the date of refusal after removal.

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1. (1891) 19 Cal. 322 (PC).
2. *Ramaswamy* v. *Palaniappa,* (1930) Mad. 364 : 30 LW 898 : 122 IC 37.
3. *Official Assignee, Bombay* v. *Madholal Sindhu,* AIR 1947 Bom. 217; *Khadija* v. *P.K. Mohammed (P) Ltd.,* (1985) 58 Comp. Cas. 543.
4. *Cooverji Umersey* v. *Mawji Vaghji,* (1936) 38 Bom. LR 982.
5. (1984) 3 SCC 96.

In *Ramaswamy* v. *Palaniappa,*[1] the Court said that in a suit for redemption of a pledge without previous tender, the plaintiff will be deprived of his cost, in case it is found that the pledgee was ready and willing to deliver up the property on payment. It was held in a Madras case[2] that in suit for redemption of jewels pledged the pawnor was not able to return the jewels the suit had to be decreed for the value of the jewels as on the date of the decree. **[655]**

According to English law where no time is stipulated for redemption, the pledge is redeemable within the lifetime of the pawnor.[3]

Also if the bank is not in a position to return the goods pledged with it as security for advancing loan, in the same condition as they were at the time of pledge, no suit can be brought.[4]

Although a pledgee has a right to sell the pledged property on the default of the pledgor in redeeming the property the pledgee however without resorting to right of sale may bring a suit. But where the pledgee brings a suit against the pledgor for the realisation of debt it is reasonable to presume that he has not sold the pledged property and is in position to return the same to the pledgor on suit claim being satisfied.[5]

178. Pledge by mercantile agent.—[6][Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

Explanation:—In this section the expressions 'mercantile agent' and 'documents of title' shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930.]

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1. (1930) Mad. 364 : 122 IC 37 : 30 LW 898.
2. *Rani Leela Kumari* v. *Zamber Lal,* AIR 1981 Mad. 29 : 1980 (2) Mad LJ 47 : (1980) 93 Mad. LW 419 : ILR (1980) 3 Mad. 370 following *Dhian Singh Sobha Singh* v. *Union of India,* AIR 1958 SC 274 : 1958 SCR 781 : 1958 SCJ 363.
3. *Kemp* v. *Westbrooke,* (1749) 27 ER 1030.
4. *Dhanalakshmi Bank Ltd.* v. *K.K. Jose,* AIR 1991 Ker. 388, 392.
5. *Dodla Bhaskar Rao* v. *State Bank of India,* AIR 1992 Orissa 161 : 1991 (72) CLJ 598.
6. Sections 178 and 178A were substituted by S. 2 of the Indian Contract Act (Amendment) Act, 1930, (IV of 1930).

Legislative changes.—This and the succeeding section were introduced in place of the old Section 178 by the Amendment Act of 1930. Sec. 30 of the new Sale of Goods Act also, covers a portion of the old Section 178. Prior to the Indian Contract Act, the law on this matter was contained in the Factors Act of 1840 and 1844.

Old and new sections compared.—The repealed Section 178 said as follows:

> "*178.* A person who is in possession of any goods, or of any bill of lading, dock warrant, warehousekeeper's certificate, wharfinger's certificate, or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents:
>
> Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly;
>
> Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them by means of an offence or fraud.

(i) **ANY PERSON.**—Under the old section, *any person* in possession of any goods or bill of lading etc., could make a valid pledge. The wide language made it possible for persons in temporary possession of goods to create binding pledges in respect of the goods. The present section confines itself to *mercantile agents* only. But under the succeeding Section 178-A, it is possible for a person who has got possession under a contract voidable under Sec. 19 or 19-A to create a valid pledge, if the pawnee acted in good faith and if the contract is not rescinded before the date of the pledge. Section 30 of the Indian Sale of Goods Act provides for a third case in which a person other than the owner of the goods can create a valid pledge.

Thus these three sections have curtailed and limited the wide language of the old Sec. 178, so that, it is not now possible, for *any person* in possession of goods to create a valid pledge.

(ii) **POSSESSION.**—Under the old section, there was some difference of opinion as to whether "possession' was to be construed as juridical possession.[1] Under the new sections, the questions not of much importance,

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1. *Sharaf Din* v. *Gokal Chand,* (1931) 12 Lah. 304 : 132 IC 835 : (1931) Lah. 526; *Poona Bank* v. *Kachhi Dasa Oswal Jain Temple,* (1931) 33 Bom. LR 848 : 134 IC 711: (1932) Bom. 31: *Durga Bai* v. *Saraswati Bai,* (1929) 31 Bom. LR 414 : 118 IC 796; *Rahimbux* v. *Central Bank of India,* (1929) 56 Cal. 367 : 119 IC 23 : (1929) Cal. 497; *King Emperor* v. *Nag Po Chit,* (1923) 1 Ran. 199 : (1923) Ran 227 : 74 IC 1650.

because only the possession of particular classes of persons named in now recognised as giving rise to certain, which gives on rights whatever,[1] This distinction has been emphasised in a case of the Madras High Court[2] where gratuitous bailee was held not to have juridical possession sufficient to validate a pledge of the article bailed.

Essentials :—

(1) The pledgor must be a mercantile agent: (2) in possession of goods or of documents of title to goods: (3) with the consent of the owner; (4) acting in the ordinary course of business of a mercantile agent; (5) the pawnee must act in good faith; and (6) without notice of any want of title in the pledgor.**[746]**

1. Mercantile agent.—The Explanation says that the term shall have the same meaning as in the Indian Sale of Goods Act, 1930. The definition of the term in the Sale of Goods Act is taken from the English Factor's Act and runs as follows;

'Mercantile Agent' means "a mercantile agent having in the customary course of business as such agent, authority either to sell goods or to consign goods for the purpose of sale, or buy goods or to raise money on the security of goods." **[746]**

2. Possession of goods or documents of title to goods.—POSSESSION.—The question of the exact connotation of the term is not likely to create difficulties, in as much as particular classes of persons have been specified in this, and the allied sections, and it is only to pledges by such persons that the law attaches validity.

In such cases possession is conclusive evidence of ownership of the agent in possession so far as it is necessary to protect a pledgee acting in good faith without notice of the agent's want of title.[3]

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1. *Biddomoye* v. *Sittaram,* (1878) 4 Cal. 497 (custody of servant); *Naganada* v. *Bapu,* (1903) 27 Mad. 424. (hirer of goods); *Ramkishen Das* v. *Jasumal,* (1925) 61 IC 305 : 14 SLR 175; *Shankar* v. *Lakshmibai* (1928) 30 Bom. LR 470 : 109 IC 737 : (1928) Bom. 225; *Seager* v. *Hakma,* (1900) 24 Bom. 458 (Possession is wife is not juridical possession).
2. *Sokhmal Suganmull* v. *Lokanatha,* (1934) Mad. 132 : 39 LW 39 : 147 IC 650 **See also** *Poona Bank* v. *Kacchi Dasa* (1931) 33 Bom. LR 848 : 134 IC 711 : (1932) Bom. 31; *Mercantile Bank of India* v. *Central Bank of India,* (1935) Mad. 936 : 42 LW 629 : (1935) MWN 973 (2) : 69 MLJ 509 (Pledgee of railway receipts giving them to pledgor for unloading the goods into pledgee's godown—No possession in pledgor sufficient to validate a pledge by him to another).
3. *Poonamchand Shankerlal & Co.* v. *Deepchand & Siremal,* 1971 MPLJ 808.

GOODS.—The term has been defined in Sec. 2(9) of the Sale of Goods Act, as:

> "Every kind of movable property other than actionable claims and money and includes stocks and shares, growing, grass, and things attached to or forming part of the land which are agree to be several before sale or under the contract of sale."

It will be observed that shares are classed as 'goods', under the present definition. This is in consonance with a decision of the Judicial Committee in *Manekji* v. *Wadilal*.[1]

DOCUMENT OF TITLE TO GOODS.—In Sec. 2(4) of the Indian Sale of Goods Act, the term is thus defined:

> "'Document of title to goods' includes a bill of lading, dock-warrant, warehouse keeper's certificate, wharfinger's certificate, railway receipt, warrant or order for the delivery of the goods and any other document used in the ordinary course of business as proof of the possession or control possessor of the document to transfer or receive goods thereby represented."

In *Official Assignee, Madras* v. *Mercantile Bank*,[2] the Judicial Committee have held, affirming the decision of the High Court, that a railway receipt was a document of title within the meaning of the old section and that the endorsement and delivery, by way of security for a loan, of railway receipt is sufficient to create a valid pledge of the goods covered by the receipt, though by the general law, a pledge of documents is not *prima facie* deemed to be a pledge of the goods. It was also held that the pledge did not lose his right of property as pledgee by parting with the custody of the railway receipts or by entrusting them to the pledgor for the special purpose of convenient dealing with the goods, by collecting them from the fort trust and putting them in the pledgee's godown. In a latter case,[3] arising out of transactions by the same pledgor, where a question of priority arose between two banks each of whom had alternately advanced monies on the security of the railway receipts that had been already pledged with the other, and taken back for the purpose of clearing the goods, the Privy Council held that the banks had been dealing with the documents only in the normal way of business, and that the circumstances did not justify the invocation of the principle of estoppel. **[604]**

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1. (1926) 50 Bom. 360 : (1926) PC 38 : 51 MLJ 1 : 30 CWN 890 : 28 Bom. LR 777.
2. (1935) AC 53 : (1934) 58 Mad. 181 : 152 IC 730 : (1934) PC 246 : 68 MLJ 26 : on appeal from (1933) 56 Mad. 177 : 37 LW 32 : 143 IC 641 : (1933) Mad. 207 : 64 MLJ 280.
3. *Mercantile Bank of India* v. *Central Bank of India*, (1938) AC 287 : ILR (1938) Mad. 360 : 42 CWN 321 : (1938) OWN 206 : (1938) ALJ 273 : 47 LW 329 : (1938) MWN 552 : 40 Bom. LR 713 : (1938) PC 52 : (1938) 1 MLJ 268.

Reading Section 178 Indian Contract Act, Section 137 Transfer of Property Act and Section 2(d) of the Sale of Goods Act, it is clear that railway receipts are documents of title and the goods covered by them can be pledged by transferring the documents.[1]

In one case arising under the old section, it was held that share certificates are not documents of title to goods.[2] But the Bombay High Court has held that the expression 'goods' will cover shares and share certificate.[3]

3. **With the consent of the owner.**—In view of the succeeding section, it would appear that even the apparent consent of the owner will be sufficient for the purposes of the section.[4] It may however be a question whether the consent spoken of has reference to the character of the possession of the mercantile agent. If so, the operation of the section will be narrowed down considerably. **[748]**

If possession has been obtained dishonestly or by a trick, a valid pledge cannot be effected.[5]

4. **Acting in the ordinary course of business.**—It is necessary that the pledge must have been made when the pledgor was acting in the ordinary course of business of a mercantile agent. In other words, there must be nothing to put the pledgee upon suspicion. In one English case, where the mercantile agent pledged the goods through the medium of a friend, the pledge was held invalid because the agent was not acting in the ordinary course of business.[6] **[749]**

5. **Good faith.**—Sec. 3, Cl. (20) of the General Clauses Act says that a thing is deemed to be done in good faith where it is done honestly, whether it is done negligently or not.[7] A person is said to act in good faith when he acts with the care and caution of a man of ordinary prudence. The mere fact that there are suspicious circumstances will not by itself disprove good faith. **[749]**

6. **Absence of notice.**—The notice may be actual or constructive. If the pledgee knows that the pledgor had a defective title the pledge will not be valid.[8]

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1. *Morvi Mercantile Bank* v. *Union of India,* AIR 1965 SC 1954 : (1966) 2 SCJ 6.
2. *Lalit Mohan* v. *Haridas,* (1916) 24 CLJ 335 : 37 IC 707.
3. *Jamshedji* v. *Magan Lal,* (1925) 27 Bom. LR 514 : 92 IC 9 : (1925) Bom. 314; *Sethna* v. *National Bank,* (1910) 12 Bom. LR 870 : 8 IC 183.
4. *Ah San* v. *Maung Ba,* (1937) Ran. 146 : 169 IC 221.
5. See *Jute Distributors* v. *Sushil Kumar Gupta,* AIR 1974 Cal. 386.
6. *De Gorter* v. *Attenborough,* (1904) 21 TLR 19.
7. *Madras Automobiles* v. *Modern Bank,* (1938) Mad. 545.
8. *Appa Rao* v. *Salem Motors,* (1955) 2 MLJ 188; Cf. *Nippon Uyusen Kaisha* v. *Ramjibhae Surowgee,* (1938) 134 IC 564 (PC).

Where the bank bonafidely accepted the pledge of the property without any notice of defect in title and advanced loan, the bank cannot be deprived of its right of lien over the pledged goods in the absence of negligence in verifying the title of the owner being proved.[1]

ILLUSTRATIVE CASES.—In *Durgabai* v.*Saraswatibai,*[2] a case under the old section a person entrusted with a diamond as agent for getting offers for it pledged it to persons who justifiably assumed he was entitled to do so. It was held that the pledge was valid. The result will be the same under the present section. **[747]**

Similarly a commission agent for sale of goods can make a valid pledge both under the old and the present sections.[3] So, where a motor salesman pledged a car with a bank, depositing with it a receipt for the price of the car it was held that the pledge was valid, though the bank had not called for the 'C' form certificate which would have disclosed the name of the owner.[4]

In *Rahimbux* v. *Central Bank,*[5] a vendor who had been in possession of the goods sold, pledged them to third parties and the Court upheld the validity of the pledge. Lord Williams, J., was of opinion that the "word 'possession' should be given its fullest and widest meaning, both natural or ordinary, and technical or artificial." The matter will now be governed by Sec. 30 (1) of the Indian Sale of Goods Act. Clause (2) Sec. 30 deals with the converse case of a buyer who gets possession of the goods before payment of the price.

A person entrusted with goods for a specified purpose will not be competent to make a valid pledge. In *Benaras Bank* v. *Prem & Co.,*[6] where shares had been entrusted by a wife to her husband for safe custody at a bank and he pledged them, it was held that there was no valid pledge. Thus in *Katta Ramaswamy Gupta* v. *Kamalammal,*[7] where a person who borrowed jewels for a marriage occasion pledged them, the court held that the possession was a qualified one, and that the pledge was invalid. It need hardly be added that the position is the same under the amended section. In *Profulla Kumar Bose* v. *Nobo Kishore,*[8] where A had consigned goods in his own name and forwarded

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1. *Shimoga District Central Co-operative Bank Limited* v. *Karnataka Food and Civil Supplies Corporation, Bangalore,* 2004 (1) CTLJ 494 (Karn).
2. (1929) 31 Bom. LR 414 : 118 IC 796.
3. *Seshappier* v. *Subramania,* (1916) 40 Mad. 678; *King Emperor* v. *Nga Pa Chit,* (1923) 1 Ran 199 : 74 IC 1050 : (1923) Ran. 227; *Sulaiman* v. *Ma Yuet,* (1934) Ran. 198 : 151 IC 413 (Broker entrusted with jewellery for sale may pledge).
4. *Madras Automobiles* v. *Modern Bank,* (1938) Mad. 545.
5. (1929) 56 Cal. 367 : 119 IC 23 : (1928) Cal. 497 : **See** observations in *Nanu Ram* v. *Hedayat Ali,* (1935) Cal. 769 : 159 IC 662.
6. (1937) All. 255 : (1937) ALJ 150 : 168 IC 156.
7. (1921) 45 Mad. 173 : 70 IC 448 : 14 LW 599 : (1922) Mad. 44 : 42 MLJ 32; *P.A.P.L Chettiar* vs *Ma Nan,* (1935) Ran. 205 : 157 IC 184; *Nanu Ram* v. *Hedayat Ali,* (1935) Cal. 769 : 159 IC 622; **see also** *Kadumal* v. *Karachi Bank,* (1921) Sind 172 : 82 IC 730 (Person entrusted with War Bonds for a specific purpose cannot make a valid pledge of them).
8. (1919) 23 CWN 907 : 54 IC 224.

the railway receipt unendorsed, to B for obtaining delivery, and B pledged the receipt to C with an endorsement as if by A in favour of C, it was held that C had obtained a good title. In a Rangoon ruling, it has been pointed out that reliance can be placed by the pledgee upon the section only if *at the time of the pledge,* he was aware that the pledgor was a mercantile agent, and that if the pledgee had dealt with the pledgor without such knowledge, he cannot avail himself of any subsequent discovery of his legal character.[1]

PLEDGE BY CO-OWNER.—One of several co-owners holding a jewel in his safe custody is a person having the possession contemplated by this section and can therefore make a valid pledge of it.[2]

BURDEN OF PROOF.—It is hardly necessary to add that the burden of proving the existence of the circumstances set out in the section is on the party setting up the validity of the pledge.[3]

178-A. Pledge by person in possession under voidable contract.—When the pawnor has obtained possession of the goods pledged by him under a contract voidable under Section 19 or 19-A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

Analogous law.—The Indian Sale of Goods Act deals in Sec. 29 with the corresponding case of sale.

Scope.—Where possession has been acquired under a contract voidable for fraud, coercion, misrepresentation or undue influence, but the party entitled to rescind the contract has not done so, the person in possession may make a valid pledge. The reason is that possession has been obtained by consent; though there is a flaw in the consent, which makes the contract based thereon voidable.[4] Under the old section, however, pledge by a person who got possession "by means of an offence or fraud' was not valid.[5]

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1. *Ah Chung* v. *Ah Wain,* (1938) Ran. 243 : 176 IC 703.
2. *Shadi Ram* v. *Mahtab Chand,* (1895) 1 PR.
3. *Ramjiban* v. *Nippon Yusen Kaisha,* (1938) 67 CLJ 276.
4. *See Devidas Sowcar* v. *Janaki,* (1932) 62 MLJ 632 : (1932) MWN 106 : 35 LW 625 (1932) Mad. 428; *Chartered Bank* v. *Imperial Bank,* (1933) 60 Cal. 262 : (1933) Cal. 366; *Croft* v. *Lumley,* (1958) 10 ER 1459 : 108 RR 252.
5. *Mercantile Bank of India* v. *Central Bank of India,* ILR (1938) Mad. 360 : (1938) 1 MLJ 268 : 42 CWN 321 : (1938) OWN 206 : (1938) ALJ 273 : 47 LW 329 : (1938) MWN 552 : 40 Bom LR 713 : (1938) PC 52; *Kartik Churn* v. *Gopal Kisto,* (1877) 3 Cal. 264; *S.A.L.S. Chettiar Firm* v. *Daw Taw,* (1929) 7 Ran. 556 : 120 IC 911 : (1929) Ran 320; *Jamshedji* v. *Maganlal,* (1925) 27 Bom LR 514 : 92 IC 9: (1925) Bom. 314 : *Poona Bank* v. *Kachhi Dasa,* (1931) 33 Bom LR 848 : 134 IC 711 : (1932) 33 Bom. LR 848 : 134 IC 711 : (1932) Bom. 31.

The section presupposes a contract, and therefore, where possession is got without a contract (*e.g.,*) by theft, there can be no doubt that the person in possession has no title at all.

A person who himself is a pledgee has no title to the property pledged with him and if such a person pledges the said property his pawnee cannot claim the benefit of Section 178A.[1]

179. Pledge where pawnor has only a limited interest.—Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Limited interest of pawnor.—This section enacts that where the pawnor has only a limited interest in the goods pledged, the pledge will be valid to the extent of such interest.[2] So, where there was a contract of sale of goods, but the vendor retained possession of the goods, and pledged them with a third party, it was held that the pledgees could obtain no interest *under this section,* for the vendor himself had no interest at all in the goods.[3] Again, where a person has been entrusted with possession of goods for a limited or particular purpose, he cannot be said have any limited interest in the goods and a pledge by such person is invalid.[4] But a person may be one of several joint owners or may have some other kind of limited interest (*e.g.,*) interest for life. Thus where a plate settled upon a widow for life, was pawned by her, it was held that the pawnee could not retain it after the death of the widow.[5] Where the pledgee is unaware of the limited interest of the pawnor, and the other conditions mentioned in Sec. 178 are present, this section ceases to be applicable. The interest then taken is not limited to that of the pledgor only. **[750]**

The scope of this section was thus described in a Bombay case.[6] "Sec. 179 does not limit the scope of Sec. 178, but, saves a pledge to the extent of the pledgor's own interest, not withstanding the presence of the invalidating conditions falling under one of the provisions to Sec. 178. In other words,

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1. *Belgaum Pioneer Urban Co-operative Credit Bank Ltd.* v. *Satyapromoda,* AIR 1962 Mys. 48.
2. (Cf.) *Raja of Ramnad* v. *Subramaniam,* (1928) 52 Mad. 465 : 116 IC 827 : 30 LW 36 : (1928) Mad. 1201.
3. *Rahimbux* v. *Central Bank of India,* (1929) 56 Cal. 367 : 119 IC 23 : (1929) Cal. 497. **But see** *Lakhamsey* v. *Lakhmi Chand,* (1918) 42 Bom. 205 : 19 Bom. LR 335 : 40 IC 148. **See also** *Belsize Motor Supply Co.* v. *Cox,* (1914) 1 KB 244 (option to purchase in hire purchase agreement).
4. *Nyberg* v. *Handelaar,* (1892) 2 QB 202.
5. *Hoare* v. *Parker,* (1788) 103 ER 202 : 1 RR 500.
6. *Lakhamsey* v. *Lakhmi Chand,* (1918) 42 Bom. 205 : 19 Bom. LR 335 : 40 IC 148.

whenever he has an interest, the person in possession of the goods or document has unconditional authority to charge at least that interest."

SUITS BY BAILEES OR BAILORS AGAINST WRONG DOERS

180. Suit by bailor or bailee against wrong doer.—If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Suit against wrongdoers.—As the bailee is the person entitled to possession of the goods bailed, the law vests in him a right to such remedies as the owner would have had, if no bailment had been made; but the bailor also is, by the section, given the option of suing for the injury or deprivation caused by the third party. In a simple bailment of a chattel the bailee has actual possession, the bailor has a right of possession. In the case of trespass, ordinarily the person who has possession of the property has a right to bring an action against a wrong-doer he may also sue in certain circumstances. Thus the bailor has a right to sue a stranger for damages for trespass in respect of the chattel in spite of the fact that he was not in immediate possession thereof.[1]

There is no warrant for holding that the rights of the pawnee who had parted with money in favour of the pawnor on the security of goods can be defeated by the goods being lawfully seized by the Government and the money being made available to other creditors of the pawnor without the claim of the pawnee being fully satisfied. The pawnee has special property and a lien which is not of an ordinary nature on the goods and so long as his claim is not satisfied no other creditor of the pawnor has a right to take away the price or the goods where the act of the Government resulted in deprivation of the amount to which the plaintiff-bank (pawnee) was entitled, it was bound to reimburse the plaintiff for such amount which the plaintiff in ordinary course would have realised by sale of the goods pledged with it on the pawnor making default in the payment of the debt.[2] Thus where the goods with the pawnee were seized by Government for realisation of arrears of sugarcane cess and sold it was held that the cane commissioner was only an unsecured creditor and was entitled only to the surplus money after satisfaction of the pawnee's dues.[3]

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1. *Kanhaiyalal* v. *Badrilal,* AIR 1965 Raj. 121 : ILR (1965) 15 Raj. 159.
2. *Bank of Bihar* v. *State of Bihar,* AIR 1971 SC 1210 : (1971) 2 SCJ 661.
3. *Ibid.*

The section follows the English law in giving the bailee the full rights of an owner as against third persons. The bailee is entitled to damages against a wrongdoer, irrespective of the consideration whether the (bailee) is liable to the bailor or not.[1] In *Pauline D' Souza* v. *Cassamalli,* [2] the Bombay High Court has pointed out that a bailee, (*e.g.,*) a hirer of a motor car under a hire purchase contract is not the agent of the bailor, the owner and can sue and claim full damages for loss caused to him by the negligence of the defendant in relation to the article bailed, without prejudice to the rights of the bailor to adjust with the bailee the damages recovered. **[645]**

181. Apportionment of relief or compensation obtained by such suits.—Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

Apportionment between bailor and bailee.—This section provides that the compensation recovered by either bailor or bailee shall be apportioned according to their interests. Of course, a recovery by one will oust the other of his right to recover; for there cannot be double satisfaction.

As between himself and the bailor, the bailee must account to the bailor for everything that he may recover beyond his own interest.[3]

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1. *The "Winkfield,"* (1902) P 42; **see** *Ramnath* v. *Pitambar,* (1916) 43 Cal. 733. **See also** *Union of India* v. *Ganpatrai,* AIR 1983 Cal. 14; *State Bank of Hyderabad* v. *Susheela,* AIR 1980 AP 1 (suit by pawnee bank, secured creditor with regard to title over sale proceeds deposited in court; bank was held entitled to satisfaction of its debt and creditors were held entitled to the surplus money only after satisfaction of Bank's dues). *Union of India* v. *Ganpatrai,* AIR 1983 Cal. 14 (Pledgee of goods by transfer of RR. Place of transfer decides jurisdiction of court).
2. (1933) 35 Bom LR 1007 : (1933) Bom. 465.
3. *Eastern Construction Co.* v. *National Trust,* (1914) AC 197; *Waters* v. *Monarch Fire & Life Assurance Co.,* (1856) 119 ER 705 : 103 RR 317; *London & N.W. Ry* v. *Glyn,* (1859) 120 ER 1054 (Bailee has insurable interest in the goods).

CHAPTER X

AGENCY

Appointment And Authority of Agents

182. "Agent" and "principal" defined.—An "Agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal".

Agent defined.—Where one employs another to do an act for him or to represent him in dealings with third parties, the person so employed is called an agent. In the theory of the English law, the agent is a connecting link between the principal and third parties. He is an intermediary who has the power to create legal relationships between the principal and their parties. The essence of the agent's position is that he shall be but a conduit pipe connecting two other parties. But in the process he has the competency to make the principal responsible to strangers for his actions,[1] and it is this, which distinguishes agency from relations, which have a close similarity to it. It has been held by the Supreme Court[2] that the Post Office is not an agent of the sender of the postal article. Likewise the Supreme Court has held that signing letters on behalf of an ex-ruler of a former princely State could not constitute the person an agent.[3]

A person employed by another to invest money on his behalf and represent him with debtors is an agent within the meaning of Section 182;[4] but a company promoter is not as there can be no agent for a non-existent principal.[5]

Directors of a company are in the eye of law agents of the company for which they act.[6]

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1. As to this, **see** *Versha Engineering (P) Ltd.* v. *M/s. Vijay Traders,* (1983) 24 GLR 126.
2. *Union of India* v. *Mohd. Nizam,* AIR 1980 SC 431 : 1980 (1) SCR 968 : (1980) 1 SCC 284 (Cf., *Union of India* v. *Sumer Chand,* 1969 MPLJ 184 : 1969 Jab. LJ 254; **see also** *Naraindas* v. *Kantam,* AIR 1977 SC 774 (Mortgagee exercising right of sale is not an agent of the mortgagor); *Sakthi Sugars Ltd.* v. *Union of India,* AIR 1981 Delhi 212 : ILR (1980) 2 Delhi 1293. (STC held to be not an agent of Union of India).
3. *Mohan Lal Jain* v. *Ex-Ruler of Jaipur,* AIR 1962 SC 63 : (1962) 1 SCJ 104.
4. *Harbans Lal* v. *Produce Exchange Corporation Ltd.,* AIR 1973 P&H 244.
5. *Weavers Mills* v. *Balkis Ammal,* AIR 1969 Mad. 462 : (1969) 2 MLJ 509.
6. *Somayazulu* v. *Hope Prodhome & Co.* (1963) 2 An.WR 112.

Nature of Relationship—An agent in whom the principal places trust and confidence stands in a fiduciary position in relation to the principal. Although the fiduciary relation is the key too much of the law governing this relation, every agent cannot said to be in fiduciary position vis-a-vis his principal.[1]

About the existence of an agency relationship GHL Fridman has observed :

> "Agency as is well settled, is a legal concept, which is employed by the Court, when it becomes necessary to explain and resolve the problems created by certain fact situations. In other words, when the existence of an agency relationship would help to decide an individual problem, and the facts permits a Court to conclude that such a relationship existed at a material time, then whether or not any express or implied consent to the creation of an agency may have been given by one party to another, the Court is entitled to conclude that such relationship was in existence at the time, and for the purpose in question*".[2]

AGENT AND SERVANT.—For instance a servant, in one sense, does an act for his master. But what he does is merely to mechanically carry out the master's order.[3] He is under his master's control not only as to what he does but also as to the manner in which he does his work.[4] No element of personal discretion enters into his performance of the master's behest. There is no question of bringing the master into touch with third parties. But an agent is primarily employed to represent the principal as regards third parties, and bring them into contract with him. Besides, the agent has got some discretion in the matter of acting for his principal. In fact the foundation of agency is laid in the confidence in the judgment, capacity and integrity of the agent.

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1. *Southern Roadways Ltd., Madurai* v. *S.M. Krishnan,* AIR 1990 SC 673, 677 : (1989) 4 SCC 603.
2. *Chairman, Life Insurance Corporation* v. *Rajiv Kumar Bhasker,* 2005 (2) CTLJ 121 (SC) : 2005 (5) Supreme 649.
3. *Barnett* v. *South London Tramways Co.,* (1887) 18 QBD 815; *Hill* v. *Beckett,* (1915) 1 KB 578. **See also** *Ah Cheung* v. *Ah Wain,* (1938) Ran. 243 : 176 IC 703; *Kalyanji* v. *Tirkaram,* (1938) Nag. 254 : 176 IC 675 (Definition may include servant); *Govindram* v. *Partapsingh,* (1937) Sind 151 : 169 IC 423 (Servant of company A, ordering goods in A's name from another firm—Supply without inquiry—No liability).
4. *Govind Prasad Sharma* v. *Board of Revenue,* AIR 1965 MP 66.

*. (See Establishing Agency by GHL Fridman – 1968 (84) Law Quarterly Review 224 at P. 231)

AGENT AND INDEPENDENT CONTRACTOR.—The relation of agency has to be distinguished from that of an independent contractor. An independent contractor is one who undertakes to do some work for another, or to produce a certain result but is not subject to the control or directions of the employer as to the means or process by which he is to achieve the result.[1] But an agent has to act according to the principal's instructions, whether given at the outset or from time to time. **[753]**

AGENT AND TRUSTEE.—Again, agency has to be distinguished from trusteeship. The trustee administers the trust property, and the person for whose benefit the trust is created is called the beneficiary. But there is a great difference between the legal position of the agent and that of the trustee. The trust property is legally vested in the trustee. The trustee therefore has full powers of disposition, subject, of course, to any limitations imposed by the instrument of trust. He can sue in his own name. But the agent's position in far different. His legal personality is simply a reflection of that of his principal. The agent is not the legal owner of the principal's property in his hands. He cannot sue or be sued, except in the name of the principal.

The distinction between the relation of agency and that of trust is well marked but it may be observed that agency may often involve a relation of trust and confidence and that property in the hands of an agent may sometimes be impressed with a trust for the benefit of the principal.[2]

Creation of agency.—Agency may be created expressly by a written document, or by operation of law or by subsequent ratification or, it may be inferred from the circumstances and conduct of the parties. A bare allegation of agency is insufficient, but the specific scope of the agent's powers must be proved.[3] It will hardly be doubted that the mere fact that one person offers advice to anther in matters of business, does not constitute a relationship of agency.[4] Nor will a mere direction by A to B to pay a certain sum of money of C makes B the agent of A. It must be proved that A intended that the money should be paid on his behalf, and that C intended to accept the money as paid on behalf of A.[5] But where goods purchased by one person are consistently and uniformly received by another person, and dealt with by him, it may be a permissible inference that the latter is an agent for the former.[6]

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1. *Quarman* v. *Burnett,* (1840) 151 ER 509 : 55 RR 717; *Samson* v. *Aitchison,* (1912) AC 844; *Union of India* v. *Motilal Kamalia,* AIR 1962 Pat. 184.
2. **See** *Burdick* v. *Garrick,* (1807) 5 Ch. 233; *Kali Pada* v. *Hari Dasi,* ILR (1938) 1 Cal. 652: (1938) Cal. 673.
3. *Umasasi* v. *Akrur Chandra,* (1926) 53 Cal. 297 : 30 CWN 160 : 92 IC 984 : (1926) Cal. 542; **see** *Lakhani Sahakari SKV Sanstha Ltd.* v. *Moreshwar,* AIR 1978 Bom. 273 : 1978 Mah.LJ 59; **see** *Varsha Engineering (P) Ltd* v. *M/s. Vijay Traders,* AIR 1983 Guj. 166.
4. *Mohesh Chandra* v. *Radha Kishore,* (1908) 12 CWN 28 : 6 CLJ 580.
5. *Haricharan* v. *Taraprasanna,* (1925) Cal. 541 : 79 IC 354.
6. *Pulin Behary* v. *Mathuranath,* (1928) Cal. 863 : 110 IC 817.

Whether the legal relationship disclosed in a particular case amounts to an agency or not is a mixed question of law and fact.[1] That the parties have chosen to style the relationship as an agency is not conclusive, if the incidents thereof, as disclosed by the evidence, do not justify a finding of agency.[2]

SPECIFIC PERFORMANCE.—It is well settled that no action is maintainable at the instance of either principal or agent to compel specific performance of a contract of agency.[3] But, as in other cases, the Court will restrain the breach of any negative stipulation in such a contract.[4]

A donee of power is an agent by necessity, filing a suit on pronote in favour of donor will within limitation is in order. Doctrine of Agency by necessity is applicable.[5]

EXTENSION OF THE TERM AGENCY.—Even an agent can become a buyer when he pays the price to the principal.[6] The development of commerce in modern days has extended the use of the terms 'agent' and 'agency' As the Judicial Committee pointed out in *Hope Prudhomme* v. *Horley.*[7]

> "In many trades—particularly in the motor car trade—the so-called agent is merely a favoured and favouring buyer, one who under an over-riding contract, undertakes to do his best to find a market for the manufacturer's stock, who is given some special advantages, such as a special discount or preference in complying with his orders; but who in each particular contract acts as a buyer from the manufacturer, and sells at whatever price he can get, unless he is forbidden to sell too cheap."

Classes of agents.—The Act does not draw any fine distinction between different classes of agents and merely lays down principles in wide and general terms. But in English law, the rights and liabilities of the various kinds of agents vary; and it may be that those distinctions may apply in Indian law also, so far as they are not inconsistent with the law as laid down in this chapter.[8]

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1. *Adaikappa* v. *Natesan,* (1930) MWN 729; (Cf) *Khub Chand* v. *Dhittar Mal,* (1931) ALJ 225 : 132 IC 43 : (1931) All. 372; (Cf) *Goenka Cotton Mills* v. *Duncan Stratton,* (1938) Lah. 277.
2. *Suryaprakasaraya* v. *Matheson's Coffee Works,* (1913) 14 MLT 249 : 21 IC 322; *Phul Chand* v. *Aggarwal B.M. Co.,* (1938) Lah. 814 : (Cf.) *Benares Bank* v. *Ram Prasad,* (1930) All. 573 : 124 IC 180.
3. *White* v. *Boby,* (1878) 37 LT 652; *Whitwood* v. *Hardman,* (1891) 2 Ch. 416.
4. *Dietrichsen* v. *Cabburn,* (1846) 41 ER 861; *Warner* v. *Nelson,* (1936) 155 LT 538; *Kirchner & Co.* v. *Gruban,* (1909) 1 Ch. 413.
5. *Chami Narayana* v. *V.R. Krishna Iyer,* AIR 1998 Ker. 365 : 1998 (2) Ker LT 420.
6. **See** *Kulsekarapatnam Hand Match Workers' Co-operative Cottage Industrial Society Ltd.* v. *Radhelal Lalloolal,* AIR 1971 MP 191 : 1971 MPLJ 552 : 1971 Jab.LJ 529.
7. (1925) 49 Mad. 1 : 30 CWN 794 : 88 IC 307 : (1925) PC 161; *Phul Chand* v. *Aggarwal B.M. Co.,* (1938) Lah. 814 (where the observations regarding favoured buyer have been applied). See the observations in Halsbury's Laws of England, (2nd Edition), Vol. 1 page 194 that the description 'agent is often employed in business in a complimentary and not a legal sense; *Livingstone* v. *Ross,* (1901) AC 327.
8. **See** *Kalyanji* v. *Tirkaram,* (1938) Nag. 254 : 176 IC 675.

In respect of authority, agents are distinguished as general and particular or special agents. The former expression comprises persons filling positions of a generally recognised character like brokers, factors, partners, etc. The latter term denotes an agent appointed for a particular occasion or purpose.

> "A general agent has the full apparent authority due to his employment or the position and the principal will be bound by his acts within that authority, though he may have imposed special restrictive limits which are not known to the other contracting party. A special agent has no apparent authority beyond the limits of his appointment and the principal is not bound by his acts in excess of those limits whether the other contracting party knew of them or not.[1]

Another classification of agents is that into mercantile or commercial agents and non-mercantile or non-commercial agents. Estate agents[2] and election agents[3] will fall within the latter category.

Auctioneer.—An auctioneer is a particular agent employed to sell property of the vendor. He acts in a twofold capacity. Till the fall of the hammer, he is an agent for the seller but when the sale is completed, he becomes an agent of the buyer has thus an authority to sign a contract on behalf of both the vendor and the purchaser.[4] The auctioneer may sell the goods and sue for the price his own name,[5] and can maintain an action for wrongful interference with them or damage to them. He has a lien upon the goods for his charges and advances.[6] **[772]**

It is not open to an auctioneer to delegate his authority, though he may employ others where the work is of a merely mechanical character and is done under his direction.[7] On the sale of a specific chattel, where he discloses the fact of agency, though he does not disclose the name of his principal[8] he gives no implied warranty of the vendor's right to sell.

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1. *Jacobs* v. *Morris,* (1902) 1 Ch. 816; *Watteau* v. *Fenwick,* (1893) 1 QB 346.
2. *Keppel* v. *Wheeler,* (1927) 1 KB 577.
3. *Nasiruddin* v. *Haji Mahomed,* (1936) 63 Cal. 825 : 40 CWN 741 : 165 IC 489 (Election agent)
4. *Emmerson* v. *Heelis,* (1809) 127 ER 989 : 11 RR 520; *White* v. *Proctor,* (1811) 128 ER 309 : 13 RR 580.
5. *Williams* v. *Millington,* (1788) 126 ER 49 : 2 RR 724 : *Consolidated Co.* v. *Curtis,* (1892) 1 QB 495; *Woolfe* v. *Home,* (1877) 2 QBD 355. **See also** *Benton* v. *Campbell,* (1925) 2 KB 410.
6. *R.P. Kharas* v. *Bawanji,* (1926) Sind 6 : 92 IC 394; *Webb* v. *Smith,* (1885) 30 Ch. D 192; *Williams* v. *Millington,* (1788) 126 ER 49 : 2 RR 724.
7. *Coles* v. *Trecothick,* (1804) 7 ER 167 : 32 RR 592.
8. *Benton* v. *Campbell Parker & Co.,* (1925) 2 KB 410.

The auctioneer is entitled to indemnity form his employer for the consequences of acting on his authority and he can claim reimbursement in respect of damages recovered against him by the true owner of goods.[1]

Broker.—A broker has been described in *Sushil Chandar* v. *Gauri Shankar*,[2] as a mercantile agent employed for buying or selling goods or other property of which he is not entrusted with possession or control. His chief function is to establish privity of contract between two parties with regard to a transaction,[3] and for this work he gets a commission. [772]

He is a negotiator interested in establishing privity of contract between the parties. He is not concerned with the actual fulfilment of the contract nor does he incur any personal liability in that behalf.[4]

Primarily, the broker is the agent of the party by whom he is originally employed. Very often, however, he is in the position of an agent to both the parties whom he brings together for the purpose of a mercantile transaction.[5] When he brings about a contract, he puts the terms in writing and gives the vendor and buyer what are called bought and sold notes, and his liability depends on the terms of such notes.

In some instances, the broker may be entitled not only to negotiate, but also to enter into a contract so as to bind the principal.[6] Where the principal is not disclosed or where there is a trade usage permitting it, the agent may act or sue in his own name. Otherwise, he must act in the name of the principal.[7]

In all matters, he is subject to the regulations and usages of the particular market.[8]

Commission agent.—A commission agent is one who buys and sells goods in the market on behalf of his employer *in his own name* and on the best terms available. His position differs from that of the broker in the competency to contract with other *eo nomine*. As Blackburn, J., observed in *Robinson* v.

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1. *Adamson* v. *Jarvis*, (1827) 130 ER 693 : 29 RR 503; *Halbronn* v. *International Horse Agency*, (1903) 1 KB 270.
2. (1917) 39 All. 81 : 14 ALJ 873 : 36 IC 371.
3. *Purna Chandra* v. *Indra Chandra*, (1921) 49 Cal. 389 : (1922) Cal. 397 : *Durga Charan* v. *Rajendra*, (1923) Cal. 57 : 36 CLJ 467 : 77 IC 558; (Cf) *Mollett* v. *Robinson*, (1872) 7 CP at (97).
4. *A Ramamurti & Co.* v. *Ramanujam*, AIR 1961 AP 408 : 1960 An. LT 882.
5. *Vasanji* v. *Karsondas*, (1928) 52 Bom. 627 : 30 Bom. LR 486 : 109 IC 716 : (1928) Bom. 270; *Patiram* v. *Kanknarrah Co. Ltd.*, (1915) 42 Cal. 1050 : 19 CWN 623 : 31 IC 607; *Municipal Corporation of Bombay* v. *Motibai*, (1895) 20 Bom. 124
6. *Durga Charan* v. *Rajendra*, (1923) Cal. 57 : 36 CLJ 467 : 77 IC 558.
7. *Kishenchand* v. *Khuda Baksh*, (1921) 60 IC 727. See also *Jitmull* v. *Ram Gopal*, (1923) 50 Cal. 12 (Jute market of Calcutta—Customs and usages of the trade discussed).
8. *Robinson* v. *Mollett*, (1874) 7 HL 802.

Mollett,[1] great inconvenience would result if the commission agent is made to establish privity of contract between the foreign producer and the home merchant. But in relation to the principal, he is not in the position of a vendor and so he will not be liable for failure to deliver. He cannot charge his employer a higher price than he actually contracts for, though it may happen that the higher price is well within the limits set by the intent of the employer.[2] Nor can he trade on his own account, though in another name.

Where a commission agent contracts in his own name and renders himself personally liable for the price of goods bought on behalf of the principal, the property in the goods vest only in the agent and does not pass to the principal until after payment.[3]

For transactions directly resulting from his intervention, he will be entitled to a commission.[4] As in the case of a broker, the commission agent cannot recover his commission, unless he shows that the conditions of the bargain have been fulfilled. On proof of fulfilment, he recovers: otherwise, he fails *in toto.* There is no room for a claim by way of *quantum meruit.*[5]

Where an agent for purchase of goods sells his own goods to the principal the principal is not bound to accept,[6] but if he does accept, the relationship of principal and agent is superseded *quoad* the particular transaction, by relation of vendor and purchaser.[7]

It has been pointed out in a recent case that commission agents receiving goods for sale are agents only up to the date of sale and to that extent, they stand in a position of active confidence towards their principals, but beyond that, they are not agents in the real sense of the terms and the relationship between the parties becomes one of debtor and creditor.[8]

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1. (1875) 7 HL 802 (810).
2. *Paul Bier* v. *Chotalal,* (1906) 30 Bom. 1; *Babu Lal Kedar Nath* v. *Net Ram,* (1922) All. 400 : 64 IC 6; *Shaw* v. *Baijnath,* (1897) 21 PR (Agent buying at less price than indent price cannot charge principal more).
3. *Babasa* v. *Hombanna,* (1932) 34 Bom. LR 1268 : 140 IC 624 : (1932) Bom. 593; *Harilal Chimanlal* v. *Pehladrai,* (1929) 31 Bom. LR 508 : 120 IC 337 : (1929) Bom. 260 (can re sell or stop in transit); *Beni Pershad* v. *Narain Das,* (1930) Lah. 974.
4. *Mahomed Ally* v. *Schiller,* (1888) 13 Bom. 470.
5. *Satchidanand* v. *Nritya Nath,* (1924) 50 Cal. 878 : (1924) Cal. 517 : 79 IC 287 : 27 CWN 1007.
6. *Kalluram* v. *Chimniram,* (1934) Bom. 86 : 36 Bom. LR 68 (cannot sell his own goods to principal).
7. *Holmes Wilson* v. *Bala Kristo,* (1927) 54 Cal. 549 : 104 IC 268 : (1927) Cal. 668. **See also** *Macleod & Co.* v. *Ivan Jones & Co.,* (1926) Cal. 189 : 87 IC 218 (foreign principal).
8. *Kalyanji* v. *Tirkaram,* (1938) Nag. 254 : 176 IC 675; **see also** *Kirkham* v. *Peel,* (1881) 43 LT 171; *Ex parte White,* (1871) 6 Ch. 397; *Bhagwandas* v. *Kanji,* (1906) 30 Bom. 205.

Del credere agent.—A *del credere* agent, called Dubash in Madras or Banian in North India, is an agent who, in consideration of an extra remuneration, guarantees the solvency of the parties, with whom he brings the principal into contractual relations, and undertakes to indemnify the principal against any damage that may be caused by the party's failure to perform the contract.[1] His liability, like that of a surety, is secondary and arises only on insolvency of the other party or other similar grounds. But where the other party forbears from performance because of a genuine dispute as to the terms of the contract, the *del credere* agent will not be liable. In Bombay, the brokers holding certificates of the Bombay Native Share and Stock Brokers Association are *del credere* agents.[2] **[772]**

It may be added that a *del credere* agency may be inferred from the course of dealings between the parties.[3]

A commission agent under Section 78 of the Mysore Agricultural Produce Marketing (Regulation) Act, XXVII of 1966 is only a *del credere* agent and does not incur any risk by being *del credere* agent.[4]

Factor.—A factor, is a mercantile agent entrusted with possession of goods for sale.[5] He has authority to sell in his own name and sue for the price, and is generally vested with a large amount of discretion as to the time of sale, the price etc.[6] He is even entitled to sell on reasonable credit[7] and is authorised to give a warranty in respect of the goods, if the course of business requires it.[8] He cannot however barter or pledge the goods.[9] Nor is it open to him to delegate his authority.[10]

Where a factor who has made advances, claims the right to sell *invito domino,* the question will be whether there was an agreement between the parties that the factor should under particular circumstances have the power

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1. *Morris* v. *Cleasby,* (1816) 105 ER 943 : 16 RR 544; *Hornby* v. *Lacy* , (1817) 105 ER 1205: 18 RR 345; *Gabriel* v. *Churchill,* (1914) 3 KB 1272; *Churichill & Sim* v. *Goddard,* (1937) 1 KB 92 : (1936) 1 AER 675; *Periamiyanna Marakkayar* v. *Banians & Co.,* (1926) 49 Mad. 156 : 23 LW 432 : 95 IC 154 : (1926) Mad. 544; *S.I. Industrials v. Rama jogi,* (1915) 27 MLJ 501 : 26 IC 822 **see also** *Gurumukh Rai Radha* v. *State of Bihar* 25 STC 70 : 1969 BLJR 680; *Voltamp Transformers (P) Ltd.* v. *Commissioner of Income-tax,* (1981) 129 ITR 105.
2. *Fazal* v. *Mangaldas,* (1922) 46 Bom. 489 : 66 IC 726 : 23 Bom. LR 1144 : (1922) Bom. 303; *Meghraj Roormal* v. *Anoop Singh,* (1935) All. 1004 : 159 IC 984 (Pakka Adatia occupies a position analogous to *del credere agent*).
3. *Shaw* v. *Woodcock,* (1827) 108 ER 652 : 31 RR 158.
4. *K.N. Marularadhya* v. *Mysore State,* (1969) 1 Mys. LJ 533 : AIR 1970 Mysore 114.
5. *Stevens* v. *Biller,* (1883) 25 Ch.D. 31; *Evans* v. *Dixon,* (1876) 4 Ch. D 133.
6. *Smart* v. *Sandars,* (1848) 136 ER 1132 : 75 RR 849.
7. *Houghton* v. *Mathews,* (1803) 127 ER 263 : 7 RR 815.
8. *Dingle* v. *Hare,* (1859) 141 ER 770 : 121 RR 424.
9. *Guerriero* v. *Peile,* (1820) 106 ER 786 : 22 RR 500.
10. *Cockran* v. *Irlam,* (1813) 105 ER 393 : 15 RR 257.

to sell against the will of the owner of the goods.[1] In the absence of such an agreement, the factor cannot sell against the wishes of the owner. It would, however, be open to him to sue for recovery of the advances made by him even before an actual sale of the goods takes place and even if the contract provide that the advances made by the factor must be repaid out of the sale proceeds.[2] It may also be noted that the factor has got a general lien on a balance of account under Sec. 171, while a broker has not.[3]

Pakka Adatia and Kacha Adatia.—These types of commercial agents are peculiar to Bombay. Generally, a merchant in the Bombay Presidency enters into transactions in the Bombay market through the medium of a *Pakka adatia.* But the relationship between the mofussil constituent and the *pakka adatia* is not merely that of principal and agent. As was said by Jenkins, C.J., in *Bhagwandas* v. *Kanji,*[4] "In effect, he [the *pakka adatia*] undertakes or guarantees to find goods for cash or cash for goods or to pay the difference." He is in the position of a principal to the parties seeking to purchase and sell, and guarantees performance to both. But no privity of contract is established between the seller and buyer as in ordinary cases. To all intents and purposes, therefore, he is in the position of a principal, and so, he has the right to enforce the contract entered into on behalf of the principal.[5] **[773]**

The relationship between a pakka adatiya and his constituent can be either that of a principal or that of an agent to the principal depending on the facts of the case.[6] He is like a principal in that he can allocate the contract to his constituent.[7] The provisions of the Contract Act defining the rights and liabilities of an agent would apply to the pakka adatya and he is bound to carry out the instructions of the constituent.[8]

The *Kacha adatia* is in the position of a *del credere* agent acting on behalf of an undisclosed principal.[9] His remuneration consists solely of his commission. He is in no way interested in the profits or loss made by his constituent.[10]

Joint agency.—Where an authority to act is given to more than one person, the general presumption is that it is a joint authority and not joint

1. *Jafferbhoy* v. *Charlesworth,* (1893) 17 Bom. 520; (Cf) *Murtunjoy* v. *John Cockrane,* (1865) 10 MIA 229 (Facor's interest in principal's goods by reason of advances made) **See also** *De Comas* v. *Prost,* (1865) 16 ER 59 : 146 RR 45.
2. *Sheik Mahammad* v. *Oakley Bowden & Co.,* (1919) 11 LW 1.
3. *Stevens* v. *Biller,* (1883) 25 Ch. D 31.
4. (1906) 30 Bom. 205; **see also** *Manilal* v. *Radhakisson,* (1920) 45 Bom. 386 : 62 IC 361 : 22 Bom. LR 1018; *Meghraj Roormal* v. *Anoop Singh* (1935) All. 1004 : 159 IC 984.
5. *Hukam Chand* v. *Abraham,* (1920) 21 Bom. LR 783 : 52 IC 519.
6. *Ganesh Lal* v. *Jothi Prasad,* 1969 All LJ 1104.
7. *Nathmal Bhaironbux & Co.* v. *Kashi Ram,* AIR 1973 Raj 271.
8. *Ibid.*
9. *Champa Ram* v. *Jai Lal,* (1927) All. 617 : 105 IC 739. **See also** *Sobhaglal* v. *Mukund Chand,* (1926) 53 IA 241 : 51 Bom. 1 : 28 Bom. LR 1376 : 44 CLJ 509 : 51 MLJ 809 : 98 IC 338 : (1926) MWN 830.
10. *Harphoolchand Ganeshilal* v. *K.L. Jagannath Prasad,* ILR (1961) Raj. 390.

and several. It is therefore necessary that joint agents must act in consent,[1] unless the document creating the agency provides for a quorum.[2] In the case of public bodies, however, the act of the majority of the members who are constituted agents of the body will be valid and binding.[3]

"Person".—The word 'person' used in this section and other cognate sections of the Contract Act includes a Hindu joint family.[4]

183. Who may employ agent.—Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

Capacity of parties.—PRINCIPAL—The section provides that the principal must be a person competent to contract (*i.e.,*) must be of the age of majority, and of sound mind.[5] Under this section a person who is *sui juris* may appoint an agent for any purpose whatever, save as to exceptions as when the act to be performed is personal in character or is annexed to a public officer or to an office involving fiduciary obligation.[6] The guardian of a minor or the committee of a lunatic cannot be said to be the agent of the minor or lunatic, because he is not 'employed' by such minor or lunatic.[7] Though a minor cannot appoint an agent his guardian is not precluded from appointing an agent to the minor.[8] **[755]**

The legal counsel is not competent to give evidence on behalf of his client in a representative capacity.[9] Where the principal becomes old, weak and mentally infirm incapable of thinking independently, the power of attorney is worthless.[9] Client counsel relationship ceases when the client is unable to give instructions to the counsel owing to his mental infirmity.[9]

184. Who may be an agent.—As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an

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1. *Brown* v. *Andrew,* (1849) 118 ER 1304 : 83 RR 842. **But see** *Guthrie* v. *Armstrong,* (1822) 106 ER 1320 (Authority given jointly and severally).
2. *Ridley* v. *Plymouth Grinding & Baking Co.,* (1848) 76 RR 742 : 2 Ex 711; *Macdonald & Herslett's case,* (1911) 2 Ch. 430.
3. *Grindley* v. *Barker,* (1798) 126 ER 875 : 4 RR 787.
4. *Shankar Lal* v. *Toshan Pal,* (1934) ALJ 453 : 150 IC 151 : (1934) All 553.
5. *Parkash* v. *Strauss & Co.,* (1928) Lah. 854 : 109 IC 336; *Daily Telegraph* v. *Mc Laughlin,* (1904) AC 776 (Person of unsound mind cannot give power of attorney).
6. *Zonal Manager, L I.C.* v. *City Munsif,* AIR 1968 All. 270 : 1968 Lab.IC 910. Cf. *K.K. Khadilkar* v. *Indian Hume Pipe Co.,* AIR 1967 Bom. 521 : 96 Bom.LR 273 : 1967 Mah.LJ. 579 holding right of audience before a tribunal can be delegated to an agent.
7. *Ranmalsinghi* v. *Vadilal,* (1896) 20 Bom. 61.
8. *Madanlal* v. *Bherulal,* AIR 1965 Mys. 272.
9. *Mahendra Prathap Singh* v. *Padma Kumari Devi,* AIR 1993 All. 143.

agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

Capacity of parties—Agent.—The wide language of the section "any person may become an agent" shows that though the principal must be a major, there is nothing to prevent a minor or *non compos mentis* being an agent. This is so, because, as regards third parties, the act of the agent is that of the principal. Though the agent may lack contractual capacity, the contract made by him with third parties is really the contract of his principal and will therefore be binding.[1] But, in such a case the immediate contract of agency between principal and the minor agent will not be valid, and consequently, the minor agent will not be responsible to the principal. **[755]**

185. Consideration not necessary. — No consideration is necessary to create an agency.

Consideration.—It has been said [2]:

> "Agency is not a contract for which any express consideration on either side is necessary because, on the one hand, the fact of employment and the credit thereby gained, and on the other the promise to act, are themselves, sufficient to constitute a good contract."

186. Agent's authority may be expressed or implied.— The authority of an agent may be expressed or implied.

Crucial test of agency.—The relationship of agency arises whenever one person called the agent has authority to act on behalf of another called the 'principal' and consents so to act.[3]

Express authority.—Instances where express authority in writing is required may be found in Sec. 32 of the Registration Act, and Or. 3, Rules 1, 2 and 4 of Code of Civil Procedure, regulating the appointment of pleaders in suits.

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1. *Parkash Chand* v. *Strauss & Co.*, (1928) Lah. 854 : 109 IC 336; *Gopi Mal* v. *Jain Bank*, (1918) 45 IC 17; *Madan Gopal* v. *Hindu Biscuit Co.*, (1902) 4 Bom. LR 627; *Re D' Angibau*, (1880) 15 Ch. D 228.
2. *Allahabad Bank* v. *Simla Banking Industrial Co.*, (1929) Lah. 182 : 114 IC 321. **See also** *Bhoobun Chander* v. *Ram Soonder*, (1878) 3 Cal 300; *Vishnucharya* v. *Ramchandra*, (1881) 5 Bom. 253, **see** *Mohd. Moinuddin* v. *Ahmed Ali*, AIR 1965 AP 409 :1965 (2) An.WR 78. (claim by counsel for fees sought to be negatived on the ground that he agreed to work free and he was an agent of the party and no consideration was necessary to create an agency.)
3. *Syed Abdul Khader* v. *Rami Reddy*, AIR 1979 SC 553 : 1979 (2) SCR 424 : (1979) 2 SCC 601.

When arbitrator handed over the award to one of the parties it was held[1] that the party must be deemed to have implied authority of arbitrators for filing the award in court.

187. Definition of express and implied authority.—An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Illustration

A owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by *B*, and he is in the habit of ordering goods from *C* in the name of *A* for the purposes of the shop, and of paying for them out of *A's* funds with *A's* knowledge. *B* has an implied authority from *A* to order goods from *C* in the name of *A* for the purposes of the shop.

Express authority.—The authority is said to be express, where it is given by words, written or spoken. There is no need for any particular form. Any informal writing will suffice. But in many cases, the written authority is in the form of a power of attorney. As regards powers of attorney, the authority to act should be found within the four corners of the instrument in express terms or by necessary implication.[2] **[758]**

Implied authority.—Where there is no express appointment, the law infers the relationship from the situation of the respective parties, the usage or course of dealing etc.[3] **[762]** But when the relationship other than principal and agent exists between the parties merely because certain acts suggest the relationship of principal and agent, the parties cannot be taken out their original relationship. Where under an oral agreement, the defendant bank received bills, documents and air receipts sent by or on behalf of the plaintiff and also released or taken delivery of the goods of the plaintiff and also kept them in its godown, although such acts are capable of giving rise to an inference

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1. *Ram Lakhan* v. *Mukhdeo,* AIR 1982 Pat. 19 : 1982 (1) Civ.LJ 242.
2. *Bank of Bengal* v. *Ramanathan Chetty,* (1916) 43 Cal. 527 : 30 MLJ 232 : 3 LW 210 : 32 IC 419.
3. *Shah Mahomed* v. *Ahmad Ali,* (1934) 11 OWN 880 : (1935) Oudh 170.

that it acted as the agent of the plaintiff, but the parties cannot be taken outside the ordinary relationship of banker and customer.[1] An employer though not an insurance agent under the Insurance Act, has an implied authority of LIC to be its agent for collecting the premium from the salary of the employee.[2]

HUSBAND AND WIFE.—The relation of husband and wife is a familiar instance of implied agency. The wife, when living with the husband can pledge her husband's credit for purchases made in the course of the management of the household. Again, by virtue of the husband's legal duty to maintain the wife, the latter is invested with the right to pledge the husband's credit in respect of articles of necessity.[3] Where monies were borrowed by the wife to discharge prior debts and not for purchases for the household or for necessaries,[4] it was held that the husband was not liable for the debts. Nor will the wife's implied authority extend to acknowledgment of a debt due by the husband.[5]

Where the wife is living apart from her husband, the question of implied authority will depend on whether there is justification for her separate living and whether the husband has given her maintenance. As was said in *Viraswami* v. *Appaswami.*[6]

> "A person dealing with a wife and seeking to charge her husband must show the existence of such a state of things as would warrant her in living apart from her husband and claiming support or maintenance, when of course, the law would give her an implied authority to bind him for necessaries supplied to her during such separation, in the event of his not providing her with maintenance.

Therefore, in the case above cited, a Hindu wife was held to have no implied authority to bind her husband by her borrowings where her living apart was not justified, the reason therefor being the second marriage of the husband. So, where it was found that the husband had been giving sufficient

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1. *UCO Bank* v. *Hemchandra Sarkar,* AIR 1990 SC 1329, 1332 : (1990) 3 SCC 389.
2. *Delhi Electric Supply Undertaking* v. *Basanti Devi,* AIR 2000 SC 43, 48 (DB) : (1999) 8 SCC 229 : 1999 (8) Supreme 538 : 1999 (3) SCJ 413 : 1999 (98) Com Cas 695.
3. *Gomathi Ammal* v. *Avu Ammal,* (1933) 56 Mad. 964 : 146 IC 49 : (1933) MWN 365 : 38 LW 321 : (1933) Mad. 686 : 65 MLJ 355; *Kanshi Ram* v. *Nisbett Shedman,* (1929) Lah 18 : 116 IC 618; *Manby* v. *Scott,* (1659) 82 ER 1000.
4. *Girdhari Lal* v. *Crawford,* (1885) 9 All. 147.
5. *Gomathi Ammal* v. *Avu Ammal,* (1935) 56 Mad. 964 (The reason given may not be valid now in view of the Hindu Marriage Act, 1955 and the Hindu Adoptions and Maintenance Act, 1956).
6. (1863) 1 MHCR 375.

funds for the wife's maintenance and had specifically forbidden her from pledging his credit, the Court held that the husband was not liable for goods supplied to the wife.[1] **[767]**

MASTER AND SERVANT.—The authority has been presumed in such cases as "when a master frequently sent a servant to market without ready money so that the servant is trusted on the master's account." The plaintiff must be able to show a course of dealing by which it was a practice for goods to be supplied to the principal through the servant in the course of employment.[2]

AGENCY OF NECESSITY.—It may be observed that in exceptional cases, an authority is implied in law from the necessity of the situation, to contract on behalf of the person whose interest is concerned.[3] The most usual instances are cases of the master of a ship being forced to pledge the credit of the owner for repairs in the course of the voyage, or even to sell the cargo.[4] **[765]**

As to the limits of the applicability of this doctrine while the view has been expressed in *Prager* v. *Blatspiel, Stamp & Heacock* [5] that the doctrine should be expanded so as to meet the needs of a growing society to every case where one has to act for another in an emergency, in a later case *Jebara* v. *Ottoman Bank* [6] the court was of opinion that the doctrine must be limited to certain well known exceptional cases like the carrier selling perishables, or the master of a ship pledging its credit.

Scope of authority.—In *Malukchand* v. *Sham Moghan,*[7] it was held that an authority "to dispose of" property in any way the holder thought fit, does not imply an authority to mortgage. the Privy Council pointed out in *Bank of Bengal* v. *Ramanathan Chettiar,*[8] that in case of a money-lending business, authority to borrow implies an authority to pledge the principal's credit for obtaining or securing advances from others to customers. In *Uma Shankar* v.

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1. *Morel Bros.* v. *Westmoreland,* (1904) AC 11; *Mahomed Sultan* v. *Horace Robinson,* (1907) 30 Mad. 543. **See also** *Pusi* v. *Mahadeo Prasad,* (1880) 3 All. 122. Compare the English case of *Debenham.* v. *Mellon,* (1880) 6 AC 24 (Question of authority to pledge husband's credit is one of fact).
2. *Suga Ker* v. *Brijraj* (1937) Pat. 526 : 168 IC 986. (Cf.) *Wright* v. *Glyn,* (1902) 1 KB 745.
3. *G. N. Ry* v. *Swaffield,* (1874) 9 Ex. 132.
4. *Hopper* v. *Burness,* (1876) 1 CPD 137.
5. (1924) 1 KB 566.
6. (1927) 2 KB 270 on appeal (1928) AC 269; (Cf.) *Cox* v. *Midland Counties Ry.,* (1849) 3 Ex. 268.
7. (1890) 14 Bom. 590.
8. (1916) 43 Cal. 527 (PC) : 14 ALJ. 117 : 18 Bom. LR 317 : 30 MLJ 232 : 3 LW 210 : 32 IC 419.

Gobind Narain[1] the mere fact of a person writing letters on behalf of his principal was held insufficient to clothe him with authority to make a binding acknowledgement.

188. Extent of agent's authority.—An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

Illustrations

(a) *A* is employed, by *B*, residing in London, to recover at Bombay a debt due to *B*. *A* may adopt any legal process necessary for the purpose of recovering the debt and may give a valid discharge for the same.

(b) *A* constitutes *B* his agent to carry on his business of ship-builder. *B* may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business.

Extent of agent's authority.—Where one person authorises another to do a certain thing, he impliedly empowers the other to adopt all the necessary means for doing the thing directed. As Story says, the authority of the agent is construed to include all the necessary and usual means of executing it. This is the first paragraph of the section. The second para enacts that where the agent is authorised to carry on a business, he has authority to do every lawful thing, which is necessary for the purpose or usually done in the course of conducting such business.[2]

Thus in both cases, there is an extension of the authority, beyond what is expressly or intentionally conferred by the principal. The reason for the rule is that the principal would have certainly not intended to satisfy the authority in terms given by him, by denying authority to do all incidental acts necessary to make that authority effective. And most of the questions in the decided cases on this branch of the subject centre round what are such necessary or incidental acts in relation to the 'execution' of the authority. **[778]**

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1. (1924) 46 All. 892 : 22 ALJ 807 : 80 IC 6 : (1924) All 855.
2. *Howard* v. *Baillie* (1796) 126 ER 737 : 3 RR 531.

The term 'lawful' in the section means that what the agent does must not be against public policy or for any other reason illegal.[1] An agent of a corporation cannot have authority to do any act as agent, which would be ultra vires, the corporation.[2] The statement of a person having authority to represent another under a power of attorney is one made in the course of business and is admissible in a criminal case against the principal.[3] The Secretary of a co-operative stores authorised under the bye-laws to carry on business on sound lines has implied authority to purchase goods on credit.[4] An agent merely for collection has no authority to allow for deficiencies, admit counterclaims or pay off or recognise any other adverse claim.[5] Authority to sell includes authority to agree to sell.[6] An agent having authority to take delivery of goods from the railway cannot rebook them.[7]

Construction of authority.—As agency is only a species of contract, the general rules of construction relating to contracts will apply here also. Where the contract has been reduced to writing, that will be the conclusive evidence of the intention of the parties and it is doubtful whether Sec. 187 of the Contract Act can be relied upon.[8] The whole document will have to be construed in the light of surrounding circumstances, the situation of the parties, the object to the authority etc., the usual course of dealing in the business of the agency may be referred to in cases of doubt.[9]

Where the terms are ambiguous, and the agent has in good faith acted upon one construction, his acts will be binding on the principal.[10]

Powers of attorney.—As a power of attorney is a solemn document executed with certain formalities, it is construed strictly. As was said in *Bank of Bengal* v. *Ramanathan Chetty,*[11] where an act purporting to be done under a

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1. *Nabagopal Das* v. *Dacca Co-operative Town Bank,* IDR 93.
2. *Sutlej Cotton Mills Ltd.* v. *Ranjit Singh,* AIR 1952 Punjab 253.
3. *R.K. Dalmia* v. *Delhi Administration,* AIR 1962 SC 1821 : 1963 (1) SCR 253 : 1962 (2) Cr. LJ 805 : 1962 (32) CC 699.
4. *Velapad Co-operative Stores Ltd.* v. *Srinivasa Iyer Brothers,* AIR 1964 Ker. 126.
5. *State of Jammu & Kashmir* v. *Vasant Rai Amresh Parek,* 1978 Kash. LJ 13.
6. *Palaniappa* v. *South Indian Planting & Industrial Co. Ltd.,* AIR 1953 Trav. Co. 161.
7. *Mohammed Ebrahim* v. *Union of India,* AIR 1959 Pat. 337.
8. *Poboodan* v. *Miller,* (1938) 2 MLJ 688 : (1938) MWN 1023 : 48 LW 666 : (1938) Mad. 966.
9. *Ireland* v. *Livingston,* (1872) 5 HL 395 : *Gould* v. *S.E. & C. Rail Co.,* (1920) 2 KB 186; *Westminister Bank* v. *Hilton,* (1926) 136 LT 315.
10. *Ireland* v. *Livingston,* (1872) 5 HL 395; *Gould* v. *S.E. & C. Ry,* (1920) 2 KB 186; *Pole* v. *Leask,* (1860) 54 ER 481 : 126 RR 259; *Seethalakshmi* v. *Narayana Swami,* (1922) 15 LW 205.
11. (1916) 43 Cal. 527 (PC). **See also** *Shankar* v. *Lakshmibai,* (1928) Bom. 225 : 30 Bom. LR 470 : 109 IC 737; *Jonmenjoy* v. *Watson,* (1884) 10 Cal. 901 (PC); *Palaniappa* v. *Arunachala,* (1912) 23 MLJ 595; *Stocking* v. *Tata Iron & Steel Co.,* (1917) Pat 273 : 41 IC 175; Mt. *Karam Bibi* v. *Mehr Ali,* (1933) Lah. 876 : 144 IC 553; *Vijathammal* v. *Kadir Sultan* (1937) 1 MLJ 23 : 44 LW 603 : 165 IC 831 affirming 69 MLJ 177, **see also** *Syed Abdul Khader* v. *Rami Reddy,* AIR 1979 SC 553; *Konda Anthiah* v. *Madan Rao,* AIR 1969 AP 211.

power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication.[1] The limits of "necessary implication" are pointed out in the section itself.[2] Power of attorney authorising a bank to collect bills due to a contractor from military officers does not operate as an assignment of the debts.[3] Authority to sell for cash gives the donee power not merely for prompt payment of cash but also for deferred payment.[4] Generally, a power of attorney will be construed as including such necessary and incidental powers, as will help to carry out the object of the power.[5] Power delegated through a power of attorney has to be interpreted according to the terms, which the power of attorney indicates, but not in a narrower sense and such power also includes all other incidental powers necessary for its effective execution.[6] The general words used in the operative part are to be construed with reference to the specified object or controlling purpose of the instrument, and are controlled by the recitals.[7] Again, where special powers are followed up by general powers, the later are construed, as strictly limited to what is necessary for the effective exercise of the special powers.[8] Thus, where a power of attorney was executed empowering the agent to borrow any money for any purpose and do any other work as necessity arose, it was held that the deed could not be construed as conferring a power to mortgage the property of the principal.[9] Similarly, where the authority was to demand and receive moneys due to the principal and take all steps for collection, and to do all other business, the words last mentioned (*viz.*) to do all other business were limited to the business of recovering the moneys due, and were held not to include the indorsement of a

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1. For English authority **see** *Bryant* v. *La Banque du Peuple,* (1893) AC 170.
2. *Paboodan* v. *Miller,* (1938) 2 MLJ 688 : (1938) MWN 1023 : 48 LW 666 : (1938) Mad. 966. **See also** *Palaniappa* v. *Arunachala,* (1912) 23 MLJ 595 : 17 IC 139 : (1912) MWN 1204; *Ferguson* v. *Umachand,* (1906) 33 Cal. 343.
3. *Union Bank of India* v. *Bank of the East Ltd.,* AIR 1954 Assam 23.
4. *Palaniappa* v. *South Indian Planting & Industrial Co. Ltd.,* AIR 1953 Trav. Co. 161.
5. *In re : Wallace,* (1884) 14 QBD 22 (Power to carry on suits includes power to sign a petition for adjudication of the principal's debtor as a bankrupt); *Routh* v. *Macmillan,* (1863) 159 ER 310 : 133 RR 788; *Howard* v. *Baillie,* (1796) 126 ER 737 : 3 RR 531.
6. *H.M. Krishna Reddy* v. *N.K. Parameshwaran,* 2002 (1) Civil LJ 404 (Karn).
7. *Midland Bank* v. *Reckitt,* (1933) AC 1; *Danby* v. *Coutts,* (1885) 29 Ch. D 500; *Bank of Scotland* v. *Dominions Bank,* (1891) AC 592.
8. *Adaikappa* v. *Thomas Cook & Son,* (1933) 64 MLJ 184 : (1933) ALJ 277 : 37 LW 319 : (1933) PC 78 : 142 IC 660 (Power to "endorse" given to bank manager does not include power to "bank" bills); *Jan* v. *Fajjan,* (1938) Lah. 351 : 40 PLR 59 (Authority to manage property—Power to mortgage and sell Sale proper only if necessity therefor in course of management) *Attwood* v. *Munnings,* (1827) 108 ER 727 : 31 RR 194; **see also** *Jacobs* v. *Morris,* (1902) 1 Ch. 816.
9. *Solema Bibi* v. *Hafez Mahomed,* (1927) 54 Cal. 687 : (1927) Cal. 836 : 104 IC 833.

bill of exchange.[1] So too, a power to draw cheques "without restriction" was held not to give the donee authority to draw cheques for payment of his private debts.[2] An authority to surrender shares of the principal in a company was held not to include a renunciation of shares newly issued to the principal.[3] So too a power to carry on proceedings in court will not include power to present a document for registration.[4] On the same principle, a power to institute legal proceedings in respect of claims and to settle them does not include authority to assign a decree obtained by the principal.[5] Where an agent did not have the power of attorney to institute a suit on the date of instituting of such suit but subsequently obtained a general power of attorney ratifying his action in filing the suit, it cannot be said that the agent has taken the authority on behalf of the principal for prosecution of the cases against the defendants.[6] But a power to transact "all the affairs and concerns" of a Chetty firm in Rangoon and to sign the principal's name to all documents was held to include authority to execute a lease for the firm.[7] A general power of attorney, authorising the agent "to sign or execute any bond, surety bond, mortgage or any other documents purporting to create a charge" was construed as conferring a power to enter into a contract of suretyship whereby the principal became a surety for the agent himself.[8] Where the principals carrying on export and import trade had executed a power of attorney authorising the agent to purchase goods, the court had no difficulty in holding that the power could not include a power to borrow or to receive deposits of money on behalf of the principal.[9] Similarly, a power of attorney to the director of a company authorising him to appear for and on behalf of the company and to prosecute proceedings in court was held not to include the right to plead.[10]

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1. *Hogg* v. *Snaith,* (1808) 127 ER 867 : 9 RR 788. **See also** *Fenn* v. *Harrison,* (1791) 100 ER 842 (Authority to discount bills does not authorise endorsing of bills in the principal's name).
2. *Midland Bank* v. *Reckitt,* (1933) AC 1.
3. *Ezektal* v. *Carew & Co.,* ILR (1938) 2 Cal. 190 : (1938) Cal. 423.
4. *Madan Lal* v. *Ganga Bishan,* (1938) Lah. 255. But it may include power to file appeal and engage pleader therefor, **see** *Rasul Shah* v. *Dewan Chand,* (1936) Lah. 583 : 165 IC 274; *Inderwati* v. *Hari Ram,* (1937) Lah. 318 (Power to conduct appeal does not include power to appeal in *Forma pauperis).*
5. *Govardhandas* v. *Friedmans Diamond Co.,* (1939) MWN 290 : 49 LW 375.
6. *State of Karnataka* v. *Muni Raju,* AIR 2002 Kant. 287 : 2002 (4) Civil LJ 418 (Kam) : 2002 AIR Kant HCR 1616 : 2002 (3) ICC 767 : ILR (Kant) 2002 (3) Kam 2923.
7. *Bhagwan Das* v. *S.P.K.A. Chettiyar,* (1933) Ran 385.
8. *Kumar Narendra Nath* v. *Bimala Sundari,* (1938) Cal. 573 : 42 CWN 718 : 177 IC 715 (It was found in this case that the agent did not act in fraud of his principal); *Cohen* v. *Baidyanath Mookerjee,* (1936) Cal. 646 : 40 CWN 1270; (Power of attorney by mortgagee to execute and enforce powers of sale includes powers to appoint receiver of the mortgaged properties).
9. *Vijiathammal* v. *Kadir Sultan,* (1937) 1 MLJ 23 (affirming 69 MLJ 179) : 44 LW 603 : 155 IC 831.
10. *Eastern Tavoy Minerals Corpn In Re.* (1934) 61 Cal. 324 : 151 IC 753 (1) : (1934) Cal. 563.

Where a general power of attorney authorised the agent to mortgage certain property, it was held that the agent could not bind his principal to personal decree on the balance after sale of the mortgaged property.[1]

As long as the general power of attorney legally continues to subsist validly, the power of attorney will have all the necessary authority to deal with all properties belonging to the principal without making any distinction between the property owned and acquired by the principal prior to the power of attorney and subsequent thereto for empowering the power of attorney to deal with them.[2]

Where a power of attorney is executed by the principal authorising the agent to act on his behalf, he can revoke it by serving a notice unless the agency is one coupled with interest.[3]

Where the document is titled "General Power of Attorney", it cannot be confined to one single transaction as in the case of "Special Power of Attorney" and it being in writing cannot be revoked orally. [4]

On the same principal, a servant has been held to have no authority merely from the fact of service, to pledge his master's credit.[5]

Again, the terms of the agency may, in particular cases, exclude expressly or impliedly, particular powers. Thus is *Ferguson* v. *Umachand,*[6] an authority to the manager of a silk factory specifying the powers, but silent as to authority to borrow, was held to exclude such power.

Revocation of power of attorney.—It is open for the principal to revoke the power of attorney. But where the power of attorney created in favour of agent is coupled with interest. Even though the expression "irrevocable" is mentioned in a power of attorney, it will not make the power of attorney irrevocable unless the terms thereof, disclose that it created or recognised the agency coupled with interest in favour of the agent. Ordinarily a power of attorney which delegate's power to an agent to do certain acts can either be revoked or cancelled at the will of the principal. But where the power of attorney executed in favour of an agent/attorney in the property being the subject matter of agency, the power of attorney can neither be revoked nor terminated.[7]

1. *V.E.R. Firm* v. *U Ba Cho,* (1931) Ran. 223 : 134 IC 216.
2. *P.L.Pinto* v. *F.F. Menzes,* AIR 2001 Karn. 141, 144.
3. *Bhagyalakshmi* v. *Appasamy Asari,* AIR 2004 Mad 424.
4. *Amina Begum* v. *Mohd. Ramzan,* AIR 2005 Raj 41 : 2004 (4) Cur CC 197 : 2004 (4) WLC 540 : 2005 (1) CTLJ 509 (Raj).
5. *Wright* v. *Glyn,* (1902) 1 KB 745.
6. (1905) 33 Cal. 343.
7. *Corporation Bank Bangalore* v. *Lalitha H. Holla,* AIR 1994 Kant. 133 : 1994 (1) Civ.LJ 310 (FB) : ILR (1993) Karn. 3260 : 1993 (3) Kant.LJ. 372.

Where a power of attorney is executed by all the land owners in connection with the sale of land, the death of one of the executants does not necessitate the consent of his heirs and legal representatives particularly in the absence of any express contract for putting an end to the agency.[1]

Co-principal can jointly constitute an agent by a power of attorney.[2] When an agent is appointed by a plurality of principals he is liable to them jointly. He is not bound to account to any one of them separately.[3]

Authority to manage business.—In such cases, the extent of the implied authority will depend on the nature of the business and the amount of control, which has been given to the agent. For instance, the authority to conduct a business implies authority to appoint and dismiss clerks and servants. A power to carry on business may include a power to enter into forward contracts.[4] Again, as in the case of *Bank of Bengal* v. *Ramanathan Chetty,*[5] where the business was that of native banker and moneylender, it may be that an authority to borrow may imply an authority to pledge the credit of the firm. But a power to manage the principal's lands will not include the power to acknowledge a debt of the principal.[6] Nor will an authority to carry on a partnership business include the right to sue for dissolution.[7]

Authority to Purchase.—An authority for purchase of goods on credit implies an authority to agree to pay reasonable interest.[8] It may, in some cases, include a power to insure them,[9] but not a power to sell. It has also been held that an authority to purchase implies no authority to borrow for the purpose.[10]

Where the owner of rice mill who was purchasing-cum-milling agent of Food Corporation of India, denied of having authorised his son to sign the documents on behalf of the Mill, and no power of attorney was produced by the son at the time of execution of documents while receiving advance from FCI, his liability arises from his admission that he acted as agent and received advance but not from any document which has not been executed.[11]

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1. *Bhagwan Bhai Karaman Bhai* v. *Arogyanagar Co-op. Hsg. Socy. Ltd.,* AIR 2003 Guj. 294, 307.
2. *Syed Abdul Khader* v. *Rami Reddy,* AIR 1979 SC 553 : 1979 (2) SCR 424 : (1979) 2 SCC 601.
3. *Raghubir Dayal* v. *Firm Piare Lal,* AIR 1933 Lah. 93.
4. *Sassoon & Co.* v. *Angullia & Co.,* (1911) 10 IC 895.
5. (1916) 43 Cal. 527 : 20 CWN 329 : 30 MLJ 232 : 14 ALJ 217 : 3 LW 210 (PC); *Dhanpat Rai* v. *Allahabad Bank,* (1927) 2 Luck 253 : 89 IC 783 : (1927) Oudh 44.
6. *Beti Maharani* v. *Collector of Etawah,* (1894) 17 All. 198 (PC).
7. *Palanippa* v. *Arunachala,* (1916) 25 IC 140.
8. *Gopalaratnam* v. *Chockalingan,* (1915) 26 IC 365.
9. *Kanji Dwarkadas* v. *Haridas Purushotham,* (1911) 36 Bom. 484.
10. *Vijiathammal* v. *Kadir Sultan,* (1937) 1 MLJ 23 (affirming 69 MLJ 179) : 44 LW 603 : 165 IC 831.
11. *Parasram Agarwal* v. *Food Corporation of India,* AIR 1994 Orissa 290, 292.

Authority to sell.—In the first place it must be distinguished from a mere authority to find out a purchaser,[1] which is usually given to a broker. An authority however, to sell at a definite price extends to the making of a binding contract for sale.[2] But it does not necessarily imply authority to receive payment for the principal.[3] The sale must be for cash; credit sales are not permissible in the absence of any usage of the particular trade.[4] An authority to sell for cash will not warrant a sale partly for cash and party of shares.[5] An authority to sell may imply an authority to give a warranty as to the title to goods.[6] The authority however will not extend to creating a pledge or mortgage.[7]

Where part of the goods sold by a seller through a selling agent was rejected by the buyer as not being of the description agreed upon and the agent took back the unwanted goods it was held that the act of the agent was in the interest of the principal and was within the scope of the agent's authority.[8]

Where the power was to execute a sale deed, it has been held that it did not imply a power to execute an agreement for sale.[9]

Authority to make payments.—An authority to pay a debt implies an authority to make an acknowledgement of it.[10] But an authority to pay off a debt in full satisfaction will not include authority to make a part payment.[11] In this connection reference may be made to *Anantachari* v. *Rathnam & Sarathy,*[12] where it was held that an authorisation by the principal to the agent to pay certain sums coupled with an intimation to the third party will operate as an equitable assignment of the amount in favour of the third party.

Authority to receive payments.—Authority to receive the interest on a debt will not include authority to receive the principal.[13] A power to

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1. *Durga* v. *Rajendra,* (1923) 36 CLJ 467 : 77 IC 558 : (1923) Cal. 57.
2. *Sangali Solagan* v. *Nagamuthu,* (1924) MWN 857 : 20 LW 523 : 84 IC 612 : (1925) Mad. 227; *Purna Chandra* v. *Indra,* (1922) 49 Cal. 389 : 69 IC 978 : (1922) Cal. 397 : (Cf.) *Keen* v. *Mear,* (1920) 2 Ch 574.
3. *Butwick* v. *Grant,* (1924) 2 KB 483; *Krishna Rao* v. *Subba Reddi,* (1936) Mad. 379 : 70 MLJ 570 : 43 LW 698 : (1936) MWN 591 : 163 IC 154 (Buyer paying to seller's agent can show he had authority to receive payment).
4. *Pelham* v. *Hilder,* (1841) 62 ER 765 : 57 RR 208.
5. *Jumma Dass* v. *Eckford* (1882) 9 Cal. 1.
6. *Dingle* v. *Hare,* (1859) 141 ER 770 : 121 RR 424.
7. *Malukshand* v. *Shan Moghan,* (1890) 14 Bom. 590.
8. *Kulsekarapatnam Hand Match Workers' Co-operative Cottage Industrial Society Ltd.* v. *Radhelal Lalloolal,* AIR 1971 MP 191 : 1971 MPLJ 552 : 1971 Jab. LJ 529.
9. *Janki Pershad* v. *Yahia Hussain,* (1912) 16 CLJ 119 : 13 IC 637.
10. *Seshan Pattar* v. *Veera Raghavan* (1908) 32 Mad. 284.
11. *Linsell* v. *Bonsor,* (1835) 132 ER 95.
12. (1923) Mad. 713.
13. *Debendranath* v. *Mizra Abdul,* (1909) 10 CLJ 150. **See also** *Wilkinson* v. *Candlish,* (1850) 155 ER 39 : 82 RR 588.

receive payment of money will not imply a power to receive payment by a cheque,[1] or bill of exchange,[2] (in the absence of a custom to the effect) or by way of a set off.[3] Similarly, a power to receive payment of a mortgage debt will not include the exercise of the power of sale given under the deed.[4] But there can be no doubt that the power to receive payment will include an authority to give a receipt.

Authority to recover debts.—An authority to recover a debt includes the authority to take all steps necessary for the realisation of it. A general authority to collect debts will include the power to collect decree debt also.[5] But it will not include a power to sell or assign the claim,[6] or to give up a portion of the claim or to endorse bills for the principal.[7] An authority to continue, institute, prosecute, defend or oppose suits will not imply an authority to compromise suits.[8] A power to receive rents will not imply a power to distrain for rents.[9]

Authority to borrow.—Sec. 187 and 188 may no doubt authorise an agent to borrow money, if necessary, but these provisions are subject to modifications in cases where the transactions do not prove anything in favour of an implied authority to borrow.[10] Where the agent of a money lending firm at Rangoon pledged the credit of the firm for the purpose of securing an advance for a client by the bank the Privy Council held that, in view of the nature of the business, the agent had implied authority to pledge the credit of the firm, because without such authority, the business of money lending could not be carried on to advantage.[11] But, where specific powers are delegated, it is against all rules of construction to sweep in other powers by general words appearing in the document.[12] A partner however, who is in sole management of a partnership business, has power to borrow as incidental to the conduct of the business, and of pledging the credit and assets of the partnership.[13] And a power to borrow and repay money on behalf of a firm implies power to acknowledge a debt.[14]

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1. *Pape* v. *Westaocott,* (1894) 1 QB 272; *Sweeting* v. *Pearce,* (1859) 141 ER 890 : 121 RR 584.
2. *Williams* v. *Evans,* (1866) 1 QB 352 (Auctioneer receiving deposit by way of bill of exchange).
3. *Pearson* v. *Scott,* (1878) Ch. D 198; *Underwood* v. *Nicholls,* (1855) 139 ER 1062 : 104 RR 675.
4. *In re Dawson & Jenkin's Contract* (1904) 2 Ch. 219.
5. *Ramaswami* v. *Obai,* (1904) 15 MLJ 487; *Srinivasa Ayyangar* v. *Tirumalai Chetty,* (1914) MWN 372 : 23 IC 99.
6. *Palaniappa* v. *Arunachala,* (1912) 23 MLJ 595; see however, *Krishna Bhoopathi* v. *Raja of Vijyanagaram,* (1914) 38 Mad. 832.
7. *Murray* v. *East India Co.,* (1821) 106 ER 1167 : 25 RR 325
8. *Chetterjee* v. *Durga Dutt,* (1916) 20 CWN 943 : 34 IC 394.
9. *Ward* v. *Shaw,* (1833) 131 ER 742 : 35 RR 640.
10. *Ferguson* v. *Umchand,* (1906) 33 Cal. 343.
11. *Bank of Bengal* v. *Ramanathan Chetty,* (1916) 43 Cal. 527 : 20 CWN 329 : 30 MLJ 232 : 14 ALJ 217 : 3 LW 210 : 32 IC 419.
12. *Krishna Kidavu* v. *Raman,* (1926)39 Mad 918 : 38 IC 638.
13. *Asan Kani Rowther* v. *S. Chettiar,* (1907) 31 Mad 206.
14. *Lalta Prasad* v. *Babu Prasad,* (1909) 32 All. 51 : 4 IC 708.

Authority to give into custody.—The implied authority of an agent or servant to give persons into custody has been considered in a number of English cases. The test of authority would appear to be whether he is acting within the scope of his ordinary duties, and within the scope of his employer's powers.[1]

Authority of legal practitioner.—COUNSEL—According to the practice and traditions of the English Bar, a Barrister (or Advocate in Scotland) accepting a brief, is not an agent of the client.[2] The Barrister does certainly undertake a duty on his client's behalf, but in accepting the brief, he enters into no contract, express or implied, with his client.[3] He is deemed to have taken on himself a duty in the proper discharge of which, not merely the client, but the Court and the public at large, have an interest. The practical consequence of such a theory is that the ordinary rules as to limits of an agent's authority have no application to the relations between counsel and client. The counsel has extensive discretion as to the mode of conducting the case for his client. And incidentally, he has authority to compromise the suit in which he has retained as counsel.[4]

In *Sourendranath Mitra* v. *Tarubala Dasi*,[5] the Privy Council observed that, according to the English practice, the power to compromise a suit is inherent in the position of counsel or advocate, and that in India also, the same rule as to implied authority will apply, subject, as in England, to any specific directions of the client. A Full Bench of the Allahabad High Court has held that a Barrister enrolled as an Advocate is entitled to sue his client for fees.[6] **[781]**

Under the present law in India, as advocate is not a mere agent or power of attorney holder. The jural relationship between him and his client is not founded so much on a contract as from his status and the choice of the particular person by the client.[7] He holds a position of trust.[8]

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1. *Percy* v. *Glasgow Corporation*, (1922) 2 AC 299 (If within the scope, there is implied authority); *Walker* v. *S.E. Ry. Co.*, (1870) 5 CP 640 ; *Ormiston* v. *Great Western Ry. Co.*, (1917) 1 KB 598 (If agent is not acting within the scope of his authority and employer's powers, no protection); *Bank of New South Wales* v. *Owston*, (1879) 4 AC 270.
2. *Matthews* v. *Munster*, (1887) 20 QBD 141.
3. *Swinfen* v. *Lord Chelmsford*, (1860) 157 ER 1436.
4. Cf. also *Chengam Souri Nayakam* v. *A.N. Menon*, AIR 1968 Ker. 213 : ILR (1967) 2 Ker. 692.
5. (1930) 58 MLJ 581 : 34 CWN 453 : (1930) ALJ 489 : 32 Bom. LR 645 : (1930) ALJ 489 : 32 Bom. LR 645 : (1930) PC 158 : 123 IC 545 (PC) **See also** *Nilmoni Chaudhri* v. *Kedar Nath*, (1922) 1 Pat. 489 : 67 IC 96: (1922) Pat. 232; *Nundo Lal* v. *Nistarini*, (1900) 27 Cal. 428; *Jang Bahadur* v. *Shankar Rai*, (1890) 13 All 272 (FB); *Muttiah Chetty* v. *Karuppan Chettiar*, (1927) 50 Mad. 786 : (1927) Mad. 852.
6. *Nihalchand* v. *Dilawar Khan*, (1933) 55 All. 570 : (1933) ALJ 451 : 143 IC 727 : (1933) All. 417 (FB).
7. *In re an advocate*, 1979 Ker. LT 238.
8. *V.C. Rangadurai* v. *Gopalan*, AIR 1979 SC 281 : 1978 UJ (SC) 838 : 1979 All.LJ. 144 : (1979) 1 SCC 308.

The authority, however, does not extend to collateral matters.[1] Nor, will it justify a reference to arbitration contrary to instructions.[2] The Calcutta High Court held that the apparent authority of counsel is restricted to acts and admissions *coram judice* or in court.[3]

Barring lack of good faith, implied authority of counsel to enter into a compromise cannot now be denied in India.[4]

PLEADER.—But in any case the considerations set out above do not apply to pleaders who appear only under an express written authority given by the client. It is well settled by the highest authority that a pleader cannot compromise on behalf of his client without express authorisation.[5] And, the rule has been consistently applied by all the High Courts.[6]

In one Madras ruling, where the vakalatnama contained a clause that, if expedient or necessary, the vakil may compromise the suit, it was held that it was within the discretion of the pleader to decide whether it was necessary or expedient to compromise the suit.[7]

In a Full Bench case of the Allahabad High Court,[8] it has been held that where a vakalat confers wide powers in general terms and then specifies certain particularly important powers, the specification of particular powers does not detract from the general authority. In the case in question, the power to abide by the oath of a witness was held to be implied from the general wide powers in the vakalat. Mention may also be made of one Patna case, where following a ruling of the Privy Council, it was held that a vakil's general powers in the conduct of a suit include the abandonment which, in his discretion, he thinks it inadvisable to press.[9]

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1. *Johurmal Butra* v. *Kedar Nath,* (1927) 55 Cal. 113 : 104 IC 387 : 31 CWN 959 : (1927) Cal. 714.
2. *Chunilal* v. *Hira Lal,* (1928) Cal. 378 : 32 CWN 44 : 106 IC 309. **See also** *Neale* v. *Gordon Lennox,* (1902) AC 465.
3. *Askaran* v. *E.I. Ry,* (1925) 52 Cal. 386 : 29 CWN 566 : 88 IC 413 : (1925) Cal. 696.
4. *Madras Co-operative Printing & Publishing Co.,* v. *Ramalingam,* (1976) 1 MLJ 156 : *Jamilabi Abdul Kadir* v. *Shankerlal Gulabchand,* (1976) 2 SCJ 5 .
5. *Sorindranath* v. *Heramba Nath* (1923) PC 98 : 45 MLJ 453 : (1923) MWN 734 : 84 IC 721 (PC); **see also** *Saratkumari* v. *Amullyadhan,* (1923) MWN 692 : 17 LW 481 : 27 CWN 629 : 25 Bom. LR 548 : (1923) PC 13.
6. *Mt. Govindi* v. *Ganga* (1933) All. 955; *Mehra* v. *Ahmad,* (1929) Lah. 746 : 119 IC 430; *Devendranath Sarkar* v. *Ram Rachipal,* (1926) 1 Lah. 341 : 93 IC 302 : (1926) Oudh 315; *Jagapati* v. *Ekambaram,* (1897) 21 Mad. 274; (Cf) *Desram* v. *Baswa,* (1929) 8 Ran 290.
7. *Bashyam Ayyangar* v. *Srinivasa Chariar,* (1933) Mad. 734 : 38 LW 341 : 146 IC 219 (Authorities reviewed).
8. *Akbari* v. *Rahmat Hussain,* (1933) All. 861 : (1933) ALJ 1127 : 146 IC 84 (FB).
9. *Lalita Prasad* v. *Ram Narain,* (1934) Pat. 25 : Following *Venkata Narasimha* v. *Bashyakarlu,* (1902) 25 Mad. 367 (PC).

ATTORNEY.—In the case of an attorney, the English rule is that he can make a reasonable *bona fide* compromise, if the client has not specifically forbidden such a course.[1] The rule under the Contract Act is the same.[2]

Authority of the Officials:—Where the acts of the officials are beyond their authority and done with malafide intent, such acts cannot be binding on the principal.[3]

Authority of auctioneer.—By virtue of his peculiar legal position (as representing the owner of the goods at one stage and also the successful bidder at a later stage), an auctioneer is deemed to have implied authority to sign a contract of sale on behalf of the owner as well as the purchaser.[4] The authority cannot be delegated, so as to permit of a clerk signing the contract.[5]

Authority to sell by public auction does not include authority to sell the goods privately even though the auction may have been ineffective, and though the private offer may exceed the reserve price.[6] The deposit or the price must be received in case or by cheque, (if it is usual to accept cheques), but there is no implied authority to accept a bill of exchange.[7] Nor is there any implied, authority for rescinding a sale completed,[8] or for delivering goods without receiving payment,[9] or for giving a warranty as to the goods sold.[10]

An auctioneer has an implied authority to sell without reserve and if he does so, the vendor cannot set up against the buyer a limitation of that authority not made known to the buyer.[11]

Authority of broker.—A broker has implied authority to act according to the rules and regulations of the particular market. If he has been authorised to sell, there is implied authority for selling on reasonable credit if there is no usage to the contrary.[12] Where the principal is disclosed there is no implied authority to receive payment.[13] The broker has no authority to rescind

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1. *Fray* v. *Voules,* (1859) 120 ER 1125 : 117 RR 483.
2. **See** *Jagannadh Das* v. *Ram Das,* (1870) 7 BHC (OC) 79.
3. *Delhi Development Authority* v. *Skipper Construction Co., (P) Ltd.,* AIR 1996 SC 2005, 2016 : (1996) 4 SCC 622 : 1996 (2) Cur. CC 241 : 1996 (2) Guj. LH 36 (SC) : 1996 (62) DLT 543 : 1996 (21) Cur. LA 291 : 1996 (4) JT 679.
4. *Emmerson* v. *Heelis,* (1809) 127 ER 989 : 11 RR 520.
5. *Bell* v. *Balls,* (1897) 1 Ch. 663; *Peirce* v. *Corf,* (1874) 9 QB 210.
6. *Marsh* v. *Jelf,* (1862) 176 ER 105 : 130 RR 836; *Mews* v. *Carr,* (1856) 156 ER 1292 : 108 RR 683 (Private sales of unsold lots).
7. *Williams* v. *Evans,* (1866) 1 QB. 352; *Farrer* v. *Lacy* (1885) 31 Ch. D 42.
8. *Nelson* v. *Aldridge* (1818) 171 ER 697 : 20 RR 709.
9. *Brown* v. *Staton,* (1816) 23 RR 750 : 2 Chitty 353.
10. *Payne* v. *Leconfield,* (1882) 51 LJQB 642.
11. *Rainbow* v. *Howkins,* (1904) 2 KB 322 : (Cf.) *Mc Manus* v. *Fortescue,* (1907) 2 KB 1.
12. *Boorman* v. *Brown,* (1842) 114 ER 603 : 61 RR 287.
13. *Linck* v. *Jameson,* (1886) 2 TLR 206; *Campbell* v. *Hassel,* (1816) 171 ER 457; **but see** *Catterell* v. *Hindle,* (1867) 2 CP 368

or make variations in the terms of the contract made by him.[1] Nor has he power to delegate his business,[2] or to contract in his own name.[3]

Though ordinarily brokers are authorised simply to secure customers for their principals, they may also be authorised to effect contracts.[4]

In the case of stock-brokers, as they are usually employed to sell, to buy and to raise money upon as well as to keep in custody the securities of their customers, it is a reasonable assumption that they have full authority to deal with the securities.[5]

Authority of factor.—The factor has got an extensive discretion in the matter of the sale of the goods entrusted to him.[6] He may sell the goods in his own name,[7] and receive payment of the price.[8] He has authority to sell on reasonable credit,[9] and where the usual course of the trade demands it, authority to give a warranty in respect of the goods.[10] The authority, however, does not extend to barter of the goods.[11] The general rule against delegation of authority applies also to the case of the factor.[12]

Authority of shipmaster.—In *Beldon* v. *Campbell*[13] it was pointed out that as the master of a ship is appointed for the purpose of conducting the navigation of a ship to a favourable termination, the master has as incident to that employment, a right to bind has owner for all that is necessary to attain and the extent of the authority is determined by what is called "the law of the flag" (*i.e.,*) the law of the country to which the ship belongs.[14] He can enter into

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1. *Xenos* v. *Wickham,* (1866) 149 RR 467 : 2 HL 296 (Rescission of contract by broker); (Cf.) *Blackburn* v. *Scholes,* (1810) 170 ER 1177 : 11 RR 723.
2. *Cockran* v. *Irlam,* (1814) 105 ER 393 : 15 RR 257; *Henderson* v. *Barnewell,* (1827) 148 ER 721 : 30 RR 799.
3. *Baring* v. *Corrie,* (1818) 106 ER 317 : 20 RR 383.
4. *Laxmi Ginning & Oil Mills Ltd* v. *Amrit Banaspati & Co. Ltd.,* AIR 1962 Punj. 56.
5. *Mercantile Bank of India* v. *Central Bank of India,* ILR (1938) Mad. 360 : (1938) PC 52 : (1938) 1 MLJ 268; *London Joint Stock Bank* v. *Simmons,* (1892) AC 201.
6. *Smart* v. *Sandars,* (1848) 136 ER 1132 : 75 RR 849.
7. *Ex parte Dixon,* (1876) 4 Ch. D 133; *Baring* v. *Corrie,* (1818) 106 ER 317 : 20 RR 383.
8. *Drinkwater* v. *Goodwin,* (1775) 98 ER 1070.
9. *Houghton* v. *Mathews,* (1803) 127 ER 263 : 7 RR 815.
10. *Dingle* v. *Hare,* (1859) 141 ER 770 : 121 RR 424.
11. *Guerreiro* v. *Peile,* (1820) 106 ER 786 : 22 RR 500; *Gill* v. *Kymer,* (1821) 5 Moore CP 503. The same limitation applies to pledge of goods. **See** *Martini* v. *Coles,* (1813) 105 ER 53.
12. *Cockran* v. *Irlam,* (1821) 105 ER 393 : 15 RR 257.
13. (1851) 155 ER 805 : 86 RR 534.
14. **See** *The August,* (1891) Pr. 328. The *Gaetano & Maria,* (1882) 7 P Div. 137; *Droegs* v. *Stuart "The Karnak,*(1869) 2 PC 505; *Lloyd* v. *Gubert,* (1865) 122 ER 1134 : 141 RR 352.

contracts in respect of the usual employment of the ship.[1] But he cannot make any contract outside the scope of the voyage,[2] nor can he vary the terms of the contract already made by the owner.[3] He has authority to sign bills of lading in respect of goods on board.[4] For the purpose of executing necessary repairs, he may pledge the principal's credit.[5] He has also implied authority to borrow, where ready money is necessary for the prosecution of the voyage,[6] and where communication with the principal is not possible. Similarly, he can enter into agreements for towage [7] and salvage [8] where necessary. The authority extends to the hypothecation of the ship or cargo in cases of urgent necessity where it is not possible to get the owners instructions.[9] But the sale of cargo is justified only in cases of absolute necessity, as where the voyage becomes impossible for want of necessary repairs.[10] The principle is that the master is authorised by the owners of the cargo only to convey the goods to the port of discharge and that nothing but necessity can authorize him to adopt any other course of action.[11] The master, however, must use all reasonable efforts to convey the goods to their destination. Even an outright sale of the ship is justifiable where the ship has become damaged beyond repair or the cost of repair exceeds the then value of the ship.[12]

It may be added that in cases where the master is an appointee of the charterer of a particular ship, the owner of the ship is not liable on any of the contracts made by the master, because for the period covered by the charter

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1. *Grant* v. *Norway,* (1851) 138 ER 263 : 84 RR 747; *McLean* v. *Fleming* (1871) 2 HL 128; *Routh* v. *Macmillan,* (1863) 159 ER 310 : 133 RR 788 (has power to enter into a charter party).
2. *Burgon* v. *Sharpe,* (1810) 170 ER 1241 : 11 RR 788.
3. *Pearson* v. *Goschen,* (1864) 144 ER 142 : 142 RR 390; *Pickernell* v. *Jauberry,* (1862) 176 ER 98 : 130 RR 834 (Lessening the rate of freight); *Reynolds* v. *Jex,* (1865) 147 RR 351 : 7 B & S 86 (Freight made payable to other persons than the owner).
4. *Smith* v. *Bedouin Steam Navigation Co.,* (1896) AC 70; *Lishman* v. *Christie,* (1887) 19 QBD 333.
5. *Frost* v. *Oliver,* (1853) 118 ER 780 : 95 RR 560; *Gunn* v. *Roberts,* (1874) 9 CP 331.
6. *Edwards* v. *Havill,* (1853) ER 45 : 98 RR 561 (Purchase of provisions); *Arthur* v. *Barton,* (1840) 151 ER 355 : 55 RR 542; *Rocher* v. *Busher* (1815) 171 ER 391 : 18 RR 742; *Gunn* v. *Roberts,* (1874) 9 CP 331 (No authority to borrow where the agent of the owner is available for consultation).
7. *Welfield* v. *Adamson,* (1884) 50 LT 511.
8. *The Inchmaree,* (1899) Pr. 111 (Unreasonable agreement for salvage not binding); *The Renpor,* (1883) 8 Pr. 115.
9. *Kleinwort* v. *Cassa Marittima Genoa,* (1877) 2 AC 156; *The Staffordshire,* (1872) 4 PC 194; The Onward (1873) 28 LT 204.
10. *Australian Steam Navigation Co.,* v. *Morse,* (1872) 4 PC 222; *Gibbs* v. *Grey,* (1857) 157 ER 10 : 115 RR 408; *Freeman* v. *East India Co.* (1822) 106 ER 1316 : 24 RR 497.
11. *Atlantic Mutual Insurance Co.,* v. *Huth,* (1880) 16 Ch.D. 474.
12. *The Australia,* (1859) 15 ER 50 : 25 RR 676; *Cobequid Marine Insurance Co.* v. *Barteaux,* (1875) 6 PC 319; *Ireland* v. *Thomson,* (1847) 136 ER 460 : 72 RR 560.

party, the vessel is to be regarded as that of the charterer and not that of the owner.[1] So where the vessel is chartered to the master himself, he will be solely liable and no question of vicarious liability will arise at all.[2]

189. Agent's authority in an emergency.—An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Illustrations

(a) An agent for sale may have goods repaired if it be necessary.

(b) *A* consigns provisions to *B* at Calcutta, with directions to send them immediately to *C* at Cuttack. *B* may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

Emergency powers.—This has to be read as a qualification of the provisions contained in Secs. 211 and 214. The agent must prove that there was a real emergency, which did not permit of any communication with the principal. Where a railway company had sold certain quantities of butter entrusted to them for carriage, the Court held it was incumbent on the company to show that there was a real necessity to sell, and that communication with the consignor or other party interested was not possible.[3] **[782]**

The section is general in its terms and, subject to the condition of a real emergency, all acts, which a person of ordinary prudence will do in his own case, are authorised. It would therefore appear that the distinction laid down in some English cases,[4] that the particular act should be necessarily incidental to the business, and that a power to do what is usual does not include a power to do what is unusual, however urgent, will not be of much practical importance in the construction of the section.

The acts covered by such emergency authority may extend even to deviation from the authority given by the principal. See Illustration (b). There

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1. *Baumwell Manufacturer Von Carl* v. *Furness*, (1893) AC 8.
2. *Frazer* v. *Marsh*, (1811) 104 ER 362 : 12 RR 336.
3. *Sims* v. *Midland Ry. Co.*, (1930) 1 KB 103.
4. See *Hawtayne* v. *Bourne*, (1841) 151 ER 905 : 56 RR 806; *In re, Cunningham & Co.*, (1887) 36 Ch. D 532.

is authority in England to the effect that a factor may in an emergency sell perishable goods below the stipulated price.[1] Similarly, the agent may delegate his authority or appoint a sub-agent.[2] But it has been held that an agent in the management of a business in the conduct of which he has no implied authority to borrow does not become invested with such authority because of exceptional circumstances.[3] It is a question, however, whether the rule will be the same in India, in view of the wide language of the sections. In one case, it has been held that the agent in charge of a business may, in an emergency, borrow for the purpose of the business, so as to bind the principal.[4] And similarly, the managing agent of a company who had been given extension powers in the conduct of its affairs was held entitled to contract a loan when the exigency of the situation justified such a course.[5]

SUB-AGENTS

190. When agent cannot delegate?—An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the 'nature of the agency, a sub-agent must, be employed.

Analogous law.—Compare Sec. 47 of the Trust Act under which a trustee cannot delegate, except in certain cases, (*e.g.*) where the trust deed provides for delegation or the delegation is in the usual course of business.

Delegation.—The contract of agency has its root in personal confidence reposed by the principal in the agent,[6] and therefore the general rule is that laid down in the maxim *'Delegatus non potest delegare'* . Where the agent has personally undertaken to perform something, he cannot delegate performance,[7]

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1. *Chapman* v. *Mortin,* (1843) 152 ER 917 : 63 RR 669.
2. *De Bussche* v. *Alt,* (1878) 8 Ch. D 286.
3. *Hawtayne* v. *Bourne,* (1841) 151 ER 905 : 56 RR 806 (Manager of a mining business—Borrowing not an usual incident of the business—No authority to borrow even under exceptional circumstances); *In re Cunningham & Co.,* (1887) 36 Ch. D. 532.
4. *Dhanpat Rae* v. *Allahabad Bank,* (1927) Oudh 44 : 98 IC 783 : 2 Luck. 253.
5. *Dehra Dun Electric Tramway* v. *Jagmandar,* (1931) ALJ 1038 : 134 IC 244 ; **see also** *Roop Ram (Firm)* v. *Nanak Ram (Firm)* (1927) Lah. 493 : 103 IC 543 (Commission agent settling with his vendor, on default of payment by the principal).
6. *De Bussche* v. *Alt,* (1878) 8 Ch. D 286; *Bell* v. *Balls,* (1897) 1 Ch. 663.
7. *Coles* v. *Trecothick,* (1804) 32 ER 592 : 7 RR 167 (Auctioneer cannot delegate); *Cockran* v. *Irlam,* (1813) 105 ER 393 : 15 RR 257 (Factor cannot delegate); *Henderson* v. *Barnewell,* (1827) 148 ER 721 : 30 RR 799 (Broker cannot delegate); *Punjab National Bank* v. *Hukam Chand,* (1938) Pesh. 63.

unless the ordinary custom of the business[1] allows, or the nature of the agency[2] necessitates, such delegation, Again, where the act to be done by the sub-agent is only of a ministerial character, the rule against delegation will not apply.[3] Further, the conduct of the parties may raise a presumption about the intention to delegate to the knowledge of the principal.[4] **[692]**

191. "Sub-agent" defined.—A "Sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

Who is a sub-agent.—In Story on Agency (Sec. 386) it is said:

> "Where agent employs sub-agent in the business of the agency, the latter are clothed with precisely the same rights, and incur precisely the same obligations and are bound to the same duties, in regard to their immediate employer, as if, they were the sole and real principals."

When two sovereign powers enter into an agreement for the benefit of the citizens of the two countries relating to parcels or other registered articles and V.P.P., neither of them could be described as an agent of the other.[5]

It is necessary to distinguish the sub-agent mentioned in this section from the person named as 'agent for the principal' in Secs. 194 and 195 *infra*. The latter on nomination becomes an agent directly responsible to the principal and the fact that it is only an agent (and not the principal) who names him, as agent to the principal does not make any difference. On the other hand, a sub-agent is immediately responsible only to the agent, whose responsibility to the principal remains unaffected. There is privity of contract between the principal and the agent appointed (for the principal) by an agent; but there is none between a sub-agent and the principal.[6] **[786]**

Where a sub-agency is created in the belief that the original contract will subsist, the cancellation of such contract terminates the sub-agency.[7]

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1. *Moon* v. *Witney Union*, (1837) 132 ER 624 : 43 RR 802 (Customs of trade may authorise delegation); *Re, Neuen*, (1903) 1 Ch. 812 (Country solicitor may employ town agent).
2. *Leibaock Syndicate* v. *Finlay Fleming & Co.*, (1923) Ran. 84 : 77 IC 920.
3. *Brown* v. *Tombs*, (1891) 1 QB 253 (creditor under composition authorising agent to sign); (Cf.) *Ex-parte Birmingham Banking Co.*, (1868) 3 Ch. 651.
4. *De Bussche* v. *Alt*, (1878) 8 Ch. D 286; *Tarn* v. *Scanlan* (1928) AC 35.
5. *Union of India* v. *Mohd Nizam*, AIR 1980 SC 431 : 1980 (1) SCR 968 : (1980) 1 SCC 284.
6. *South Indian Industrials* v. *Rama Jogi*, (1914) 27 MLJ 501; *Meckersy* v. *Ramsays*, (1843) 8 ER 628 : 57 RR 183; *Stephens* v. *Badcock*, (1832) 110 ER 133 : 37 RR 448; *Calico Printers Assn* v. *Barclays*, (1931) 145 LT 51.
7. *Gopalasami Pillai* v. *Chidambaran*, (1916) 2 LW 411 : 29 IC 151.

Where a constituent of a bank draws a bull for collection at a place where the bank has neither branch nor agent and appoints an agent of his own, the collection of money by the latter would not bind the bank since he is no agent of the bank and the latter cannot be held liable on default by him, by the constituent.[1]

192. Representation of principal by sub-agent properly appointed.—Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

Agent's responsibility for sub-agents.—The agent is responsible to the principal for the acts of the sub-agent:

Sub-agent's responsibility.—The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

When sub-agent represents the principal.—Where a sub-agent has been appointed conformably to the provisions of Sec. 190, he is said to be 'property appointed' within the meaning of the present section; and the principal is, so far as third parties are concerned, properly represented by such a sub-agent, as if he were a person directly appointed by the principal himself in the first instance. **[786]**

In *Raghunath Prasad* v. *Firm Seva Ram Tikam Das*[2] A authorised B to carry on business for and on behalf of A in any manner he chose. B appointed C as commission agent to enter into transactions of purchase and sale of bullion on the following terms: (i) that C would render accounts of all sales and purchases to B; (2) that C would be responsible to B for solvency on behalf of B; (3) that C would act according to the instructions of B on behalf of B; and (4) that C would charge a certain commission on the transactions. It was held that the aforesaid terms coupled with the fact that C was indicating the names of the third parties with whom he had entered into transaction on behalf of B showed clearly that the relationship between B and C was that of principal and agent and not of principal and principal. C was a katcha aditya. Since B had employed C as katcha aditya, for carrying on the business on behalf of A, the position of C was that of sub-agent within the meaning of Section 192 and C was not answerable to A. Suit for accounts by A against C was not maintainable.

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1. *Bhogalingam* v. *The Indo Commercial Bank,* AIR 1961 AP 346.
2. AIR 1980 All 15.

Agent's responsibility for sub-agent.—As has been pointed out by the Judicial Committee, an agent who employs a sub-agent, is liable to the principal for money received by the sub-agent to the principal's use, and is responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of his employment.[1]

Sub-agent's responsibility.—In *Peacock* v. *Baijnath,*[2] *A* consigned goods to Calcutta, where the consignee's banian sold them and duly accounted to the consignee. It was held that the consignor had no right to call upon the banian for a account, because in relation to *A*, the banian was only a sub-agent, and was not answerable to him. (*A*)

Where, however, the sub-agent is guilty of fraud or other wilful wrong, it is provided that he shall be responsible to the principal.[3] For instance the sub-agent will be accountable to the principal in respect of secret profits.[4] But the principal is not prevented from suing the agent appointed by him.[5]

Though a sub-agent is not directly accountable to the principal, the latter can maintain a suit against the sub-agent for recovery of goods, which are with him, or for their value. It is open to the sub-agent to set-off as against what is due from him the amount he was entitled to from the agent.[6]

The sub-agent after notice from the principal, can acquire no rights against the agent in derogation of the rights of the real principal (*e.g.,*) a right of set off.[7]

193. Agent's responsibility for sub-agent appointed without authority.—Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

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1. *Hugh Francis Hoole* v. *Royal Trust Co.,* (1930) 32 LW 649 : 127 IC 529 : (1930) PC 274. **See also** *Pearse* v. *Green,* (1819) 37 ER 327 : 20 RR 258 (neglect of sub agent no defence to an action against agent for account of the agency).
2. (1891) 18 IA 78 : (1891) 18 Cal. 573 (PC). **See also** *Mercantile Bank* v. *Chetumal,* (1930) Sind 247.
3. *Banwari Mukunda Das Nandi Dalal* v. *Promatha Nath Bhattacharji,* ILR (1937) 2 Cal. 124 : 173 IC 530 : (1938) Cal. 12.
4. *Powell* v. *Jones,* (1905) 1 KB 11.
5. *Nensukhadas* v. *Birdichand,* 1917 (19) Bom. LR 948 : 43 IC 699.
6. *Sadasivan* v. *Ramanathan Chettiar,* (1969) 82 LW 37.
7. *Mildred* v. *Maspons,* (1883) 8 AC 874.

Sub-agent not properly appointed.—This section defines the position of parties where the sub-agent is not appointed properly (*e.g.,*) not in conformity with the provisions of Sec. 190. In such a case, the appointee does not represent the principal and the principal will not be bound by his acts. But the person who appointed him, (*viz.,*) the agent, will be responsible alike to the principal and third parties for the acts of the sub-agent. **[790]**

194. Relation between principal and person duly appointed by Agent to act in business of agency.—Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations

(a) *A* directs *B*, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. *B* names *C*, an auctioneer, to conduct the sale *C* is not a sub-agent, but is *A's* agent for the conduct of the sale.

(b) *A* authorises *B*, a merchant in Calcutta, to recover the moneys due to *A* from *C* & Co. *B* instructs *D*, solicitor, to take legal proceedings against *C* & Co., for the recovery of the money. *D* is not a sub-agent, but is solicitor for *A*.

Agent nominated for principal.[1] —In *De Bussche* v. *Alt,*[2] Thesiger, L.J., observed:

"The exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose and where that is the case, the reason of the thing requires that the rule *delegatus non potest delegare* should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed a "substitute," and on the other hand to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And an authority to devolve upon another obligation..... may and

1. Cf. The American restatement of the law of agency, where a person who communicates the principal's offer to a third party or vice versa is called *nuntius* and in no sense an agent.
2. (1878) 8 Ch. D 286 (310).

should be implied where from the conduct of the parties to the original contract the usage of trade or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute, and that when such authority exists and is duly exercised privity of contract arises between the principal and the substitute."

Thus a person nominated by an agent expressly or impliedly authorised to do so becomes directly an agent of the principal. [See Illustrations (a) and (b)] And the agent responsible for the nomination is not liable either to third parties or to the principal for any act of the substitute. Thus, it has been held that an officer of Government (*e.g.,*) Postmaster-General is not liable for the acts of those employed under him, because the latter are not his servants but the servants of Government.[1] Similarly, where the charterers of a ship are empowered to name stevedores, the latter still be the agents of the shipowners.[2]

In *Saligram Marwari* v. *Ayodhya Prasad Musaddilal* [3] the plaintiff was purchasing flowers from A for sale in another state. The plaintiff's was shown as consignor and consignee of the parcels in the railway receipts. The export permit was also in his name. A as commission agent named B in the other state for selling flowers on commission there under instructions from the plaintiff and was sending the railway receipts to B for taking delivery of the flowers. It was held in the circumstances though named by A, B was not the sub-agent of A but a substituted agent.[3]

In one Calcutta case *Chowdhury* v. *Girindra Mohan*,[4] the vendors of certain goods had instructed their bankers to collect the purchase money through the local bankers of the vendee. As the vendors had thus given express authority to delegate to a named person, the court had no difficulty in holding that no question of sub-agency could arise in the circumstances and that it was a case of a substituted agent. **[787]**

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1. *Mersey Docks Trustees* v. *Gibbs*, (1866) 1 HL 93 : 145 RR 385. **See also** *Owen* v. *Cronk*, (1895) 1 QB 265 (Manager appointed by mortgagees, trustees for debenture holders).
2. *Bombay & Africa Steam Navigation Co.* v. *Haji Azum*, (1916) 41 Bom. 119 : 18 Bom. LR 230 : 34 IC 525.
3. AIR 1966 Pat. 61 : 1965 BLJR 367.
4. (1930) 56 Cal. 686 : 121 IC 636 : (1930) Cal. 10. **See also** *Jai Pershad* v. *Chartered Bank*, (1929) Lah. 536 : 30 PLR 433 : 11 LLJ 425 : 120 IC 284 (A appointing one branch of a Bank as his agent—The bank instructing another branch to do the work—The latter is a substituted agent of A).

In *Eastern Traders (I) Ltd.* v. *Punjab National Bank Ltd.*,[1] the plaintiff was an importer of free wheels of cycles from New York through the Punjab National Bank. The National City Bank of New York was employed to effectuate transactions of import and a letter of credit was issued accordingly. It was held that privity was established and the American bank assumed the position of agent.

Where the first defendant requested the second defendant to arrange for reshipment of goods from Rangoon to Calcutta and the second defendant agreed with the plaintiff to do so, he became thereby a nominee of the plaintiff and privity was established between them. Hence the first defendant would not be liable for the negligence of the second defendant.[2]

In a suit against the cancellation of contract of construction work by a sub-contractor carried on behalf of the contractor to whom the contract was assigned by the Food Corporation of India, the sub-contractor cannot be treated as substitute for the main contractor since there is no privity between the principal and sub-contractor.[3]

195. Agent's duty in naming such person.—In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected.

Illustrations

(a) *A* instructs *B*, a merchant, to buy a ship for him, *B* employs a ship surveyor of good reputation to choose a ship for *A*. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. *B* is not, but the surveyor is, responsible to *A*.

(b) *A* consigns goods to *B*, a merchant, for sale. *B* is due course, employs an auctioneer in good credit to sell the goods of *A*, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. *B* is not responsible to *A* for the proceeds.

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1. AIR 1966 Punj. 303.
2. *Gambhirmull Mahabirprasad* v. *Indian Bank Ltd.*, AIR 1963 Cal. 163.
3. *Raj Kumar Bahal* v. *Food Corporation of India*, AIR 1990 Raj. 64.

Care in selecting substituted agent.—In the choice of a "substitute" agent, the agent is expected to bring to bear the discretion and care of a man of average prudence in his own affairs; and if he does this, the misconduct of the person so selected, will entail no liability on the agent. It will be noticed that this section has no application where the person appointed is a sub-agent, for the agent continues to be responsible in such cases, and so, it does not matter to the principal who the sub-agent is. **[787]**

RATIFICATION

196. Right of person as to acts done for him without his authority. Effect of ratification.—Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follows as if they had been performed by his authority.

Ratification.—Lord Wensleydale in *Ridgway* v. *Wharton*[1] observes:

> "Wherever a man purports to make a contract with the agent of another, in order to bind that other, the agent must have authority from him. It matters not whether it is authority previous or subsequent. If man, professing to act for another, makes a contract for him, and authority is afterwards given by that other, the authority given subsequently is equal to authority given before, according to the old maxim *omnis ratihabitio retro trahitur et mandato priori aequiparatur*. If a contract is made by an agent, whether by authority given before, or afterwards, by ratifying the contract, it equally binds the principal".

Ratification thus, has the effect of investing the unauthorised act already done, with the same binding character, which it would have, if it had been done under authority *ab initio*. In short, subsequent ratification is equivalent to a prior command. **[790]**

In the words to Tindal, C.J. : "The principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort, or on a contract to the same effect as by, and with all the consequences which follow from the act done by his previous authority;[2] subsequent ratification relates back to the date of the act ratified.[3]

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1. (1857) 10 ER 1287 (1310) : 108 RR 88.
2. *Wilson* v. *Tummon*, (1843) 134 ER 879 : 64 RR 770; **see also** *Rajan & Co.* v. *National Nail Industries*, (1975) 2 MLJ 490.
3. *C.G. Thorborg* v. *Union of India*, AIR 1968 Delhi 292 : 1968 (70) Pun.LR. 148.

Essentials of ratification.—

(1) THE ACT RATIFIED MUST HAVE BEEN DONE FOR THE PERSON RATIFYING.—As the Bombay High Court remarked a ratification of the unauthorised contract of an agent can only be effectual, when the contract has been made by the agent avowedly for, or on account of the principal and not when it has been made on account of the agent himself.[1] It has even been held that the agent must have done the act in the name of the supposed principal.[2] The motive with which the agent did the original act is entirely immaterial, so long as he purported to do it for the principal.[3] So, where an agent contracts *in his own names, without disclosing that he acts as an agent,* but intending in his own mind to make the contract for another that other person cannot ratify it, because the contract at its inception did not purport to be on behalf of the principal.[4] Similarly, where at an execution sale, the agent bid for the property not intending to bid on behalf of the principals, the court held that it was not open to the principals to adopt or ratify the purchase of the agent and claim the property.[5] **[792]**

(2) THE PERSON RATIFYING MUST HAVE BEEN IN EXISTENCE.—As Willes. J., pointed out in *Kelner* v. *Baxter*,[6] ratification can only be by a person ascertained at the time of the act done, *i.e.,* by a person in existence either actually or in contemplation of law. This is well illustrated in company cases, where promoters of companies make contracts before the incorporation of the company, purporting to make them on the company's behalf. Such contracts cannot be ratified by the company, for at the time of the formation of the contract, it had no legal existence.[7] **[794]**

But, in the case of a marine insurance though it is necessary that there must be an existent principal, it is not necessary that he must be known to the agent: it will be sufficient if he is ascertainable. Thus a marine insurance policy

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1. *Shidheshwar* v. *Ramchandra Rao,* (1882) 6 Bom 463. **See also** *Bhagwat Dayal* v. *Debi Dayal,* (1908) 35 Cal. 420 : 10 Bom. LR 230 : 12 CWN 393 : 7 CLJ 335 : 18 MLJ 100 (PC); *Wilson* v. *Tummon,* (1843) 134 ER 879 : 64 RR 770.
2. *Marsh* v. *Joseph,* (1897) 1 Ch. 214; *Surendranath* v. *Kedar Nath,* (1936) Cal. 87 : 161 IC 224 : 63 CLJ 86; *Hukumchand Insurance Co.* v. *Bank of Baroda,* AIR 1977 Karn. 204 : (1977) 2 Kant.LJ 194 : ILR (1977) 2 Kant. 980.
3. *Subbaraya Chetty* v. *Nagappa Chetty,* (1927) 53 MLJ 311 : 103 IC 150 : (1927) Mad. 805. **See also** *Re. Tiedermann, and Ledermann,* (1899) 2 QB 66.
4. *Keighley* v. *Durant,* (1901) AC 240. **See also** *Imperial Bank of Canada* v. *Begley,* (1936) PC 193 : 44 LW 128 : (1936) ALJ 944 : (1936) MWN 844 : 163 IC 295; *Eastern Construction Co.* v. *National Trust Co.,* (1914) AC 197; *Harrison & Crossfield* v. *London & North Western Railway Co.,* (1917) 2 KB 755; *Collins* v. *Associated Greyhound Race Courses,* (1930) 1 Ch. 1; *Boston Fruit Co.* v. *British & Foreign Insurance* (1906) AC 336.
5. *Raghavachary* v. *Pakkiri Mahomed,* (1916) 30 MLJ 497 : (1916) 2 MWN 73 : 34 IC 6.
6. (1866) 2 CP 174.
7. *Lakshmi Shankar* v. *Motiram,* (1904) 6 Bom. LR 1106; *Natal Land & Colonisation Co.* v. *Pauline Collieries Syndicate,* (1904) AC 120 : *In re Empress Engineering Co.,* (1880) 16 Ch. D 125.

may be effected on the chance of its being adopted, on behalf of all the people interested, and any one of them may ratify and adopt the contract for his benefit,[1] and such a ratification may take place even after the occurrence of the loss insured against.[2]

It has also been held in some cases that it is sufficient if the agent professes to act in some existing capacity or interest, recognised by law though the person to fill it is unascertained. Thus, an administrator may ratify a contract made before his appointment on behalf of the estate.[3] So an heir on becoming ascertained may ratify acts done on his behalf by the agent of the deceased owner.[4]

If an agent under a written authority of the principal holds himself as agent even after the principal's death and if the person competent to ratify his action after the principal's death ratifies the same, then the agent should be deemed to have acted within the limits of his authority and that he validly holds himself out as agent of the person ratifying his acts.[5]

(3) THE PERSON RATIFYING MUST BE COMPETENT TO HAVE AUTHORISED THE ACT.—For instance, a minor cannot ratify a mortgage of his property made without sanction of court by his guardian.[6] **[794]**

(4) RATIFICATION MUST BE WITH FULL KNOWLEDGE OF ALL THE FACTS.—As to this, see commentary under Sec. 198 *infra*. **[795]**

(5) THE ACT RATIFIED MUST NOT BE VOID OR ILLEGAL.—Where an act done by an agent in is excess of his authority it may be subsequently ratified. In *Secretary of State* v. *Kamachee Boyee Saheba*[7] and *Collector of Masulipatam* v. *Cavalry Vencata,*[8] acts done by Government servants in excess of their authority were ratified by the Government. In this connection, however, it must be remembered that the mere ratification of an unauthorised act in excess of authority will not amount to a licence to do acts of the like nature in the future.[9]

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1. *Boston Fruit Co.* v. *British & Foreign Insurance,* (1906) AC 336; *Hagedon* v. *Oliverson,* (1814) 105 ER 461 : 15 RR 317; *Grover* v. *Mathews,* (1910) 2 KB 401.
2. *Williams* v. *North China Insurance Co.,* (1876) 1 CPD 757.
3. *Campanari* v. *Woodburn* (1854) 139 ER 480 : 100 RR 406.
4. *Lyell* v. *Kennedy,* (1880) 14 AC 437.
5. *Management of Sri Sivasakthi Bus Service* v. *Gopal,* AIR 1971 Mad. 434 : (1971) 2 MLJ 83 : 84 Mad.LW 403 : (1971) 2 Mad.LJ. 83.
6. *Mauji Rama* v. *Tara Singh,* (1881) 3 All. 852. **See also** *Irwine* v. *Union Bank of Australia,* (1877) 3 Cal. 280 (285) : 2 AC 366 (PC).
7. (1859) 7 MIA 476.
8. (1860) 7 MIA 529; *Ramasamy* v. *Obai,* (1905) 15 MLJ 487.
9. **See** *Irwine* v. *Union Bank of Australia,* (1877) 3 Cal 280 : 2 AC 366; *Lakshmanan Chettiar* v. *Karuppan Chettiar,* 1978 (2) MLJ 364.

But where an Official Receiver to whom an insolvency petition had been transferred for disposal, sold the properties of the insolvent before a vesting order had been passed, it was held that the Court cannot validate the sale by ratification because the Official Receiver is not an agent of the Court.[1]

In *Pramila Devi* v. *People's Bank of Northern India,*[2] where the Directors of a bank, acting in contravention of a scheme sanctioned by the court under Sec. 153 of the Indian Companies Act, purported to forfeit certain shares, and relied on the fact that the creditors and shareholders had ratified such forfeiture, the Judicial committee held that the forfeiture of the shares was *ultra vires* the bank and that ratification could no validate it.

An act may be ratified though it is tortious. In the words of Dallas, C.J.[3]

> "He for whom a tresspass is committed, is no trespasser unless he agree to the trespass: but if he afterwards agree to it, his subsequent assent has reference back, and is equivalent to command."

Even a contract resulting from a fraudulent profession of agency can be ratified. Thus where an agent was fraudulently drawing bills of exchange on behalf of the principal and the principal was ratifying them, the principal was held liable on the bills being dishonoured in the absence of collusion between the payee and the agent.[4]

Where the contract made by the agent is void, no amount of ratification can validate it.[5] Thus where an alienation by way of lease was held void as against a minor, the subsequent acceptance of rent by the minor was held not to have the effect of ratification.[6]

With regard to acts of criminal nature, it was held by the majority of the court in *Brooke* v. *Hook,*[7] that an act constituting of itself a criminal offence

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1. *Sankaran* v. *Narsimhulu,* (1927) 50 Mad. 135 : 51 MLJ 529 : 25 LW 128 : 99 IC 8 : (1927) Mad. 1.
2. (1938) PC 284 : (1938) 4 AER 337 : (1939) 1 MLJ 98 : 49 LW 444.
3. *Hull* v. *Pickersgill,* (1819) 129 ER 731 : 21 RR 598; *Hilbery* v. *Hatton,* (1864) 159 ER 341 : 133 RR 811.
4. *Beronji Byramji & Co.* v. *Central Bank of India,* AIR 1963 AP 348 : (1963) 1 An. WR 80.
5. *Mahendranath* v. *Kailash,* (1929) 55 Cal. 841 : 32 CWN 439 : 47 CLJ 376 : 109 IC 298 : (1929) Cal. 50; *Monohar Das* v. *Tarini Charan,* (1929) 34 CWN 135 : (1929) Cal. 612; *Janardhan* v. *Janardhan,* (1927) Nag. 214 : 101 IC 839; *Bengal Coal Co.* v. *Union of India* AIR 1971 Cal. 219; *Madanlal* v. *Municipal Board,* 1968 Raj. LW 356; *Mohd. Dilawar Ali* v. *A.P. Muslim Wakf Board,* AIR 1967 AP 291 : 1967 (1) An.WR. 221; *Panduranga* v. *State of Mysore,* AIR 1965 Mys. 244; *State of Madras* v. *Saifuddin Abdul Hussain,* AIR 1963 Mad. 140; *Har Saran Das* v. *Executive Officer,* (1962) All. LJ 676.
6. *Krishnadhan* v. *Brojendra,* (1930) 34 CWN 642 : (1930) Cal. 738.
7. (1871) 6 Ex. 89 (Forged signature to a promissory note cannot be ratified); *Greenwood* v. *Martin's Bank,* (1932) 1 KB 371.

is incapable of ratification. But in the later case of *M'Kenzie* v. *British Linen Co.*,[1] Lord Blackburn observed that a person who chooses to ratify an act known to be a crime (*e.g.*,) forged signature may be civilly liable, as if he had authorised it, but such a ratification will be no defence against a criminal charge of forgery. In *Leach* v. *Buchanan*,[2] a person who had induced a holder of a negotiable instrument to believe his forged signature to be genuine was held to be estopped from setting up the forgery. **[796]**

Effect of ratification.—RELATION BACK.—Ratification relates back to the date of the agent's act.[3] It has complete retroactive efficacy and places all the parties in exactly the same position, as they would have occupied in the case of a precedent agency by formal constitution.[4] Where, for instance, a suit on a promissory note is instituted without the holder's knowledge; he may step in and adopt the proceedings.[5] Similarly, where a reference to arbitration is made by one on behalf of another, the latter may ratify it.[6] The doctrine of relation back has been extended even to a case where the professed agent accepted an offer and the offeror sought to withdraw the offer before the ratification.[7] The doctrine will not apply, so as to affect adversely the rights, which have accrued in favour of third parties. There are authorities inclining to the view that exceptions to the general rule to ratification must be recognised.[8]

The expression ratification of a contract means ratifying the contract which was already in existence but does not mean making of a new contract to be bound by the old one or making of a new contract in terms of the old.[9]

197. Ratification may be expressed or implied.—Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Illustrations

(a) *A*, without authority buys goods for *B*. Afterwards *B* sells them to *C*, on his own account *B's* conduct implies a ratification of the purchase made for him by *A*.

1. (1881) 6 AC 82.
2. (1802) 170 ER 700; *Greenwood* v. *Martin's Bank*, 1933 AC 51 (Principle of estoppel).
3. *C.G. Thorburg* v. *Union of India*, AIR 1968 Delhi 292.
4. *R.* v. *Chapman*, (1918) 2 KB 298; *Koenigsblatt* v. *Sweet*, (1923) 2 Ch. 314; *Keay* v. *Fenwick*, (1875) 1 CPD 745 (Agent becomes entitled to his commission in respect of the transaction ratified); *Surendranath* v. *Kedar Nath*, (1936) Cal. 87 : 161 IC 224 : 63 CLJ 86.
5. *Ancona* v. *Marks*, (1852) 158 ER 645 : 126 RR 646.
6. *Saturjit* v. *Dulhin*, (1897) 24 Cal. 469.
7. *Bolton* v. *Lambert*, (1819) 41 Ch. D 295; **but see** *Fleming* v. *Bank of New Zealand*,(1900) AC 577; *Watson* v. *Davies*, (1931) 1 Ch. 455.
8. **See** *Ford* v. *Newth*, (1901) 1 QB 683 (693); *Donelly* v. *Popham*, (1897) 127 ER 729 : 9 RR 687.
9. *Ashok Kumar J.Pandya* v. *Suyog Co-op. Society Ltd.*, AIR 2003 NOC 118 (Guj).

(b) *A*, without *B's* authority, lends *B's* money to *C*. Afterwards, *B* accepts interest on the money from *C*. *B's* conduct implies a ratification of the loan.

Expressed and implied ratification.—As to express ratification it has been held in *Rajagopalacharyulu* v. *Secretary of State,*[1] that an express ratification is complete only on communication. But there is English authority for the view that ratification need not be made known to the third person.[2]

As regards implied ratification, acceptance of the benefit of the transaction is evidence of ratification.[3] A contract for supply of goods to Government entered into on behalf of the Government by an officer or a person not authorised by the rules is not binding on the Government even though the person who supplied the goods on such order might have been induced to believe that he will be paid. The fact that the Government paid for some of the goods received by them under the order will not amount to ratification of the same.[4] Acquiescence in an unathorised reference to arbitration and taking further steps in furtherance of the arbitration is evidence of implied ratification.[5] But the mere fact that a person on whose behalf an income-tax return has been filed by an unathorised agent sends the same person to produce accounts before the Income-tax Officer does not amount to a ratification of the unathorised return.[6] **[800]**

Thus acquiescence is stronger evidence of ratification where the relationship of principal and agent existed between the parties and the act to be ratified was rather one in excess of the agent's authority than one, which was totally unauthorised.[7]

Time for ratification.—It has been held in English cases that ratification must be made within a reasonable time of the act purported to be ratified.[8] Where the principal does not repudiate the agent's act within a

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1. (1915) 38 Mad. 997 : 14 MLT 454 : 22 IC 107 : (1913) MWN 937.
2. **See** *Buron* v. *Denman,* (1848) 154 ER 450 : 76 RR 554.
3. *Suppayya Pattar* v. *Haji Ahmed, Sait,* (1915) MWN 761 : 32 IC 763; *Mathias* v. *Kilacheri Agricultural Bank,* (1938) Mad. 272 : (1938) MWN 3 : 47 LW 88 : (1938) 1 MLJ 241; (Cf.) *Valpy* v. *Sandars,* (1848) 136 ER 1128 : 75 RR 844; *Lloyds Bank* v. *Chartered Bank,* (1929) 1 KB 40 (Clear adoptive acts necessary).
4. *State of Madras* v. *Saifuddin Abdul Hussain,* AIR 1963 Mad. 140.
5. *Saturjit* v. *Dulhin,* (1897) 24 Cal. 469.
6. *Commissioner of Income Tax, C.P. & U.P., In re,* (1935) Oudh 305 : 155 IC 180 : (1935) OWN 420.
7. *Sentance* v. *Hawley,* (1863) 143 ER 182 (Acquiescence in a reasonale custom among brokers); *The Australia,* (1859) 15 ER 50; *Lakshman Chetty* v. *Chidamaram,* (1919) MWN 72 : 9 LW 251 : 49 IC 758; *Ramasami* v. *Karuppan Chetty,* (1915) 29 MLJ 551 : 31 IC 216; *Hukum Chand Insurance Co. Ltd.* v. *Bank of Baroda,* AIR 1977 Karn. 204 : ILR (1977) 2 Karn 990.
8. **See** *Phillips* v. *Homfray,* (1871) 6 Ch. Ap. 770; *Managers of Metropolitan Asylums Board* v. *Kingham & Son,* (1890) 6 TLR 217; *Dibbins* v. *Dibbins,* (1896) 2 Ch. 348 (Exercise of option must be ratified within the time for which the option was open); *Morrel* v. *Studd,* (1913) 2 Ch. 648; *McEvoy* v. *Belfast Banking Co.,* (1935) AC 24.

reasonable time after knowledge, he will be deemed to have impliedly ratified it.[1] **[708]** In *Sultan Mahomed* v. *Muhammad Yusuf,*[2] where an agent authorised to mortgage the principal's lands alone, mortgaged other property as well and duly communicated the fact to the principal, and the principal did not repudiate the transaction within a reasonable time, the Court held that there was implied ratification of the act.

198. Knowledge requisite for valid ratification.—No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Ratification must be with full knowledge.—This section sets out one of the important conditions of a valid ratification (*viz.,*) that the principal must have full knowledge of all the circumstances. Effective ratification as the Privy Council have pointed out,[3] necessarily involves knowledge of all the material facts on the part of him who ratifies. Thus where an agent sells his own goods at a rate higher than the market rate and the principal does not know anything of the matter, he could repudiate the transaction.[4] So, where an agent was entrusted with moneys for investment and employed them for his own business, and the principal had no definite knowledge of the agent's dealings beyond the periodical accounts sent, it was held that the doctrine of ratification would not be applied so as to turn the funds held by the agent in fiduciary capacity into a mere deposit on ordinary banking terms.[5] But it is possible that the principal may waive inquiry into the facts and accepts the act of the agent as his own. In such a case the adoption by the principal must be so unqualified as to justify an inference that he was willing to take full responsibility for the acts whatever they may be.[6] **[795]**

199. Effect of ratifying unathorised act forming part of a transaction.—A person ratifying any unauthorised act done on his behalf ratifies the whole of the transaction of which such act formed a part.

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1. *Valpy* v. *Sandars,* (1848) 136 ER 1128 : 75 RR 844.
2. (1930) Mad. 676 : 122 IC 501.
3. *Bank of Montreal* v. *Dominion Gresham Guarantee,* (1930) PC 278 : 60 MLJ 149 : 128 IC 600; *Surendranath* v. *Kedar Nath,* (1936) Cal. 87 : 161 IC 224 : 63 CLJ 86; *Gauri Shankar* v. *Jwala Prasad,* (1930) Oudh 312 : 7 OWN 426; *Hindustan A&MB Co.* v. *Khalasa Bank,* (1928) 9 Lah. 360 : 108 IC 49 : (1928) Lah. 176.
4. *Damodhar* v. *Sheoram,* (1907) 29 All. 730 (735) : (1907) AWN 245. **See also** *Kendall* v. *Wood,* (1871) 6 Ex. 248.
5. *Murugappa* v. *Official Assignee,* (1937) 64 IA 343 : (1937) PC 296 : 42 CWN 8 : 66 CLJ 118 : 170 IC 329 : (1937) PWN 914 : 46 LW 399 : (1937) MWN 1179 : (1937) ALJ 1381: 40 Bom. LR 1.
6. *Kadiresan Chettiar* v. *Ramanathan Chettiar,* (1927) MWN 118 : 102 IC 561 : (1927) Mad. 478. **See** *La Banque Jacques Cartier* v *La Banque d' Epargne,* (1887) 13 AC 111; *Lewis* v. *Read,* (1845) 153 ER 350 : 67 RR 828.

Ratification must be of the entire act.—This section simply gives effects to the well known doctrine that it is not open to a person to approbate and reprobate at the same time.[1] Where the principal ratifies an act of the agent, which had been unauthorised at the time when it was done, he impliedly, adopts the entire transaction of which the act ratified forms a part.[2] As was pointed out in *Godhanram v. Jaharmull,*[3] the agent's act must be adopted *cum onere* or not at all. He cannot adopt the benefit of the act and also claim damages from the agent.[4] If he adopts the act of the agent he will be liable to remunerate the agent in regard to the transaction.[5] **[798]**

200. Ratification of unauthorised act cannot injure third person.—An act done by one person on behalf of another, without such other person's authority, which if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Illustrations

(a) *A*, not being authorised thereto by *B*, demands on behalf of *B* the delivery of a chattel, the property of *B*, from *C*, who is in possession of it. This demand cannot be ratified by *B*, so as to make *C* liable for damages for his refusal to deliver.

(b) *A* holds a lease from *B*, terminable on three months notice, *C*, an unauthorised person, gives notice of termination to *A*. The notice cannot be ratified by *B*, so as to be binding on *A*.

Ratification must not prejudice third parties.—Ordinarily, ratification is equivalent to prior authority. But, where the interests of third parties are likely to be affected, the principle of ratification cannot be applied

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1. *Dowse* v. *Gorton,* (1891) AC 190.
2. *Katyayani Debi* v. *Port Canning and Land Improvement Co.,* (1915) 19 CWN 56 : 25 IC 274; *East Indian Ry.* v. *G.I.P. Ry.* (1924) Pat 25 : 74 IC 431.
3. (1912) 40 Cal. 335 : 17 CWN 67 : 17 CLJ 636 : 16 IC 583. **See also** *Bristow* v. *Whitemore,* (1861) 45 ER 126 : 131 RR 242; *Hovil* v. *Pack,* (1806) 103 ER 63; *Cornwall* v. *Wilson,* (1750) 27 ER 1173;*Union Bank of Australia* v. *Mc Clintock,* (1922) 1 AC 240.
4. *Brewer* v. *Sparrow,* (1827) 108 ER 739.
5. *Bristow* v. *Whitmore,* (1861) 45 ER 126 : 131 RR 242.

to the transaction.[1] In *Abdulla Khan* v. *N. K. Das,*[2] the holder of a defective power of attorney filed a suit on a promissory note dated 1st June 1968 on 16th June 1971, the reopening day after the summer vacation and hence within the period of limitation. After the expiry of the limitation period a fresh power of attorney was executed on 19th August 1972. It was held that the later power of attorney did not validate the institution of the suit and the principal could not ratify the action of the power of attorney agent after the expiry of the period of limitation as it would affect the rights accrued in favour of the defendant.[2] In Illustration (a) to the section, if the demand by A had been authorised by B in the first instance, the third party C would have been liable in damages to A. In such a case, where B makes the demands unauthorisedly, A cannot ratify the same so as to hold C liable. Similarly, if the effect of the ratification is to give the ratifier a right of suit in respect of an act committed before the ratification it is not open to the principal to ratify.[3] In *Cashim Ahmed* v. *Eussuf Haji,*[4] where of two receivers bound under the law to act in concert, one alone unauthorisedly determined a tenancy, it was held that the notice could not be ratified by the other so as to render the tenant liable to eviction. It has been similarly held that an unauthorised stoppage of goods in transit cannot be ratified by the principal to the prejudice of the purchaser.[5] As has been tersely said, "Rights of property cannot be changed retrospectively by ratification of an act inoperative at the time." So too, a debtor's plea of tender cannot be defeated by a ratification of an unauthorised demand made before such tender.[6] **[798]**

REVOCATION OF AUTHORITY

201. Termination of agency.—An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

Termination of agency.—This section deals with the several ways in which the relationship of principal and agent comes to an end. They are: (1) Revocation by principal; (2) Renunciation by agent; (3) Completion of the

1. *Ford* v. *Newth,* (1901) 1 KB 683; *Grover* v. *Mathews,* (1910) 2 KB 401; *Jardine* v. *Leathley,* (1863) 122 ER 262 : 129 RR 525. **See also** *Glaxo Laboratories Ltd* v. *Glaxo Staff Association,* 1974 Lab. IC 765.
2. (1979) 2 An. LT 281.
3. *Kidderminister* v. *Hardwicke,* (1873) 9 Ex. 13.
4. (1916) 23 CLJ 453 : 34 IC 22.
5. *Bird* v. *Brown,* (1850) 154 ER 1432 : 80 RR 775.
6. *Coles* v. *Bell,* (1808) 170 ER 1028 (Note) : 10 RR 371.

business of the agency; (4) Death of principal or agent; (5) Insanity of principal or agent; (6) Insolvency of the principal.

The enumeration is not exhaustive. For instance, there can be no doubt that the expiry of the time fixed for the agency or the destruction of the subject-matter of the agency puts an end to the agency,[1] likewise by breach of contract, by destruction of the subject-matter of the agreement and so on.[2] If the freight to cancel an agency is reserved in case the agent fails to do a specified amount of business within a certain period the agency may be cancelled if the condition is violated.[3] Again the agency may subsequently become unlawful, in which case also the agency necessarily ceases.[4] **[802]**

Termination, question of fact.—The question when an agency gets terminated is a question of fact in each case.[5]

(1) Revocation.—The sub-head "Revocation of Authority" in Chapter 10 has a purpose to serve and has a bearing on revocation. The principal has the right subject, of course, to certain limitations to revoke the agency and even so the agent in his turn has also the right to renounce the agency subject equally to certain terms and conditions. It is in this context that the terms 'revocation' and "renunciation" which primarily appear and are projected in the forefront in the sub-head or revocation of authority in Sections 207 to 210 have to be read together instead of being treated in a truncated way for the purpose of interpretation.[6] It is provided by Section 207 *infra,* that revocation may be express or implied from conduct. It is open to the principal to revoke the authority at any time before it is exercised so as to bind him.[7] Where the revocation is wrongful or premature the principal is liable to make compensation, *vide* Secs. 205 and 206 *infra*..[8] In case of authority given by two or more principals jointly, it is enough if one gives notice or revocation.[9] On revocation the agent has no right to possession of principal's property. He has no right to interfere with the principal's business.[10]

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1. (Cf.) *French & Co.* v. *Leeston Shipping Co.*, (1922) 1 AC 451.
2. *Development of Industries (India) P. Ltd.* v. *Commissioner of Income Tax,* AIR 1968 Cal. 492 : 72 Cal. WN 416.
3. *State of Kerala* v. *G.L. Kihikara,* 1966 Ker. LJ 487.
4. *Stevenson* v. *Actiengesellschaft & Co.,* (1918) AC 239.
5. *Muthia Chettiar* v. *Chidambaram Chettiar,* (1916) 31 MLJ 688 : (1916) 2 MWN 362 : 4 LW 456 : 38 IC 720.
6. *Sayam* v. *Bright Brothers,* (1980) 1 MLJ 130.
7. *Lakshmichand* v. *Chotaram,* (1900) 24 Bom. 403 : 2 Bom. LR 778. **See also** *Freeman* v. *Fairlie,* (1838) 8 LJ Ch. 44 : 49 RR 463.
8. *Venkatachalam* v. *Narayana,* (1916) 39 Mad. 376 : 28 MLJ 140 : 26 IC 740.
9. *Bristow* v. *Taylor* (1817) 171 ER 568 : 19 RR 675; **see** *Sree Kirtyanand* v. *Ramanand,* (1936) Pat. 456 : 164 IC 220 : 17 Pat. LT 865 where the above case has been explained.
10. *Southern Roadways Ltd.* v. *S.M. Krishnan,* AIR 1990 SC 673 : (1989) 4 SCC 603 : 1990 (1) UJ 264 : 1989 Supp. (1) SCR 410.

(2) Renunciation.—This corresponds to the right of revocation vested in the principal. Unless the agency is for a definite period, the agent may renounce the agency after giving reasonable notice. In cases of fixed term agencies, the agent will be liable to compensate the principal for damages sustained by his wrongful renunciation. It has been held that abandonment of the service by setting up a title adverse to the principal will be evidence of renunciation.[1]

(3) Completion of the business of the agency.—With reference to one class of agent *viz.*, agent for sale of goods, the question, has been discussed as to the point of time at which the agent comes to an end for the purposes of Art. 89 of the Limitation Act. The Allahabad and Calcutta High Courts are of the view that the agency in such a case does not terminate when the agent receives the purchase money but continues until payment over to the principal.[2] The Madras High Court has taken the view that on completion of the sale, the agency terminates.[3]

The authority of an agent to collect bills and remit the proceeds when realised by demand drafts comes to an end as soon as the drafts are despatched.[4]

AGENCY FOR A FIXED TERM.—In cases of fixed term agencies, the expiration of the term automatically determines the agency though the business may not have been completed.[5] Where the agency is granted for a fixed period on the expiry of such period, the agency cannot said to be irrevocable.[6]

AGENCY FOR COLLECTION.—Where the agency is to collect bills and remit the amounts by drafts after realisation, it is deemed to terminate as soon as the drafts are despatched, so that fiduciary relationship created by the employment comes to an end and the parties thereafter stand simply in the relation of debtor and creditor.[7]

(4) Death of parties.—The death of the principal puts an end to the agency[8] and limitation for a suit for accounts against the agent starts from

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1. *Atul* v. *Laxman,* (1909) 36 Cal. 609 : 2 IC 830 : 13 CWN 1172.
2. *Babu Ram* v. *Ram Dayal,* (1890) 12 All. 541; *Fink* v. *Buldeo Dass,* (1899) 26 Cal. 715.
3. *Venkatachalam* v. *Narayanan,* (1916) 39 Mad. 376 : 28 MLJ 140 : 26 IC 740.
4. *M.P. State Co-operative Bank Ltd.* v. *P.R. Dalal* 68 Bom. LR 500 : 1967 Bom. 279.
5. *Laljee* v. *Dadabhai Guzdar,* (1915) 43 Cal. 833 : 23 CLJ 190.
6. *P. Sukhdev* v. *Commissioner of Endowments, Hyderabad,* AIR 1997 AP 271, 274 : 1997 (3) ALT 202 : 1997 (3) ALD 338.
7. *Alliance Bank* v. *Amritsar Bank,* (1915) 79 PR : 31 IC 215.
8. *Karam Bibi* v. *Mehr Ali,* (1933) Lah. 876 : 144 IC 553 (Power of attorney given by decree – holder – Death of DH – Agent cannot execute decree). **See** *Bir Bikram* v. *Jadab Chandra,* (1936) 40 CWN 245 : 62 CLJ 464 : (1935) Cal. 817 : 160 IC 388.

the date of death.[1] In *Mujib-un-Nissa* v. *Abdur Rahim,*[2] where a power of attorney for registration was presented and registered with knowledge of the death of the grantor of the power, the Privy Council held the registration invalid.

An agent has no right to sell or transfer property under the powers delegated through power of attorney after the death of the principal.[3]

JOINT PRINCIPALS.—When the principals are members of a Hindu joint family, with rights of survivorship, the death of one does not necessarily terminate the agency with regard to all of them. It is a question depending on the intention of the parties, which is to be determined from the terms of the contract and the surrounding circumstances.[4]

In one Allahabad ruling, it has been held that where the karta of a joint Hindu family appoints an agent for the family business, the agency does not terminate with the death of the karta.[5]

But in a Madras ruling, in the case of a power of attorney executed by principals *having distinct interests* in the property, which was the subject matter of the power, it was held distinguishing the Calcutta rulings above, that the death of one principal terminated the agency.[6]

In *Monindra Lal* v. *Haripada,*[7] Mitter, J., held that in cases other than those of Hindu joint families, (*i.e.,*) in the case of "joint and several principals", to use the language of Mukherji, J., in *Re. Sital Prasad,* the agency will not determine *in toto* on the death of one of several principals and that it may continue as regard the surviving principals.

The rule in English law is that the death of one or more of the principals revokes the agent's authority.[8] **[807]**

JOINT AGENTS.—It has been held in two Calcutta cases that the death of one co-agent does not necessarily terminate the agency.[9]

1. *Nobin Chandra* v. *Chandra Madhab,* (1916) 44 Cal. 1 : 21 CWN 97; *Bir Bikram* v. *Jadab,* (1935) Cal. 817 : 40 CWN 245 : 62 CLJ 464 : 160 IC 388; *Madhusudan Sen* v. *Rakhal Chandra,* (1916) 43 Cal. 248; *Sarashibala* v. *Chuni Lal Ghosh,* (1922) 26 CWN 320 : (1922) Cal. 53 : 65 IC 219.
2. *R. Sandhyarani* v. *M. Mylarappa,* AIR 2008 (NOC) 114 (Karn) : 2007 (6) AIR Karn R 290.
3. (1900) 23 All. 233 : 5 CWN 177 : 11 MLJ 58 : 3 Bom. LR 114 (PC); (Cf.) *Mohendra* v. *Kali,* (1903) 30 Cal. 265 : 7 CWN 299 (If the fact of death is unknown to the other party the agency is not terminated). **See also** *Maung Lu Gale* v. *U.P. Hlaing,* (1934) Ran. 104.
4. *Re Sital Prasad* (1916) 21 CWN 620 : 41 IC 288; *Ponnuswamy* v. *Chidambara,* (1918) 35 MLJ 294; *Agarwal Jorawarmal* v. *Kasam,* ILR (1937) Nag. 28 : (1937) Nag. 314.
5. *Shankar Lal* v. *Toshan Pal,* (1934) ALJ 453 : 150 IC 151 : (1934) All. 553.
6. *Venkanna* v. *Achutaramanna,* (1938) 1 MLJ 610 : (1938) MWN 259 : 47 LW 492 : (1938) Mad. 542.
7. (1936) Cal. 650 : 41 CWN 27 : 166 IC 608; **see also** *Madhusudan Sen* v. *Rakhal Chandra,* (1916) 43 Cal. 248.
8. *Gee* v. *Lane,* (1812) 104 ER 967; *Raw* v. *Alderson,* (1817) 129 ER 182; *Campanari* v. *Woodburn,* (1854) 139 ER 480; *Tasker* v. *Shephered,* (1861) 158 ER 237; (Cf.) *Phillips* v. *Alhambra,* (1901) 1 KB 59.
9. *Bhagirath* v. *Premchand,* (1912) 17 CLJ 201 : 16 IC 852; *Raghumul* v. *Luchmandas,* (1916) 20 CWN 708 : 38 IC 278.

(5) **Insanity of parties.**—The section seems to be in consonance with the rule of modern English law.[1] The earlier English view was that the insane person must be certified to be so in a proper inquiry conducted for that purpose.

(6) **Insolvency of parties.**—Agency is also terminated by the insolvency of the principal.[2] But, where the principal is a firm and one of the partners becomes insolvent, the agency does not *ipso facto* terminate.[3] The section is silent as to the effect of the agent's insolvency. Considering that the agent is only a connecting link between the principal and third parties, there may be ground for saying that the insolvency of the agent does not *ipso facto* terminate the agency. There is however English authority for the view that the agent's insolvency puts an end to the agency, except in cases where the act to be done by the agent is merely formal.[4] In any event authority to receive payment on behalf of the principal is determined by the agent's insolvency.[5]

It should however; he remembered that in cases of death, lunacy or bankruptcy of the principal, the fact of the death or insanity must be known to the other party.

202. Termination of agency where agent has an interest in subject-matter.—Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Illustrations

(a) *A* gives authority to *B* to sell *A's* land, and to pay himself, out of the proceeds, the debts due to him from *A*. *A* cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) *A* consigns 1,000 bales of cotton to *B*, who has made advances to him on such cotton, and desires *B* to sell the cotton, and to repay himself out of the price, the

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1. **See** *Drew* v. *Nunn*, (1879) 4 QBD 661; *Daily Telegraph* v. *M'Laughlin*, (1904) AC 776.
2. *Pearson* v. *Graham*, (1837) 112 ER 344 : 45 RR 644.
3. *Agarwal Jorawarmal* v. *Kasam*, ILR (1937) Nag. 28 : (1937) Nag. 314.
4. *Parker* v. *Smith*, (1812) 104 ER 1133 : 14 RR 366.
5. *Hudson* v. *Granger*, (1821) 106 ER 1103 : 24 RR 268; **see also** *Re, Moss*, (1866) 2 Eq. 345 : (1866) 147 R 277 (Solicitor—Insolvency of retainer determined).

amount of his own advances. *A* cannot revoke this authority, nor is it terminated by his insanity or death.

Authority coupled with interest.—This section forms one of the limitations to the general rules as to revocation of agency. Decided cases with reference to the section chiefly centre round the question of what constitutes an "interest in the subject-matter of the agency." The corresponding English rule is that, if the agency has been created for effectuating any security or protecting any interest of the agent, it is irrevocable during the existence of such interest. Where an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such authority is irrevocable.[1] **[811]** It will be observed that the language of the section wider than that to the English rule. But the English rulings have however been applied.

Where it is clear from the power of attorney executed by the appellant in respect of a mine that right of lease has been transferred by the appellant creating an interest in favour of the respondent by receiving consideration, the agency can be said to be coupled with interest and as such cannot be revoked.[2]

In a case where the agency was coupled with interest, the agent who was the developer obtained permission for the amalgamation of plots and entered into a contract for the sale of flats to the intending buyers, the agent having exercised the authority given to him by the principal, the principal is precluded from revoking his authority.[3]

In *Lakhmichand* v. *Chotooram,*[4] it was held that the mere prospect of remuneration to be derived from a sale, if effected, is not such an interest as to make to authority irrevocable. In *Vishnucharya* v. *Ramchandra,*[5] where the facts were stronger, it was held that the mere fact that the salary of an agent collecting rents was to be paid out of the collections did not create an interest sufficient to make the authority irrevocable. But, in *Pestanji* v. *Matchett,*[6] where the

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1. *Frith* v. *Frith,* (1906) AC 254; *Smart* v. *Sandars,* (1848) 136 ER 1152 : 75 RR 849. **See also** *Clerk* v. *Laurie,* (1857) 157 ER 83 : 115 RR 489; *In re, Carmichael's Case,* (1896) 2 Ch. 643; *Kongatti Valia Nair* v. *Subramania,* (1899) 9 MLJ 290; *Mutharasu* v. *Mayandi,* (1968) 2 MLJ 74.
2. *Birat Chandra Dagara* v. *M/s. Taurian Exim Pvt. Ltd.,* AIR 2005 Ori 147 : 2006 (1) ABR (NOC) 45 (Ori).
3. *Bhaskar Aditya* v. *Minati Majumdar,* 2004 (1) CTLJ 78 (Cal) (DB).
4. (1900) 24 Bom. 403 : 2 Bom. LR 778; **see also** *Taplin* v. *Florence,* (1851) 138 ER 294 : 84 RR 773 (Auctioneer has no 'interest'). **see** *Subhash* v. *Feroze Khan,* AIR 1982 Delhi 114; *Dalchand* v. *Hazarilal,* AIR 1932 Nag. 34.
5. (1881) 5 Bom. 253.
6. (1870) 7 BHC AC 10; *Alley* v. *Hotson,* (1815) 171 ER 104.

authority was to recover amounts due to the principal and the agent was to pay himself out of the amounts the amount due from the principal the agency the agency was held not revocable. Where a creditor was authorised to receive the dividends of shares pledged with a bank the power was held to be irrevocable.[1] Where decree-holder owing money to a bank executed a power of attorney authorising the bank to execute the decree he held against a third party and credit, the realisation to his account for discharging the debt to the bank, the power is one coupled with interest and is irrevocable.[2] Under Section 202 it is enough unlike in English law that the agent has an interest in the property forming the subject matter of the agency.[3] Where an agent is entrusted with the management of property with a direction to pay the income after deducting the expenses to the principal it is only a general power of attorney and not an agency coupled with interest. The principal can cancel the power and lease out the property to a third person.[4] In a Madras ruling, *Chathu Kutti Nair* v. *Kundan Appa,*[5] a junior member of a Malabar tarwad who held a power of attorney for collection of rent and whose interest in the property was antecedent to his authority, was held to have authority coupled with interest, within the meaning of the section. But where an agency relating to the management of an endowment was made for the spiritual benefit of the agent and other members of the donor's family it was held that the spiritual benefit was not an interest, contemplated by this section.[6]

An agency to be irrevocable should create an interest in the subject matter contemporaneously with the documents wherein such agency is created and it cannot be left to guess chance or inference unless such a thing is available in the document itself, all such other power given, to the agent mainly for purpose of reimbursement of money spent by him for and on behalf of the principal, even if such reimbursement should be by way of mortgage or sale of properties, would create only a right incidental to such agency and would not amount to the creation of any interest in the agent over the subject concerned.[7]

Where an agent who has not been specifically authorised in the power of attorney to incur loan liability in his personal capacity, the plea of the agent that the principal cannot revoke the power of attorney until the liabilities

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1. *Mariyankutti* v. *Chaldean Syrian Bank Ltd.*, AIR 1957 Trav Co. 174.
2. *Seth Loon Karan* v. *John,* AIR 1969 SC 73 : (1968) 2 SCJ 851.
3. *Thomas Samuel* v. *P. Ramachandran,* 1980 Ker. LT 867; Cf. however, *Mutharasu Thevar* v. *Mayandi Thevar,* AIR 1968 Mad. 333 : (1968) 2 MLJ 74.
4. *Ganesha Bhatta* v. *Mariyappaiah,* (1968) 2 Mys. LJ 179 : 15 LR 376.
5. (1931) Mad. 70 : 34 LW 786 : 61 MLJ 852; *Shwe Lon* v. *Hla Gywe,* (1918) 47 IC 133.
6. *Krishnadas* v. *Gopeswar Lalji,* (1930) Mad. 231 : 121 IC 598.
7. *Mutharasu Thevar* v. *Mayandi Thevar,* AIR 1968 Mad. 333 : (1968) 2 MLJ 74.

incurred by him are settled is not acceptable as the agency is not one coupled with interest.[1]

The appellants who were appointed as Agents of several states for conducting online lotteries and invested huge amount in the business, they being agents coupled with interest have a legal right to challenge the validity or otherwise of a notification issued by State of Karnataka banning lottery.[2]

Factors.—The question of authority coupled with interest assumes great practical importance in the case of factors who have advanced moneys against goods entrusted to them for sale. See Illustration (b). In this case, there is express authority given to the agent to repay himself out of the proceeds of sale, and so an interest in the goods is created, and the authority is therefore not revocable. The general rule in such cases would appear to be that if from the language of the document creating the agency or the dealings between the principal and agent, it is possible it infer an interest, the authority is not revocable. In *Smart* v. *Sandars,*[3] the court observed:

> "The doctrine .... applies only to cases where the authority is given for the purpose of being a security or as part of the security, not to cases where the authority is given independently and the interest of the donee arises only incidentally ..... The making of an advance may be a good consideration for an agreement that the authority to sell shall be no longer revocable, but such an effect will not arise independently of agreement."

It is certainly true as was remarked in *Jafferbhoy* v. *Charlesworth,*[4] that mere advances by a factor whether at the time of his employment as such or subsequently cannot have the effect of altering the revocable nature of authorities to sell, unless there be an agreement, express or implied. But in *Kondayya* v. *Narasimhulu*[5] where the factor was authorised to sell at the best available price and in case of deficit, draw on the consignor, the court took into consideration the course of dealings between the parties and held that an interest in the subject-matter of the agency had been created and so held the authority irrevocable. Conversely, in *Venkanna* v. *Achutaramanna,*[6] where a power of attorney authorised the agent to conduct a suit on behalf of the

1. *Ishwarappa* v. *Arunkumar,* AIR 2004 Kant 417 : 2006 (2) CTLJ 91 (Karn) (SN).
2. *Tashi Delek Gaming Solutions Ltd.* v. *State of Karnataka,* AIR 2006 SC 661: (2006) 1 SCC 442 : 2005 (8) Supreme 770 : 2007 (1) CTLJ 121 (SC).
3. (1848) 136 ER 152 : 75 RR 849.
4. (1893) 17 Bom. 520. **See also** *De Comas* v. *Prost,* (1865) 16 ER 59; *Frith* v. *Frith,* (1906) AC 254; *Murtunjoy* v. *John Cockrane,* (1865) 10 MIA 229 (243).
5. (1896) 20 Mad. 97.
6. (1938) 1 MLJ 610 : (1938) MWN 259 : 47 LW 492 : (1938) Mad. 542; *Dilchand* v. *Hazarimal,* AIR 1932 Nag. 34; *Subhash* v. *Feroze Khan,* AIR 1982 Del. 114 an agent appointed on commission basis is not an agent within the meaning of S. 202.

principals and provided that when the subject-matter of the suit was recovered, the agent would be entitled to a share, it was held that it was not a case of authority coupled with an interest.

203. When principal may revoke agent's authority.—The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

Revocation before authority exercised.—It is open to the principal to revoke the authority so long as no act has been done by the agent which will bind the principal and no rights of third parties have come into existence. For instance the authority given to an auctioneer may be recalled at any time before the goods are knocked down.[1] Similarly, the authority of a policy broker may be revoked before the execution of the policy.[2] Even in respect of unlawful transactions, (*e.g.*,) betting transactions, authority to pay money may be revoked at any time before actual payment.[3] But if the agent has made a contract with third parties so as to bind the principal, the authority cannot be revoked.[4] However, if the agent simply appropriates a contract previously made by him with third parties, it cannot be said that the agent has acted so as to bind the principal and in such cases, revocation is possible.[5] **[813]**

Unless the right of revocation of proxies is expressly excluded by the Articles of Association of a company the right would be governed by the general law of agency.[6]

The principal has the right to revoke a vakalat given by his agent whether the agency was irrevocable or not.[7]

204. Revocation where authority has been partly exercised.—The principal cannot revoke the authority, given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

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1. *Warlow* v. *Harrison*, (1858) 120 ER 920 : 117 RR 219. **See also** *Day* v. *Wells*, (1861) 54 ER 872 : 132 RR 245.
2. *Warwick* v. *Slade*, (1811) 170 ER 1329 : 13 RR 127.
3. *Taylor* v. *Browers*, (1876) 1 QBD 291; *Hastelow* v. *Jackson*, (1828) 108 ER 1026 : 32 RR 369; *Edgar* v. *Fowler*, (1803) 102 ER 582 : 7 RR 433.
4. *Hill* v. *Royds*, (1869) 8 Eq 290; **see also** *Hamilton* v. *Spottiswoode*, (1849) 154 ER 1182 : 80 RR 519.
5. *Lakshmichand* v. *Chotaram*, (1900) 24 Bom. 403 : 2 Bom. LR 778.
6. **See** *Narayanan Chettiar* v. *Kaleswar Mills*, AIR 1952 Mad. 515, 521.
7. *Mutharasu Thevar* v. *Mayandi Thevar*, AIR 1968 Mad. 333 : (1968) 2 MLJ 74.

Illustrations

(a) *A* authorises *B* to buy 1,000 bales of cotton on account of *A*, and to pay for it out of *A's* money remaining to *B's* hands. *B* buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. *A* cannot revoke *B's* authority so far as regards payment for the cotton.

(b) *A* authorises *B* to buy 1,000 bales of cotton on account of *A*, and to pay for it out of *A's* moneys remaining in *B's* hands. *B* buys 1,00 bales of cotton in *A's* name and so as not to render himself personally liable for the price. *A* can revoke *B's* authority to pay for the cotton.

No revocation where authority partly exercised.[1]—A revocation of authority is in operative with regard to obligations already incurred. Bu, where the agent continues for forbidden transactions in spite of the revocation of his authority, the principal cannot turn round and claim the benefit of it.[2] **[814]**

205. Compensation for revocation by principal or renunciation by agent.—Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Premature revocation or renunciation.—This section provides for payment of compensation by principal to agent of *vice versa* in cases where the agency is terminated or renounced contrary to an express or implied contract that it should be continued for a fixed period.[3] Though the employment is for a fixed term and no right to terminate it exists, such employment may be terminated before the expiry of the term subject to liability to pay compensation if the discharge was without sufficient cause.[4] Where a

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1. **See** *Day* v. *Wells* (1861) 54 ER 872; *Burn* v. *Carvalho,* (1239) 41 ER 265.
2. *Harihar Prasad* v. *Kesho Prasad,* (1925) Pat. 68 : 93 IC 454.
3. *State of Kerala* v. *G.L. Kilkara,* 1966 Ker LJ 487.
4. **See** *Vishnucharya* v. *Ramchandra,* (1881) 5 Bom. 253; As to measure of damages, **see** *Landa* v. *Ahmed,* (1922) Sind 25 : 15 SLR 140; *J.K. Sayani* v. *Bright Bros. (P) Ltd.,* AIR 1980 Mad. 162 : 1980 (1) Mad.LJ 130 : 93 Mad.LW 241.

principal without reasonable cause terminates the agency prematurely, he refuses to perform his part of the contract and prevents performance by the agent. So, he will be liable in damages to the agent. Thus where the plaintiff undertook to dispose of the shares of a company on certain terms as to remuneration, and before he could do it, proceedings were started for winding up, it was held that plaintiff was prevented from performance of his part of the contract and was therefore entitled to compensation.[1] But in the case of an agency for of coal for a certain period, where the principal sold away his business before the term, the court held that there was no implied term that the principal must carry on the business for a certain period.[2] **[807]**

The interest of a Commercial Agent in England is improved and protected by virtue of Commercial Agents (Council Directive) Regulation, 1993. Regulation 17 entitles a Commercial Agent for compensation in the event of his agreement being terminated prematurely by the principal. In *Page* v. *Combined Shipping & Trading Co. Ltd.*,[3] the plaintiff whose agency agreement was terminated by the defendant company before the stipulated period of four years was held to be entitled to compensation for the loss of commission which proper performance of agency contract would have earned to him.

"Sufficient cause."—An absolute power of revocation of contract cannot be validity reserved in favour of one of the parties.[4] It is only where the agency is terminated without sufficient cause that the liability to pay compensation arises. In *Boulton Bros. & Co.* v. *New Victoria Mills Co.*,[5] one company as principal appointed another company as agent under a mistaken impression as to the latter's influence in commercial circles, and on discovering the mistake, revoked the agency. It was held that there was sufficient cause for revoking the agency. Similarly, where the agent suffers form incapacity, physical or mental,[6] or where he lacks reasonable diligence or skill or is guilty of misconduct, there will be sufficient cause for revocation. In cases of misconduct, it is a question of fact whether it is so inconsistent with the fulfilment of the conditions of service as to justify dismissal.[7]

206. Notice of revocation or renunciation.—Reasonable notice must be given of such revocation or renunciation; otherwise

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1. *Inchbald* v. *Western Nilgherry Coffee Co.*, (1864) 144 ER 293 : 142 RR 603.
2. *Rhodes* v. *Forwood*, (1876) 1 AC 256.
3. (1997) 3 All. ER 656 (CA),
4. *International Oil Co.* v. *Indian Oil Co. Ltd.*, AIR 1969 Mad. 423 : (1969) 1 MLJ 605 : *Thathaiah M & S.M. Railway*, ILR (1957) Mad. 215 : (1956) 2 MLJ 584.
5. (1929) 26 ALJ 1119 : 119 IC 837 : (1929) All 87.
6. *Cuckson* v. *Stones*, (1858) 120 ER 902 : 117 RR 196.
7. *Clouston* v. *Corry*, (1906) AC 122; *Pearce* v *Foster*, (1886) 17 QBD 536.

the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

Reasonable notice.—There is no general rule of permanence of contracts[1] since revocation and renunciation of contracts may take place in various ways the rights and obligations and flow from such termination can only be after the party who intends to snap such relationship puts the other aggrieved party on reasonable notice.[2] Where there is no express or implied contract that the agency is to be for a fixed period, reasonable notice of revocation or renunciation should be given.[3] What is reasonable notice will depend on the nature of the contract and the circumstances of the case. It may be that the natures of the dealings are such that no notice can be expected.[4]

207. Revocation and renunciation may be expressed or implied.—Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustrations

A empowers *B* to let *A's* house. Afterwards *A* lets it himself. This is an implied revocation of *B's* authority.

Implied revocation.—In *Danby* v. *Coutts*[5] a power at attorney, which recited that the donor was going abroad, was held to be impliedly revoked by the return of the donor. Similarly, in *Kickinson* v. *Lilwall*[6] it was held that by reason of a trade usage the authority was limited to a certain specified period. In a Calcutta ruling, the case of *Danby* v. *Coutts* was discussed, and it was held that a power of attorney which recited that the donor was about to go abroad and therefore authorised the agent to act for him, was not revoked by the return of the principal.[7]

208. When termination of agent's authority takes effect as to agent and as to third person.—The termination of the

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1. *International Oil Co.* v. *Indian Oil Co. Ltd,* AIR 1969 Mad. 423 : (1969) 1 MLJ 605.
2. *Sayani* v. *Bright Brothers (P) Ltd.,* (1980) 1 MLJ 130.
3. *In re : Shaw Wallace & Co.,* (1931) 58 Cal. 1153 : 35 CWN 361 : 134 IC 899 : (1931) Cal. 676.
4. *Jolynson* v. *Hint,* (1905) 93 LT 470 : 21 TLR 692; *Motion* v. *Michand,* (1892) 8 TLR 253.
5. (1885) 29 Ch. D 500.
6. (1815) 171 ER 89.
7. *Ezekiel* v. *Carew & Co.*. IIR (1938) 2 Cal. 190 : (1938) Cal. 423 : **see** *Azam Khao* v. *Sattar,* AIR 1978 AP 442.

authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or so far as regards third persons, before it becomes known to them.

Illustrations

(a) *A* directs *B* to sell goods for him, and agree to give *B* five per cent commission on the price fetched by the goods. *A* afterwards by letter, revokes *B's* authority *B*, after the letter is sent but before he receives it, sell the goods for 100 rupees. The sale is binding on *A* and *B* is entitled to five rupees as his commission.

(b) *A*, at Madras, by letter directs *B* to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter revokes his authority to sell, and directs *B* to send the cotton to Madras, *B*, after receiving the second letter, enters into a contract with *C*, who knows of the first letter, but not of the second, for the sale to him of the cotton *C* pays *B* the money, with which *B* absconds. *C's* payment is good as against *A*.

(c) *A* directs *B* his agent, to pay certain money to *C*, *A* dies, and *D* takes out probate his will. *B*, after *A's* death, but before hearing of it, pays the money to *C*. The payment is good as against *D*, the executor.

Revocation when takes effect.—The policy of the law, apparently in the interests of trade and commerce, is that the agent's action should bind the principal even though the principal might have cancelled the agent's authority unless the third person with whom the agent enters into contracts knew of the termination of the agency.[1] This section merely enunciates the rule of commonsense that revocation or termination of an agent's authority must be communicated to the parties concerned before it can have legal validity. When the principal revokes the authority by giving a notice to the agent, such agent has no right to remain in possession of the premises of the principal

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1. *Kathoom Bivi* v. *Arulappa Nadar,* AIR 1970 Mad. 76 : (1969) MLJ 241 · *Kulsekarapatnam Hand Match Workers' Co-operative Cottage Industrial Society Ltd.* v. *Radhelal Lalloolal,* AIR 1971 MP 191.

after the termination of agency.[1] In this connection, reference may usefully be made to Sec. 3 of the Powers of Attorney Act, which provides:

> "Any person making or doing any payment or act in good faith in pursuance of power of attorney shall not be liable in respect of the payment or act by reason that, before the payment or act, the donor of the power had died or become lunatic, or of unsound mind, or bankrupt or insolvent, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, insolvency or revocation was not at the time of the payment or act known to the person making or doing the same."

AS AGAINST THIRD PARTIES.—The fact that the agent is aware of the revocation of his authority will not affect third parties who deal with him in ignorance of such revocation. Thus payment of a debt to an agent whose authority is subsequently discovered to have been revoked is good payment so as to support a plea of discharge as against the creditor.[2] So too, where a creditor takes an acknowledgment of a debt from an agent in ignorance of the termination of the agent's authority, by the death of the principal such acknowledgment will be valid as against the debtor.[3] Similarly, the registration of deed, in ignorance of the fact of revocation of authority to register it, has been held to be valid.[4] **[815]**

Where the defendant land owner executed GPA in respect of his land property and subsequently revoked it, sale deed executed by GPA holder by producing certified copies of latest power of attorney without bearing an endorsement of revocation in favour of the plaintiff who purchased the property in bona fide belief without the knowledge of revocation of power of attorney shall be binding on the principal (defendant owner).[5]

Where after revocation of authority by the principal (land owners) the third party was put in possession of disputed land for the money received from him and later the principal endorsed the execution of document by the agent in favour of third party, the delegation of the authority of the agent cannot be questioned in the absence of any document on record or any other means to show that the respondent third party can be aware of the factum of revocation of agency.[6]

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1. *Southern Roadways Ltd., Madurai* v. *S.M. Krishnan,* AIR 1990 SC 673 : (1989) 4 SCC 603.
2. *Narasinga* v. *Muthusami Naicker,* (1897) 7 MLJ 218.
3. *Ebrahim* v. *Chunilal,* (1911) 35 Bom. 302 : 13 Bom. LR 264 : 10 IC 888.
4. *Maung Lu Gale* v. *U. Po Hlaing,* (1934) Ran. 104; *Ma Byaw* v. *Mg Tun Hlaing,* (1934) Ran. 341. *Mohendra* v. *Kali Prashad,* (1903) 30 Cal. 265 : 7 CWN 229; **see** *Mujib un-Nisa* v. *Abdul Rahim,* (1900) 23 All. 233, (A converse case where registering officer knew of the determination of authority by reason of principal's death).
5. *N.S.Srinivas* v. *Madduri Mallareddy,* AIR 2005 AP 177.
6. *Kashi Ram & anr* v. *Raj Kumar & Ors.,* AIR 2000 Raj 405, 406.

The knowledge of the agent about the cancellation of the agency is not binding on the third parties and the transactions entered into by the third parties with the agent shall be binding on the principal until it has been established that the third parties had knowledge about the termination of agency.

But, express or actual notice of revocation is not necessary: it will be sufficient if they somehow get knowledge of the revocation.[1]

It may be mentioned that illustration (c) to the section is different from the corresponding rule in English law.[2]

209. Agent's duty on termination of agency by principal's death or insanity.—When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Duty to protect principal's interest.—In case of the death or insanity of the principal, the law casts a duty on the agent, though the may be aware of the death or insanity, to conserve and protect the interests entrusted to him, for and on behalf of the representatives of the deceased principal. To this limited extent the rule enunciated in the section is an exception to the general rule that agency terminates with he death or insanity of the principal. An illustration is afforded by a Lahore case where a contract by an agent for the supply of molasses for the purpose of keeping a distillery going was held, a reasonable step taken for the preservation of the deceased, 'principal's estate.[3]

210. Termination of sub-agent's authority.—The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Termination of sub-agency.—The termination of the original agency automatically determines the authority of a sub-agent; for the latter's authority is dependent on the main agency.[4] **[817]**

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1. *Dasarath* v. *Brojo Mohan,* (1914) 18 CLJ 621 : 22 IC 90.
2. *Blades* v. *Free,* (1829) 109 ER 63 : 32 RR 620; *Bagel* v. *Miller* (1903) 2 KB 212.
3. *Moosajee Ahmad & Co.* v. *Adm. General, Bengal,* (1921) 3 LLJ 265 : 60 IC 739 : (1921) Lah. 48.
4. *Lachmandas* v. *Raghumall,* (1920) 47 Cal. 290 : 24 CWN 577 : 11 LW 551 : 58 IC 851 : (1919) PC 49.

AGENT'S DUTY TO PRINCIPAL

211. Agent's duty in conducting principal's business.—An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Illustrations

(a) *A*, an agent engaged in carrying on for *B* a business in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. *A* must make good to B the interest usually obtained by such investments.

(b) *B*, a broker, in whose business it is not the custom to sell on credit, sells goods of *A* on credit to *C*, whose credit at the time was very high. *C*, before payment, becomes insolvent. *B* must make good the loss to *A*.

Duty to follow instructions.—This section casts a duty on the agent to conduct his principal's business according to the instructions given,[1] and in cases where no instructions are given, according to the custom of the trade. Where the agent deviates from the instructions given or from the customary mode of business as the case may be, he will be, liable to compensate the principal for any resultant damage or to account to the principal for any profit that may have accrued. It is, however, open to him to rectify his error or deviation from instructions.[2] Where no actual loss results from the agent's deviation from instructions nominal damages will be awarded to the principal.[3]

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1. *Karuthan Chettiar* v. *Chidambaram Chettiar,* (1938) Mad. 725 : 48 LW 237 : (1938) MWN 576 : (1938) 2 MLJ 79 (Duty to collect old outstandings if so instructed).
2. *Allahabad Bank* v. *Sheo Baksh* (1926) 2 Luck 198 : 97 IC 888 : (1926) Oudh 576.
3. *Manchubai* v. *John Tod,* (1894) 20 Bom. 633; *Chalapathi* v. *Surayya,* (1902) 12 MLJ 375.

It may, however, be said that the agent is bound to obey only the lawful instructions of the principal. For instance at a sale "without reserve," the agent is not bound by any secret instructions from the principal, fixing a reserve price.[1] In *Firm Panna Lal Janki Das* v. *Mohan Lal*,[2] the plaintiff, a commission agent in Bombay purchased on behalf of the defendants a number of bales of cotton goods advancing his own money, and pending receipt of the necessary permit, for his consigning them to the defendants stored them in a godown in Bombay. The goods were to remain insured till their despatch. The plaintiff did not however insure them and the goods were destroyed by fire by the Bombay Harbour Explosion of 1944. A couple of months later the Bombay Explosion (Commission) Ordinance of 1944 was passed under which the Government was to pay full compensation for loss in respect of insured merchandise and 50% in respect of uninsured merchandise. The plaintiff sued the defendants for the price of the goods claiming his right to indemnity. The defendants counter-claimed for damages for loss due to plaintiff's negligence to insure the goods. The plaintiff had recovered half compensation from the Government and given credit to the defendants. The Supreme Court in a majority judgment held that non-recovery of the half of the defendant's claim arose directly from the plaintiff's failure to insure the goods and the measure of damages claimable by the defendants was the loss sustained by them. The agent need not follow any unlawful instructions of the principal. Instructions involving performance of a void or illegal act need not be followed. It may also be mentioned that a custom allowing deviations from instructions given by the principal will not be valid.[3] So long as the agent obeys the instructions given, he incurs no liability, even where the consequences turn out different from what the principal anticipated.[4] Where no definite instructions have been given, the agent must be guided by the honest exercise of his own judgment and the interests of his principal. And if the instructors leave two alternative courses open, he incurs no liability simply because he choose one which in the event turns out less favourable.[5]

ILLUSTRATIVE CASES.—An agent selling goods below the minimum fixed by the principal will be answerable for the consequent loss to the principal.[6] Similarly an agent warehousing goods at a different place from

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1. *Bexwell* v. *Christie*, (1776) 98 ER 1150.
2. AIR 1951 SC 144.
3. *Arlapa Naick* v. *Narsi Keshavji*, (1871) 8 B.H.C. A.C. 19.
4. *Overend* v. *Gibb*, (1872) 5 HL 480; *Common Wealth Portland Cement Co.* v. *Weber* (1905) AC 66.
5. *Comber* v. *Anderson*, (1808) 170 ER 1044; *Seethalakshmi* v. *Co-operative Society, Mayavaram*, (1922) 15 LW 205.
6. *Beni Pershad* v. *Narain Das*, (1930) Lah. 974 : 129 IC 287; *Framjee* v. *Mt. Karm Devi*, (1924) 66 IC 446; (Firm) *Mathra Das* v. *(firm) Kishen Chand*, (1925) Lah. 332 : 86 IC 567; Cf. *Pani Bai* v. *Smt. Sire Kanwar*, AIR 1981 Raj. 184 : 1984 Raj.LW 199.

that settled by the principal was held liable on the destruction of the goods by fire.[1] Omission to insure goods, though specific directions had been given, has been held to be a neglect of duty rendering the agent liable.[2] Where the agent, authorised to buy certain quantity of cotton for the principal, bought for the principal and certain others, larger quantities of cotton, it was held that though a contract was made, it was not the contract, which the defendant was authorised to make, and that therefore the defendant was answerable.[3]

An agent instructed by telegram to purchase gold and no time or place is indicated must act immediately; where he purchased next day and the principal sustained loss, the agent was held liable in damages to the principal which will be the difference in the prices prevailing between the two dates.[4]

Duty to follow custom.—Again, where a broker, contrary to the custom of the particular trade, sells goods for a low price, he must repay the loss suffered by the principal.[5] An auctioneer taking a bill of exchange for the price of goods, contrary to the custom of the trade will be liable on the dishonouring of the bill.[6] Similarly an agent delivering goods without getting the price will be liable,[7] and the damages will be measured in terms of the value of the goods. So will an agent who takes shares in a company different from what he was directed to apply for.[8] Again where a bank to whom specific instructions had been given to insure certain goods omitted to do so, it was held liable for the loss, which ensued.[9]

Good faith.—An agent for sale of goods cannot, while selling the property, make any secret profit. If he does, he must bring it into account.[10] Similarly, if an agent in letting the principal's property for rent makes arrangements for commissions from the tenants he must bring the amounts into account.[11] An agent for purchase of goods cannot sell the goods for recovery or realisation of moneys due to him from the principal.[12] If he does, he will be liable for the loss sustained by the principal. But where by mercantile usage the agent is allowed to mix the principal's goods with others, the agent will

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1. *Lilley* v. *Doubleday,* (1881) 7 QBD 570.
2. *Smith* v. *Lascelles,* (1788) 100 ER 101 : 1 RR 457.
3. *Bostock* v. *Jardine,* (1865) 159 ER 707 : 140 RR 682.
4. *Roopkishore Agarwal* v. *Kesarimal,* ILR (1959) 9 Raj. 938.
5. *Solomon* v. *Barker,* (1861) 175 ER 1258 : 121 RR 828.
6. *Ferrers* v. *Robins,* (1835) 150 ER 65.
7. *Stearine & Co.* v. *Hintzmann,* (1844) 144 ER 22 : 142 RR 245.
8. *Ex parte Panmure,* (1883) 24 Ch. D 367.
9. *Punjab National Bank* v. *Diwan Chand,* (1931) Lah. 302 : 134 IC 577.
10. (Firm) *Mathra Das* v. (Firm) *Jivan Mal,* (1928) 9 Lah. 7 : 1121 IC 29 : (1928) Lah. 196.
11. *Beaumont* v. *Boultbee,* (1802) 31 ER 695.
12. *Mulchand* v. *Sheo Mal,* (1929) Lah. 666 : 123 IC 867.

not be liable for any loss sustained because of the mixing up.[1] As the relation of principal and agent is one of confidence and rust, the agent is under an implied obligation not to divulge or use any information he may have acquired in the agency.[2] **[819]**

Undisclosed principal.—It may be mentioned in passing that it has been pointed out in a Calcutta case that the remedy under this section is open to an undisclosed principal and that there is nothing in Section 231 preventing him from seeking relief under this section, provided the circumstances bring the case within its purview.[3]

212. Skill and diligence required from agent.—An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Illustrations

(a) *A*, a merchant in Calcutta, has an agent *B*, in London to whom a sum of money is paid on *A's* account, with orders to remit. *B* retains the money for a considerable time. *A*, in consequence of not receiving the money, becomes insolvent. *B* is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as (*e.g.*,) by variation of rate of exchange—but not further.

(b) *A*, an agent for the sale of goods, having authority to sell on credit, sells to *B* on credit, without making the proper and usual enquiries as to the solvency of *B*. *B*, at the time of such sale, is insolvent. *A* must make

1. *Panna Lal* v. *Daulat Ram*, (1929) Lah. 591 : 122 IC 85.
2. *Kirchner & Co.* v. *Gruban*, (1909) 1 Ch. 413; *Robb* v. *Green*, (1895) 2 QB 315; *Amber Size etc., Ltd.* v. *Menzel*, (1913) 2 Ch. 239; *Firm Panna Lal Janki Das* v. *Mohan Lal*, AIR 1951 SC 144.
3. *Makhanlal Basak* v. *Bashudharanjan Das*, (1934) 61 Cal. 504 : 152 IC 33 : (1934) Cal. 721.

compensation to his principal in respect of any loss thereby, sustained.

(c) *A*, an insurance-broker employed by *B* to effect an insurance on a ship omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses, nothing can be recovered from the underwriters. *A* is bound to make good the loss to *B*.

(d) *A*, a merchant in England, directs *B*, his agent at Bombay, who accepts the agency to send him 100 bales of cotton by a certain ship *B*, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. *B* is bound to make good to *A* the profit which he might have made by the 100 bales of cotton at the time the ship arrived but not any profit he might have made by the subsequent rise.

Duty to exercise skill and diligence.—This section does away with the distinction made in English law between the degrees of diligence and skill expected of gratuitous agents and for reward. In either case, it sets up a uniform standard of reasonable diligence and also provides that the agent must conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business. An exception is however made where the principal knows of the agent's want of skill. As was remarked by Willes, J.[1]:

> "If gentleman, should employ a man who is known to have never done anything but sweep a crossing, to clean or mend his watch, his employer would probably be held to have incurred all risks himself."

A further provision is made that the agent must compensate the principal for any loss directly attributable to his (agent's) neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly

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1. *Harmer* v. *Cornelius,* (1858) 141 ER 94 : 116 RR 654; *Purasawakam Hindu J.S. Nidhi* v. *Kuddus Sahib,* (1926) 23 LW 476 : 94 IC 860 : (1926) Mad. 841.

or remotely caused by such neglect, want of skill or misconduct. In *Rangasuami Iyer v. Venkatarama Iyer*[1] the Court pointed out that illustration (a) to the section is traceable to the distinction between collateral damages arising from the retention of money and from failure to perform other contracts.

"Diligence"—It is well to remember that exigency of business do from time to time render necessity for carrying out of instructions of a principal by an agent who is expected to act for the purpose faithfully with diligence in a bonafide manner.[2] The question of reasonable diligence is one of fact, dependent on the nature of the particular agency and the facts of the case. The agent must not place reliance on the statements made by other but must ascertain facts for himself before committing his principal to any course of action.[3] As illustration (b) shows, an agent for sale of goods must satisfy as to the solvency of the vendee. So, an agent for letting a house must see that the prospective tenant is a solvent person.[4] Where however the agent is specifically authorised to enter into a particular transaction, he will not be liable if the transaction turns out disadvantageous.[5] But a gratuitous agent is liable only in case of loss sustained through his gross negligence.[6] In any event, an agent will be liable for loss caused by negligent non-observance of instructions.[7] It is open to the parties to exclude the obligation of diligence by special agreement.[8]

ILLUSTRATIVE CASES.—Where a commission agent was in the habit of sending goods by rail uninsured, and the principal had tacitly acquiesced, it was held that the agent was not liable for loss of the goods during transit.[9] But where the commission agent sent the goods in an open truck at the owner's (principal's) risk, and the goods were destroyed, the agent was held liable for

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1. (1915) MWN 246 : 2 LW 342 : 28 IC 635.
2. *Punjab National Bank v. Millen Sales Corporation*, AIR 1997 Raj. 151, 154 : 1997 (2) Civil Court C 177 : 1997 (1) Raj. LW 454 : 1997 (2) WLC 535 : 1997 (3) REC Civ R 74.
3. *Sitarampur Coal Co. v. Colley*, (1908) 13 CWN 59 : 1 IC 351.
4. *Hayes v. Tindall*, (1861) 30 LJ QB 362.
5. *Overend v. Gibb*, (1872) 5 HL 480.
6. *Agnew v.Indian Carrying Co.*, (1865) 2 MHCR 449; *Doorman v. Jenkins*, (1834) 111 ER 99; *Giblin v. McMullen*, (1869) PC 317; *Bullen v. Swan Electric Engraving Co.*, (1907) 23 TLR 257. But he is not liable for want of skill unless he is in a situation in which skill may be implied. **See** *Moffatt v. Bateman*, (1869) 3 PC 115; *Shiells v. Blackburne*, (1789) 126 ER 94; *Wilson v. Brett*, (1843) 152 ER 737 : 63 RR 528; *Donaldson v. Haldane*, (1840) 7 ER 1258.
7. *Mukherji v. Municipal Board, Benares*, (1924) 46 All. 175 : 22 ALJ 26 : 80 IC 241 : (1924) All. 467.
8. *Austin v. Manchester Ry. Co.*, (1850) 138 ER 181 : 84 RR 645 (Express agreement to be liable for special loss only); *Shiells v. Blackburne*, (1789) 126 ER 94.
9. *Venkatachalam v. Ponnuswami*, (1924) 20 LW 195 : (1924) MWN 499 : (1925) Mad. 46 : 82 IC 536 : 47 MLJ 312; *Nand Ram v. Gokul Chand*, (1933) Lah. 841.

negligence.[1] Indemnity clause in a letter of credit does not empower the banker to accept shipping documents for any port anywhere. Hence where the shipping documents were not in conformity with the main date in the letter of credit, the accepting banker will be acting negligently in honouring the draft against defective documents. So it cannot be predicated that the bank acted in good faith so as to be indemnified for any loss.[2] Where an agent bound under his contract to make up and repay deficiency in monies in his change omitted to exercise supervision with the result that his subordinates committed several defalcations, the Privy Council held he was bound to indemnify.[3] Similarly, where the agent allowed the rents to get time barred to the detriment of the principal, he was held liable.[4] In a case before the Privy Council, their Lordships observed that an agent's duty in a case where the debtor to the principal is financially embarrassed is to do his best to collect all he can in the circumstances, and added that it may in particular circumstances be more prudent not to press the debtor into immediate bankruptcy but to take what is available in case and to give time for the balance.[5] **[817]** Where the agent is guilty of negligence, misconduct and misinforming his principal as to the purchase of goods acting on behalf of the principal, the agent is liable for damages on the ground of breach of duty to exercise diligence in the conduct of business of agency.[6]

Measure of damages.—The measure of damages in an action by a principal against an agent for negligence or any other breach of duty by him in the course of the agency is the loss actually sustained by the principal provided it was the natural and probable consequence of the breach or such loss as in the particular circumstances the agent might have reasonably expected to result from such negligence or breach of duty.[7]

Skill.—A person acting as a skilled agent is expected to have reasonable skill and knowledge in regard to his duties[8]:

> "The public profession of an art is a representation and undertaking to all the world that the possessor possesses the

1. *Suraj Mal* v. *Fateh Chand,* (1930) Lah. 280 : 120 IC 529.
2. *Eastern Traders (P) Ltd.* v. *Punjab National Bank,* AIR 1966 Punj. 303.
3. *Taylor* v. *United Africa Co.,* (1937) PC 78 : 168 IC 494; **see also** *Phillips* v. *Barnes,* (1937) PC 314.
4. *Hari* v. *Ramjatan,* (1939) Pat. 17.
5. *Gokul Chand* v. *Nand Ram,* (1938) PC 292 : 43 CWN 87 : 178 IC 425. This does not conflict with the principle that the agent's authority is at least presumptively, to settle in cash. **See** *Blumbers* v. *Life Interest & Reversionary Securities Corpn.,* (1897) 1 Ch. 171; *Williams* v. *Evans,* (1866) 1 QB 352; *Pape* v. *Westacott,* (1894) 1 QB 272.
6. *Jayabharathi Corporation* v. *S.V. P.N. Rajasekara Nadar,* AIR 1992 SC 596 : 1992 (1) APLJ 53 : 1992 SCW 227.
7. *Gambhirmull Mahabirprasad* v. *Indian Bank Ltd.,* AIR 1963 Cal. 163.
8. *Lee* v. *Walker,* (1872) 7 CP 121 : *Jenkins* v. *Betham,* (1855) 139 ER 384 : 100 RR 297.

requisite ability and skill. An express promise or representation in the particular case is not necessary."

For instance the agent must have sufficient legal knowledge to adequately safeguard the principal's interests in the course of the agency.[1] If he is incompetent, the principal may terminate the agency before the term fixed, if any.[2] In particular cases, the agent may be even answerable for the skill of workers employed by him.[3] But as a general rule, if he exercises reasonable care and skill, he will not be liable for the consequences of a mere error of judgment.[4] It is the duty of a solicitor entrusted with the monies of his client for investment, to, satisfy himself by inquiry as to the value of the properties offered as security and not to rest content with his own general knowledge of property in the vicinity.[5] Similarly, an estate agent who is called upon to value property for the purpose of an advance by way of mortgage must make local inquiries and see what price the property has realised on recent dealings and if he makes a negligent over-valuation he will be liable in damages.[6] **[821]**

213. Agent's accounts.—An agent is bound to render proper accounts to his principal on demand.

Duty to account.—The duty of accounting is an absolute obligation incidental to the contract of agency—an obligation which attaches itself quite independently of any—specific contract or agreement to account. The obligation to render a proper account arises under the principles of equity and does not depend on contract. In *S. Paul & Co.* v. *State of Tripura,*[7] it was held that the duty to keep accounts is a statutory duty and cannot be negatives by agreement. As the Judicial Committee observed in *Raja Bhawani Singh* v. *Maulvi Misban-uddin,*[8] as between principal and agent, there is a contractual position, fortified by fiduciary relations and one of the contractual terms is that the agent should render an account to the principal of his dealings with the property entrusted to him. The mere delivery of a set of written accounts without attending to explain them and without producing the vouchers by

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1. *Park* v. *Hammond,* (1816) 128 ER 1127 : 16 RR 658; *Nielson* v. *James,* (1882) 9 QBD 546.
2. *Harmer* v. *Cornelius,* (1858) 141 ER 94 : 116 RR 654.
3. *Nagendranath* v. *Nagendra Bala,* (1926) Cal. 988 : 97 IC 200 : 43 CLJ 479.
4. *Overend Gurney* v. *Gibb,* (1872) 5 HL 480; *Lagunas Nitrate Co.* v. *Lagunas Syndicate,* (1899) 2 Ch. 392; *Rajaram* v. *Abdul Rahim,* (1916) 31 IC 450.
5. *Shaw* v. *Jack,* (1932) PC 194 : 137 IC 531.
6. *Baxter* v. *Gapp & Co.,* (1939) 2 AER 752; **see also** *Scholes* v. *Brook,* (1891) 64 LT 674.
7. AIR 1984 Cal. 378.
8. (1929) 10 Lah. 352 (PC) : (1929) ALJ 471 : 33 CWN 609 : 115 IC 729 : 31 Bom. LR 762 : 49 CLJ 576 : 30 LW 21 : (1929) MWN 449 : (1929) PC 119 : 56 MLJ 799. See *Kalyanji* v. *Tirkaram,* (1938) Nag. 254 : 176 IC 675.

which the disbursements are supported will not discharge the agent.[1] Nor does the fact that the principal writes "seen" on the account books imply that accounts have been 'rendered.[2] Where the agent fails to keep proper accounts, every adverse inference will be drawn against him.[3] **[823]**

The liability to account is only to principal. For instance, an agent appointed by an administrator to an estate is answerable only to the administrator and will not be liable to account to the person ultimately entitled to the estate.[4] Where an agent has to account to more principals than one, they must all sue and the agent is not liable to render separate accounts in separate suits to each of the principals.[5] But, he is not discharged unless he accounts to them all.[6] Further, the liability to account is only personal to the agent. His legal representatives will not be liable to account in the same way as the agent although the suit may be continued against them on the death of the agent.[7] The reason is that there is no relationship of trust and confidence between the principal and the legal representatives of the deceased agent. The estate of the agent however will be liable to the principal for any sum of money which the agent might have realised and failed to pay to the principal. That is to say, the liability of the representatives is limited to the assets in their hands.

The death of the agent has also the effect of changing the incidence of the burden of proof as to the accounting. The burden will be on the plaintiff principal who will have to prove each item of the amount he claims and the representatives will only be bound to place all the available materials for an account before the Court.[8]

Suit for accounts.—The principal right to demand accounts under Section 213 being a statutory right cannot be defeated by saving that the

1. *Shiva Prasad* v. *Hanuman,* (1938) Pat. 392 : 177 IC 133; *Bharat Chandra* v. *Kiran Chandra,* (1925) 52 Cal. 766 : 90 IC 944 : (1925) Cal. 1069; *Madhusudan Sen* v. *Rakhal Chandra,* (1916) 43 Cal. 248 : 30 IC 697 : 19 CWN 1070 : 22 CLJ 552; *Shib Chandra Roy* v. *Chandra Narayan,* (1905) 32 Cal. 719 : 1 CLJ 232; *Ram Chunder* v. *Manick Chunder,* (1881) 7 Cal. 428; *Lawless* v. *Calcutta Landing & Shipping Co.,* (1881) 7 Cal. 627; *Annoda Persad* v. *Dwarkanath,* (1881) 6 Cal. 754; *Ram Das* v. *Bhagwat Dass,* (1904) 1 ALJ 347 : (1905) AWN 1; *Ganesh Das* v. *Ganga Ram,* (1930) Sind 142 : 123 IC 228.
2. *Shankar Lal* v. *Toshan Pal,* (1934) ALJ 453 : 150 IC 151 : (1934) All. 553.
3. *Gray* v. *Haig,* (1854) 52 ER 587 : 109 RR 396; *Clarke* v. *Tipping,* (1846) 50 ER 352 : 73 RR 355.
4. *Chidambaram* v. *Pichappa,* (1907) 30 Mad. 243 : 2 MLT 326.
5. *Heath* v. *Chilton,* (1844) 152 ER 1352; *Raghbar Dayal* v. *Firm of Piare Lal,* (1933) Lah. 93: 145 IC 178; *Kadir Badsha* v. *Raichernessa,* (1921) 62 IC 766.
6. *Lee* v. *Sankey,* (1872) 15 Eq. 204; *Jones* v. *Cuthbertson,* (1873) 8 QB 504.
7. *Maharaja Bahadur* v. *Basanta Kumar,* (1913) 17 CWN 695 : 18 IC 876.
8. *Venkatacharyulu* v. *Mohana Panda,* (1921) 44 Mad. 214 : 61 IC 530 : (1921) Mad. 407; *Kumedacharan* v. *Asutosh Chattopadhya,* (1912) 17 CWN 5 : 16 CLJ 282 : 16 IC 742; *Prem Das* v. *Charan Das,* (1929) Lah. 362 : 117 IC 233. **See also** *Concha* v. *Murrieta,* (1889) 40 Ch.D. 543.

principal must sue for a specific amount.[1] Ordinarily the only suit permitted by law between a principal and an agent is a suit for general account and the principal cannot pick out capriciously certain items out of the business of agency and seek relief thereof.[2] If the principal accepts the statement of account given by the agent as rendition of accounts by the agent he may file a suit in respect of specific items without asking for the relief of rendition of accounts.[3] The agent's duty to render account is not discharged by his merely scribbling something on paper and passing it on the principal; he must attend and explain every item with proper vouchers.[4] Where the accounts consisted of debit entries only and they were accepted as correct that would not amount to a settlement of accounts.[5] It is not open to the principal to ask for an account of a single transaction only, without a complete adjustment of the right and liabilities.[6] But, if he is in the main satisfied with the accounts and objects only to specific items, the agent cannot object to the form of suit, as its only result is to relieve him of considerable burden.[7] In a suit for accounts, it is not incumbent on the principal to prove that there was a surplus in the agent's hands. It is sufficient if the defendant is proved to be a party accountable.[8] The principal may value his suit at the approximate amount due for under Sec. 11 of the Court Fees Act, where relief of greater value is given, the plaintiff will be permitted to execute the decree only on paying the deficiency in court fee.[9]

The court should first order an account to be taken of the agent's dealings, and ought not to pass a final decree straightaway. On the question of the competency of a court to pass decree for an amount exceeding its pecuniary jurisdiction, there is a diversity of judicial opinion. The Allahabad and Madras High Court incline to the view that the court may pass such a decree.[10] The Calcutta and Bombay High Courts are of the contrary view.[11]

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1. *Baroo Mal* v. *Nabha Co-operative Marketing Union Ltd.*, 66 Punj. LR 451.
2. *Ramaswami Chettiar* v. *Nadir Padi & Co.*, 77 LW 458.
3. *Ibid. Narayanan Chettiar* v. *Arunachalam Pillai*, (1965) 2 MLJ 307.
4. *Juleka Bi* v. *Hajee Abdul Rahim Sahib*, (1969) 1 MLJ 537.
5. *Lloyd's Commercial Corporation* v. *Veeravalli Satyanarayana*, AIR 1966 AP 256.
6. *Godhanram* v. *Jaharmull*, (1912) 40 Cal. 335 : 17 CWN 67 : 17 CLJ 636 : 16 IC 583.
7. *Subramania Chettiar* v. *T.R.M. T.S.T. Firm*, (1935) Ran. 209 : 157 IC 166.
8. *Hurrinath* v. *Krishna Kumar*, (1887) 14 Cal. 147; *Raghunath* v. *Ganpatji*, (1904) 27 All. 374 : (1905) AWN 3 : 1 ALJ 722.
9. *Saraju Bala* v. *Jogemaya*, (1918) 45 Cal. 634 : 26 CLJ 265 : 22 CWN 115. **See also** *Degamber* v. *Kallynath*, (1880) 7 Cal. 654.
10. *Sudershan* v. *Ram Prasad*, (1911) 33 All. 97 : 7 IC 385; *Mahomed* v. *Ala Baksh*, (1925) 47 All. 534 : (1925) All. 376; *Kannayya* v. *Venkata Narasayya*, (1917) 40 Mad. 1 : 32 MLJ 221 : 5 LW 580 : 39 IC 439 : (1917) MWN 367 (FB).
11. *Sarada Sundari* v. *Akramannessa*, (1924) 51 Cal. 737 : (1924) Cal. 783; *Bhupendra* v. *Purnachandra*, (1916) 43 Cal. 650 : 15 CWN 506 : 13 CLJ 132 : 8 IC 34; *Golap* v. *Indra*, (1909) 13 CWN 493 : 1 IC 86 : 9 CLJ 367; *Hirjibhai* v. *Jamshedji*, (1913) 15 Bom. LR 1027.

If accounts are submitted by the agent and accepted by the principal as correct, then in law the accounts are said to be settled. The settlement need not be in writing, nor is it necessary that it should be express. It can be inferred from conduct.[1]

In a suit for accounts against an agent the agent has a right to equitable set-off to the extent of the losses incurred by him.[2]

If on taking accounts, it is found that the principal has to pay to the agent, a decree may be passed in favour of the agent.[3] Where the agent is found liable, he may be directed to pay the sum due with interest.[4] Where a principal sues the agent for an account of money borrowed on his credit, any concessions shown to the principal by the creditors will not have the effect of reducing the agent's liability.[5]

It is to be noted, however, that it is not open to a principal who has got all the accounts of the agent in his possession to employ the machinery of the court for examining his accounts, on the off chance of making the agent liable.[6] In rendering accounts it is open to the agent to allege and establish that certain material account books and papers are in possession of the plaintiff who is deliberately with holding them.[7]

A suit for accounts against the heirs or legal representatives of the agent is not maintainable.[8] If after suit for accounts is filed against the agent and if he dies, the suit can be continued against the legal representatives, they may be asked to produce the accounts and vouchers but they cannot be asked to explain them.[9] A suit can be brought against them to recover a specific sum payable to the principal due to negligence, misfeasance or malfeasance of the agent, out of the assets in their hands.[10] The burden will lie on the principal to

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1. *Rameshkumar* v. *Purshottamdas,* 1965 MPLJ (Notes) 47.
2. *Sohanlal* v. *Gulab Chand,* AIR 1966 Raj. 229 : ILR (1965) 15 Raj. 1035.
3. *Ram Charan* v. *Bulaqi,* (1924) 46 All. 858 : 22 ALJ 783 : 83 IC 880 : (1924) All. 854; *Kanshi Ram* v. *Dula Rai,* (1938) Lah. 723; **see also** *Hurri Rai* v. *Krishna Kumar,* (1887) 14 Cal. 147 PC; *Annu* v. *Somasundara,* (1931) 54 Mad. 654 : 131 IC 165 : (1931) Mad. 185 : 62 MLJ 45; *Ramalinga* v. *Raghunatha,* (1897) 20 Mad. 418; **but see** *Hanuman Baksh* v. *Balmukund,* (1927) Lah. 701 : 104 IC 339; *Parmanand* v. *Jagat Narain,* (1910) 32 All. 525 : 7 ALJ 543.
4. *Ganesa* v. *Ramaswami,* (1917) 33 MLJ 468 : 6 LW 520 : 42 IC 219 : (1918) MWN 1.
5. *Kadiresan Chettiar* v. *Ramanathan,* (1927) MWN 118 : 102 IC 561 : (1927) Mad. 478 (FB).
6. *Shiva Prasad* v. *Hanuman,* (1938) Pat. 392 : 177 IC 133; *Nalini Kumar* v. *Gadadhar,* (1929) 49 CLJ 245 : 120 IC 100 : (1929) Cal. 418.
7. *Shankar Lal* v. *Toshan Pal,* (1934) All. 553 : (1934) ALJ 453 : 150 IC 151.
8. *Profulla Kumar* v. *Firoz Sundari,* AIR 1951 Cal. 182; **see** however Per *Lokur, J.,* in *Purnendu Vasudeo* v. *Ramakrishna Govind,* AIR 1945 Bom. 21.
9. *Profulla Kumar's case,* supra.
10. *Kanai Lal Ghose* v. *Purnendu Nath Tagore,* ILR (1947) 1 Cal. 48.

prove by himself rendering evidence or by means of other evidence to establish the amount due.[1]

Suit by agent against principal for accounts.—An agent cannot bring an action for accounts against the principal. The statute is not exhaustive and the right of the agent to sue the principal for accounts is an equitable right arising under special circumstances. He can sue for the balance due on an account.[2] The principal is under no statutory obligation to maintain or render accounts to the agent but there may be a trade usage or contract between the parties to that effect,[3] but where an accounting by the principal is the only way in which the agent's legal rights could be established, the principal may be called upon to render accounts. In one Lahore case, where the plaintiffs were insurance agents who were to be remunerated by a commission on the premia paid on all policies effected through them, the defendant insurance company was directed to render accounts of all the policies effected by the agents.[4]

An agent can sue for rendition of accounts if he does not possess accounts to enable him to determine his claim for commission or where his remuneration depends upon the extent of dealings which are not known to him or where he cannot be aware of the extent of the amount due to him unless accounts of his principal are gone into.[5]

Place of accounting.—It has been held that the ordinary rule of law that a debtor should seek the creditor has no application to the case of principal and agent.[6]

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1. *Smt. Sia Dulari* v. *Smt. Bhagwati,* AIR 1973 All. 260 : 1972 All.WR 772.
2. *Ramachandra* v. *Birankutti,* (1938) MWN Mad. 707 : 47 LW 654 : (1938) MWN 613 : 177 IC 631 : (1938) 2 MLJ 112 : ILR (1937) 2 Cal. 259 : 41 CWN 703 : 169 IC 730 : (1937) Cal. 359 (Pleader cannot sue client for accounts); *Gulab Rai* v. *India Equitable Insurance Co.,* (1937) Sind 51 : 167 IC 929; *Firm of Jesuram* v. *Ratan Chand,* (1925) Sind 173 : 78 IC 846; (1917) 37 IC 510; *Hanuman Baksh* v. *Balmukund,* (1927) Lah. 701 : 104 IC 339; *Kesho Ram* v. *Joti Sarup,* (1932) Lah. 619 : 140 IC 15; *Naraindas* v. *Papammal,* AIR 1967 SC 333 : 1966 Supp. SCR 311; **see also** *Chaubey Sushil Chandra* v. *Raj Bahadur,* AIR 1977 All. 259; Cf. *Mohammad Sultan* v. *Mohamed Yakub,* (1970) 2 MLJ 441; *State of Tamilnadu* v. *S. Alagiri Subramanian Chettiar,* AIR 1988 Mad. 248 : (1988) 101 Mad.LW 230.
3. *Devi Dayal* v. *Gopal Das,* (1934) 16 Lah. 7 : 152 IC 133 : (1934) Lah. 708; *Gulam Qutabuddin* v. *Faiz Baksh,* (1925) Lah. 100 : 78 IC 959; *Jowahir* v. *Haria Mal,* (1899) 60 PR.
4. *Ram Lal* v. *Asian Commercial Assurance,* (1933) Lah. 483 : 144 IC 505.
5. *B.B. Alu Co.* v. *Sunder Lal Taneja & Sons,* AIR 1981 Delhi 279; **see also** *Hindustan Handloom Factory* v. *Firm Rameshwar Dayal etc.,* 1974 Cur. LJ 577; *Ramakrishna Agencies (P) Ltd.* v. *LIC, Madras,* AIR 1967 AP 109 : (1966) 1 An. WR 423 : (1966) 1 Com.LJ 285 : (1966) 1 An.WR 423 : (1967) 37 Com.Cas. 94.
6. (Cf.) *Tika Ram* v. *Daulat Ram,* (1924) 46 All. 465 : 80 IC 661 : (1924) All. 530; *Mahomed Haji* v *Jute & Gunny Brokers,* (1930) 32 Bom. LR 1364; *Sankalchand* v. *Ambalal,* (1930) 54 Bom. 192 : 32 Bom. LR 171 : (1930) Bom. 150; *Jagan Nath* v. *Burma Oil Co.,* (1929) Lah. 605 : 119 IC 481 (Place where agency carried on is proper forum); *Bhamboo Mal* v. *Ram Narain,* (1928) Lah. 297; *Ram Das* v. *Dhanpat,* (1925) 6 Lah. 153 : 88 IC 950 : (1925) Lah. 387.

Re-opening account.—Settled accounts cannot as a rule re-opened, but the principal may obtain leave to surcharge and falsify.[1] Where however fraud or undue influence is proved, the whole account may be re-opened.[2] [827]

Interest.—As a rule, no interest is payable by an agent in respect of money received by him on his principal's behalf. But in case of default on the part of the agent as where he deals with the money in breach of his duty[3] or fails to pay it over after demand,[4] interest may be decreed from date of default.[5] Interest will also be decreed in cases where the agent is guilty of fraud, and no all bribes and secret profits.[6]

214. Agent's duty to communicate with principal.—It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

Duty to communicate with the principal.—The section lays down the duty of the agent to communicate with the principal and take his instructions in all cases of difficulty.[7] It may be that in an emergency he may act *bona fide* without consulting the principal, the principal, but even here, the condition is that there should have been no time to communicate. Where, though such communication is possible, the agent refrains from intimating the circumstances and asking for instruction, it will be open to the principal to repudiate the agent's act. In an English case, where the conductor of an omnibus authorised a third person to drive the bus to its garage near by, it was held that the conductor ought to have communicated with his employer as the garage was quite near, and that the principal (employer) was not bound by the act of the conductor.[8] In another case, an agent whose duty was to communicate to his principal the state of a ship and cargo forbore from doing so, though the telegraph was easily available. The principal effected an insurance in ignorance of a material fact (not communicated through the agent's neglect) and it was held that the insurance was void.[9] **[820]**

1. *Bharat Chandra* v. *Kiran Chandra,* (1925) 52 Cal. 766 : 90 IC 944 : (1925) Cal. 1069; *Prasanna Kumar* v. *Burn,* (1910) 7 IC 270; *Cheese* v. *Keen,* (1908) 1 Ch. 245.
2. *Kalanand* v. *Sri Prasad,* (1913) 17 CWN 1060 : 19 CLJ 152 : 19 IC 901; *Williamson* v. *Barbour,* (1877) 9 Ch.D. 529; *Watson* v. *Rodwell,* (1879) 11 Ch.D. 150.
3. *Burdick* v. *Garrick,* (1870) 5 Ch. App. 233.
4. *Edgell* v. *Day,* (1865) 1 CP 80.
5. *Barclay* v. *Harris & Cross,* (1915) 85 LJKB 115.
6. *Earle of Hardwicke* v. *Vernon,* (1808) 33 ER 614 : 9 RR 329; *Boston Deep Sea Fishing & Ice Co.* v. *Ansell,* (1888) 39 Ch.D. 339; *Nantyglo & Blaina Iron Works Co.* v. *Grave* (1878) 12 Ch.D. 738.
7. *Thandavaroya* v. *Ahmed Batcha,* (1927) MWN 578.
8. *Gwilliam* v. *Twist,* (1895) 2 QB 84.
9. *Proudfoot* v. *Montefiore,* (1867) 2 QB 511; (The ground of decision was imputed knowledge of the principal); **see also** The Graitudine, (1801) 165 ER 450.

215. Right of principal when agent deals on his own account, in business of agency without principal's consent.—If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or the dealings of the agent have been disadvantageous to him.

Illustrations

(a) *A* directs *B* to sell *A's* estate. *B* buys the estate for himself in the name of *C*. *A*, on discovering that *B* has bought the estate for himself, may repudiate the sale, if he can show that *B* has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) *A* directs *B* to sell *A's* estate. *B*, on looking over the estate before selling it, finds a mine on the estate which is unknown to *A*. *B* informs *A* that he wishes to buy the estate for himself, but conceals the discovery of the mine. *A* allows *B* to buy, in ignorance of the existence of the mine. *A*, on discovering that *B* knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Duty not to deal on his own account.—The relationship of principal and agent is of a fiduciary character and therefore the agent ought not to put himself in a position in which his interests conflict with his duty. For instance, dealing on his own account in the business of the agency is strictly forbidden unless the consent of the principal is obtained after a free and full disclosure of all the material circumstances. Where a material fact is not disclosed, or where the transaction entered into by the agent is in any way disadvantageous to the principal, he may repudiate it. It may be mentioned, in passing, that the rule is wider in English law, and it is not necessary that there should be dishonest concealment or disadvantage.[1]

1. *Woodhouse* v. *Meredith*, (1816) 35 ER 739 : 15 RR 145; *Ex parte Lacey*, (1802) 31 ER 1228 : 6 RR 9; *Dunne* v. *English*, (1874) 18 Eq. 524; *Demerara Bauxite Co.* v. *Hubbard*, (1923) AC 673; Difference in Indian Law pointed out in *Achuta Naidu* v. *Oakley Bowden*, (1922) 45 Mad. 1005; **see** Note 7.

Illustration (a) is a case where an agent employed to sell becomes himself the purchaser in the name of another. Illustration (b) is a case withholding a material fact. Other instances will be of cases where the agent makes a corrupt bargain with a third party.[1] The principal will, on discovery of such bargain, be entitled to avoid the contract made by the agent.[2] **[829]**

In *Moller* v. *Robinson,*[3] it was said that a broker employed to sell cannot himself become the buyer nor can a broker employed to buy become himself the seller without distinct notice to the principal, so that the latter may object if he thinks fit. The agent is expected to give his principal the full benefit of his discretion and judgment, and should not put himself in a position where personal interest conflicts with duty.[4]

Where a petition is filed by an agent of landowner in his own name, in the absence of any authority being filed showing that he has been authorised by the principal to initiate legal proceedings, the petition is liable to be dismissed.[5]

Where an agent for procuring a loan lent his own moneys to the principal upon the terms settled, the court held that the principal could repudiate the transaction.[6] In *Achuta Naidu* v. *Oakly Bowden,*[7] where the agent bought the principal's goods in the name of a dummy, it was held that the principal was not bound by the contract. Similarly in *Joachinson* v. *Meghjee,*[8] where an agent for sale purchased the property himself without the principal's knowledge, the sale was held not binding on the principal. So too, in *Mathra Das* v. *(firm) Jiwan,*[9] where a commission agent settled a claim for damages for no-delivery of goods on such terms as to ensure a margin of secret profit, and then sued the principal, the court non-suited the agent. Again, where an agent for purchase sold goods of his own at a higher rate without the knowledge or consent of the

1. **See** *Lister* v. *Stubbs,* (1890) 45 Ch. D. 12; *Grant* v. *Gold Exploration Syndicate,* (1900) 1 QB 233; *Re. a debtor,* (1927) 2 Ch. 367.
2. *Ravji* v. *Gangadhar,* (1880) 4 Bom. 29; *Moody* v. *Cox & Hatt,* (1917) 2 Ch. 71; *Houldsworth* v. *City of Glasgow Bank,* (1880) 5 AC 317.
3. (1870) 5 CP 546; **see also** *Charter* v. *Trevelyan,* (1844) 8 ER 1273 : 65 RR 305; *Christoforides* v. *Terry,* (1924) AC 566 (571); *Armstrong* v. *Jackson,* (1917) 2 KB 822.
4. *Boulton Bros. & Co.* v. *New Victoria Mills Co.,* (1929) All. 87 : 26 ALJ 1119 : 119 IC 837; (Cf.) *Bank of Upper Canada* v. *Bradshaw,* (1867) 1 PC 479.
5. *Nand Kishore Choudaha* v. *Union of India,* AIR 2007 (NOC) 2520 (MP).
6. *Bisweswar* v. *Guru Charan,* (1928) Cal. 727 : 112 IC 369 : 48 CLJ 266; *Kota Chinna Lakshmiah* v. *Nalam Viswanatham,* (1917) 42 IC 357.
7. (1922) 45 Mad. 1005 : 16 LW 345 : (1922) MWN 576 : 69 IC 927 : (1922) Mad. 497 : 43 MLJ 444; *Rameshardas* v. *Tansookhraj,* (1927) Sind 195 : 102 IC 366.
8. (1910) 34 Bom. 292 : 11 Bom. LR 779 : 3 IC 801. **See also** *Subbarayudu* v. *Kotayya,* (1891) 15 Mad. 389 (Vakil instructed to bid at Court sale for his client, bidding for himself through a third party—Sale set aside); (Cf.) *McPherson* v. *Watt,* (1877) 3 AC 254; *Livingstone* v. *Ross,* (1901) AC 327; *Kelly* v. *Enderton,* (1913) AC 191. (But an agent who is also given an option may purchase).
9. (1927) 9 Lah. 7 : 112 IC 29 : (1928) Lah. 196. **See also** *Clarke* v. *Tipping,* (1846) 50 ER 352 : 73 RR 355; *Munni* v. *Atmaram,* AIR 1983 HP 32.

principal, the latter was held entitled to repudiate the transaction.[1] Where a general attorney authorised to lease out land leased in to his own son, it was held that in the absence of material on record to show that the principal (owner of the land) was kept in the dark about the rent rate, the lease was not void nor voidable.[2] It has been held that a person cannot by acting as agent for the principal and the other contracting party obtains remuneration from both without the knowledge of his principal.[3]

DISCLOSURE OF CIRCUMSTANCES.—It will not do to merely put the principal on inquiry.[4] Full disclosure must be made of the nature and extent of the interest.[5]

Duty not to use information.—The agent must not use any information obtained by him in the course of the agency, against his employer.[6]

Duty not to set up adverse title.—The principle is well established that an agent entrusted with money or goods by a principal to be applied on his principal's account cannot dispute the principal's title to the same unless he proves (i) a better title in a third person and (ii) that he is defending on behalf of and with the authority of the third person.[7] **[829]**

216. Principal's right to benefit gained by agent dealing on his own account in business of agency.—If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

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1. *Damodar* v. *Sheoram,* (1907) 29 All. 730 : 4 ALJ 537 : (1907) AWN 245; *Jankidas* v. *Dhumanmal,* (1917) 37 IC 241; *Rughnath* v. *Rampartab,* (1935) Sind 38. (Cf.) *Kaluram* v. *Chimniram,* (1934) Bom. 86 : 36 Bom. LR 68. **See also** *Kimber* v. *Barber,* (1872) 8 Ch. Ap. 56 (Agent selling his own recently purchased shares).
2. *Smt. Munni* v. *Atma Ram,* AIR 1983 HP 32.
3. *Fullwood* v. *Hurley,* (1928) 1 KB 498; *Harrods* v. *Lemon,* (1930) 47 TLR 97; *Chowdhury* v. *Mrs. Ezekiel,* (1933) Ran. 184 : 146 IC 595.
4. *Dunne* v. *English,* (1874) 18 Eq. 524.
5. *Liquidators of Imperial Mercantile Credit Association* v. *Coleman,* (1873) 6 HL 189. **See also** *In re. Finlay,* (1913) 1 Ch. 565; *Lever Bros.* v. *Bell,* (1931) 1 KB 557.
6. *Lamb* v. *Evans,* (1893) 1 Ch. 218; *Kirchner & Co.* v. *Gruban,* (1909) 1 Ch. 413; *Amber Size & Chemical Co.* v. *Menzel,* (1913) 2 Ch. 239.
7. *Raja Bhawani Singh* v. *Maulvi Misbah-ud-din,* (1929) 10 Lah. 352 : 33 CWN 609 : 49 CLJ 576 : (1929) 10 Lah. 352 : 53 CWN 609 : 49 CLJ 576 : (1929) ALJ 471 : 31 Bom. LR 762 : (1929) MWN 449 : 30 LW 21 : 115 IC 729 : (1929) PC 119 : 56 MLJ 799 (PC); *Syed Yadgar Hussain* v. *Md. Ibrahim,* (1936) Nag. 71 and **see** *Blaustein* v. *Maltz Mitchell & Co.,* (1937) 2 KB 142 : (1937) 1 AER 497.

Illustration

A directs *B* his agent, to buy a certain house for him. *B* tells *A* it cannot be bought, and buys the house for himself. *A* may, on discovering that *B* has bought the house, compel him to sell it to *A* at the price he gave for it.

Right to claim benefit.—The previous section dealt with the principal's right to repudiate. The present section contemplates cases where the principal adopts the agent's acts. The agent stands in a fiduciary position in relation to his principal and so, any profits made by him without the account. Thus the principal may claim any benefit that might have accrued to the agent by dealing on his own account in the business of the agency.[1] As was said in *Williams* v. *Stevens*[2]:

"Nothing can be better settled or more in conformity with the dictates of justice than the rule that persons standing in the situation of trustees or agents must account to their principals or *cestui que trust* for all the benefits which they themselves obtain by virtue of that character or relation."

As the accountability results from the fiduciary position of the agent, it is not necessary that the principal must have been actually damnified by the agent's dealing on his own account.[3] If, for example, a commission agent receives a commission from the other party to the transaction, the principal could recover it.[4] Where an agent authorised to purchase on behalf of the principal, buys for himself, the principal could recover the property with all profits. So, where an auctioneer receives rebates or discounts from buyers, he is bound to being such gains into account. the decisions have gone even to this extent (*viz.*) that in cases where the agent has not actually received the promised secret commission, the principal may directly sue the third party.[5] The corrupt agent

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1. *Joachinson* v. *Meghji,* (1910) 34 Bom. 292 : 11 Bom. LR 779 : 3 IC 801; **see also** *Costa Rica Ry. Co.* v. *Forwood,* (1901) 1 Ch. 746; *Puranmal* v. *Ford,* (1919) 41 All. 635 : 17 ALJ 805 : 52 IC 873.
2. (1866) 1 PC 352.
3. *Kaluram* v. *Chimniram,* (1934) Bom. 86 : 36 Bom. LR 68.
4. *Parker* v. *McKenna,* (1874) 10 Ch. 96; *Mayen* v. *Alston,* (1892) 16 Mad. 238 (Return commission from sub-agent); *Andrews* v. *Ramsay & Co.,* (1903) 2 KB 635 (Auctioneer receiving secret commission from the buyer); *Chowdhury* v. *Mrs. Ezekiel,* (1933) Ran. 184 : 146 IC 595 (No broker can get commission from both sides, unless authorised); (Cf.) *Nitedals* v. *Bruster,* (1906) 2 Ch. 671 (Acting for principal's trade rivals); *Hippesley* v. *Knee,* (1905) 1 KB 1 (Discount received incidentally may be retained); *Boston Deep Sea Fishing Co.* v. *Ansell,* (1888) 39 Ch.D. 339 (Agreement for secret commission with contractor); *Jubilee Cotton Mills* v. *Lewis,* (1924) AC 958 (Company promoter getting secret benefit from vendor to company).
5. *Whaley Bridge Printing Co.* v. *Green,* (1879) 5 QBD 109 (Company promoter—Agreement for secret profit—Right of company to enforce).

and the third party are in the position of wrongdoers against whom the principal has distinct causes of action. The principal may recover the profit surreptitiously earned by the agent and also sue the third party for damages.[1] **[830]**

AGENT DEBTOR OR TRUSTEE.—In English law, the relationship between principal and agent in regard to secret profits, is only that of debtor and creditor, and not that of trustee and beneficiary. And so the doctrine of tracing or following trust property cannot be called in aid by a principal who has discovered that his agent has made profits and has secreted them.[2] But in India, the rule would appear to be different, for Sec. 88 of the Trusts Act provides that where a trustee, agent, director of company, legal adviser or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interest are or may be adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.[3]

Misconduct as affecting the right to commission.—See also Sec. 220 *infra.* An agent who wrongful deals in the business of the agency cannot recover, commission.[4] But there will be no forfeiture where the principal has been previously informed and sanctions the agent's acts. The information must relate to all material particulars.

In *Damodar* v. *Sheoram,*[5] where an agent for purchase sold his own goods to the principal, at a rate higher then the market rate, the principal was held entitled to repudiate the transaction. **[835]**

LIMITS OF THE RULE.—As the rule applies only to profits acquired in the course of the agency, it will not be wrong for an agent who before the contract of agency had acquired certain property, to sell it to the principal at a profit.[6] The Bombay High Court has however recently held that the section will apply even in such a case.[7] Again, where, by the usage of trade, the agent

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1. *Grant* v. *Gold Exploration Syndicate,* (1900) 1 QB 233; *Mayor of Salford* v. *Lever,* (1891) 1 QB 168; *A.G.* v. *Goddard,* (1929) 98 LJKB 743.
2. *Lister* v. *Stubbs,* (1890) 45 Ch.D. 12; *Powell* v. *Jones,* (1905) 1 KB 11; *Metropolitan Bank* v. *Heiron,* (1880) 5 Ex. D. 319.
3. *Ramaswami* v. *Karuppan Chetti,* (1915) 29 MLJ 551 : 31 IC 216.
4. *Harivalabhdas* v. *Bhai Jivanji,* (1902) 26 Bom. 689; *Joachinson* v. *Meghjee,* (1909) 34 Bom. 292 : 11 Bom. LR 779 : 3 IC 801; *Fakir Mahomed* v. *Rangiah,* (1915) 1 LW 181 : 22 IC 527; *Saloman* v. *Pender,* (1865) 159 ER 682 : 40 RR 651; *Andrews* v. *Ramsay & Co.,* (1903) 2 KB 635.
5. (1907) 29 All. 730. See *Re. Haslam,* (1902) 1 Ch. 765 (the principal may ratify); *Bentley* v. *Craven,* (1853) 52 ER 29 : 104 RR 373.
6. *Burland* v. *Earle,* (1902) AC 83; (Cf.) *In re. Cape Breton Co.,* (1885) 29 Ch.D. 795.
7. *Kaluram* v. *Chimniram,* (1934) Bom. 86 : 36 Bom. LR 68.

is entitled to a certain remuneration from the other party to the contract, such remuneration will not be a profit to be brought into hotchpotch.[1] The general rule may therefore be stated to be that any agreement between the agent and third parties, which tends to create a conflict with the duties as agent will be void unless the principal chooses to affirm such an agreement.[2]

Measure of damages for breach of duty.—In a suit by the principal against the agent for breach of duty, the measure of damages is the full amount of the loss sustained,[3] but it must be such loss as is the natural and probable consequence of the breach of duty[4] or such as was within the contemplation of the parties. Profits actually lost will be recoverable by way of damages, but not merely anticipated profits, which might have been earned if the agent had done his duty.[5] Where the agent sells to the principal will be entitled to acquired by himself before the agency stated, the principal will be entitled to the profits made by the agent, (*i.e.,*) the difference between the price at which the agent sold to the principal and the market value of the goods as date of sale.[6]

217. Agent's right of retainer out of sums received on principal's account.—An agent may retain, out of any sum received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

Right of retainer.—This section confers on the agent a lien over moneys of the principal in his hands in respect of (i) advances made, (ii) expenses properly incurred and (iii) remuneration earned.[7] A later section (Sec. 221) gives the agent a lien over all the property of the principal in his possession. **[837]**

In regard to advances made by the agent, it was ruled in *Official Trustee of Madras* v. *Sundaramurthi*[8] that an agent for sale of goods may retain the proceeds

1. *Great Western Insurance Co.* v. *Cunliffe,* (1874) 9 Ch. 525; *Baring* v. *Stanton,* (1876) 3 Ch.D. 502.
2. *Venayakrao* v. *Ransordas,* (1870) 7 BHCOC 90.
3. *Smith* v. *Price,* (1862) 175 ER 1268 : 121 RR 831; *Lewcock* v. *Bromley;* (1920) 37 TLR 48 (Agent to sell land signing contract in excess of authority—Suit for specific performance against principal—Measure of damages awardable to principal in subsequent suit against agent); *Keppel* v. *Wheeler,* (1927) 1 KB 577; *Eastern Shipping Co.* v. *Quah Beng Kee,* (1924) AC 177.
4. *Mainwaring* v. *Brandon,* (1818) 129 ER 361 : 19 RR 497.
5. *Johnston* v. *Braham & Campbell,* (1917) 1 KB 586; *Salveseo* v. *Rederi,* (1905) AC 302; *Cassaboglou* v. *Gibbs,* (1883) 11 QBD 797.
6. *Kaluram* v. *Chimniram,* (1934) Bom. 86 : 36 Bom. LR 68.
7. *Leibaoak Syndicate* v. *Finlay Fleming & Co.,* (1923) Ran. 84 : 77 IC 920 (No time-limit for exercise of agent's lien).
8. (1922) 15 LW 201 : 24 CWN 1004 : 76 IC 944 : (1921) PC 103.

of sale towards advances made by him, in cases where the principal becomes insolvent. Similarly in *Subba Pillai* v. *Ramaswami Iyer,*[1] a pleader was held entitled to a right of retainer under the section for payment of advances made towards outfees. The rule is the same with regard to a solicitor.[2]

A mere statement by a purchasing agent of a licensed grain distributor which parting with the possession of the grain to the Government that the principal owes him a certain amount cannot amount to reservation of a lien either expressly or impliedly.[3]

Where the value of the material supplied by the principal to the agent is more than the amount due to the agent, the material cannot be detained by the agent by exercising the right of lien.[4]

The agent cannot retain papers, goods etc, of the principal which are the subjects of different transaction in the absence of a contract to that effect.[5]

The language of the section "in conducting such business" makes it clear that money collected in one agency cannot be retained for sums due and payable in connection with any other agency.[6] So, a pleader cannot retain amounts realised in one suit against his dues in another suit.[7]

218. Agent's duty to pay sums received for principal.—Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

Duty to pay over monies.—It is the duty of the agent to pay over all moneys received on the principal's behalf, subject, of course, to any lawful deduction for remuneration or expenses properly incurred. Therefore, in a case where a person indebted to the agent in his personal capacity, made payments on the principal's account, it was held that it was not open to the agent to appropriate such payments towards his personal debt.[8] In a Calcutta case, a Zamindar had appointed a *naib* and an *undernaib* for collection. The duty of the latter was to make collections and hand them over to the *naib*. He did not hand over the amounts collected by him, and in a suit by the Zamindar, it was

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1. (1903) 27 Mad. 512.
2. *Ex parte Morrison,* (1868) 4 QB 153; *Cullianji* v. *Raghowji,* (1906) 30 Bom. 27 : 6 Bom. LR 879.
3. *Ram Prasad* v. *State of M.P.,* AIR 1970 SC 1818 : (1970) 2 SCR 677.
4. *Food Corporation of India* v. *Panipat Co-op. Mktg. Processing Society Ltd.,* AIR 1990 P&H 330 : 1989 (96) Pun. LR 96.
5. *Hiralal* v. *Ramrakha,* AIR 1953 Pepsu 113.
6. *Sardar Muhammad* v. *Babu Daswandhi,* (1885) 49 PR.
7. *Narayanaswami* v. *Challapalli,* (1908) 33 Mad. 255 : 20 MLJ 326; 4 IC 398.
8. *Heath* v. *Chilton,* (1844) 152 ER 1352 : 67 RR 447.

held that the *under-naib* received the money to the use of the Zamindar and that Zamindar could therefore sue to recover the amounts.[1] **[827]**

Illegal and void transactions.—An agent who has received moneys on behalf of the principal is accountable to the latter for the payment thereof. He is under a legal obligation to do so subject to the provisions of Section 217 and 221. This obligation subsists even if the moneys received are the fruit of a void or illegal contract.[2]

Export license or quota paper granted under the Export Control Order is a personal privilege granted to a party and is not property. So where the principal allowed the agent to sell the export license to a third party it is circumventing the provisions of the Export Control Order. A suit for the recovery of the proceeds and profits from the agent cannot be maintained and the principal cannot recover on the principle *ex trupi causa non-oritur actio.*[3] Any illegal gratification, bribe or corrupt allowance received, must be accounted for, and the illegality or void character of the transaction cannot be set up a defence in the principal's action for an account.[4] For instance, moneys received under a wagering contract,[5] or *abwabs* under the Bengal Tenancy Act,[6] must be duly paid over to the principal. It will, however, be open to the agent to show that he has, for a lawful reason, repaid the money to the person who had made the payment.[7] He cannot, however, after receiving moneys on behalf of the principal, set up as against the latter's claim, the rights of third parties with regard to such monies.[8] The agent is liable to pay interest on the monies in his hands, where he has failed or refused to render proper accounts at the due dates.[9] Likewise, interest may be recovered on bribes taken by the agent from the date of receipt.[10]

In cases where the contract of agency is itself illegal, the court will not assist either party to carry out the contract: therefore the principal cannot recover any sums received by the agent in pursuance of such a contract. Thus,

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1. *Rajendra* v. *Nagendra,* (1927) Cal. 917 : 104 IC 704.
2. *Murlidhar Banwarilal* v. *Kishore Lal Jagannath,* AIR 1960 Raj. 296 : ILR (1960) 10 Raj. 412.
3. *Nathmal Bhaironbux & Co.* v. *Kashi Ram,* AIR 1973 Raj. 271 : 1973 WLN 505.
4. *De Mattos* v. *Benjamin,* (1894) 63 LJQB 248 : 10 TLR 221; *Bridger* v. *Savage,* (1885) 15 QBD 363; *Tenant* v. *Elliot,* (1797) 126 ER 744 : 4 RR 755; *Bholanath* v. *Mulchand,* (1903) 25 All. 639 : (1903) AWN 161; *Palaniappa* v. *Chockalinga,* (1921) 44 Mad. 334 : (1921) Mad. 334; *Kedarnath* v. *Prahlad Rai,* AIR 1960 SC 213.
5. *Bholanath* v. *Mulchand,* (1903) 25 All. 639 : (1903) AWN 161.
6. *Nagendrabala* v. *Guru Dayal,* (1903) 30 Cal. 1011 : 7 CWN 535.
7. *Murray* v. *Mann,* (1848) 154 ER 605 : 76 RR 686.
8. *Roberts* v. *Ogilby,* (1821) 147 ER 89 : 23 RR 671.
9. *Ganesa* v. *Ramaswami,* (1917) 33 MLJ 468 : 42 IC 219.
10. *Nanty-glo & Blaina Iron Co.* v. *Grave,* (1879) 12 Ch.D. 738.

where an agent employed to effect insurances in breach of an Act of Parliament received premia from some persons, it was held that the principal could not recover them.[1]

219. When agent's remuneration becomes due.—In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such Act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

Remuneration of agent.—Where there is an express contract as to the remuneration of the agent, it will, of course, govern the rights of the parties. If all the conditions of the agreement are fulfilled, he becomes entitled to his commission.[2] But in the absence of a specific contract the right to remuneration will be governed by the usage or custom of the particular trade.[3] The right to remuneration may also be implied from the conduct of the parties. Especially, where a professional agent is employed, the mere fact of employment may raise a presumption of a contract to remuneration him.[4] **[832]**

Where the contract relating to the purchase of machinery by the defendant has provided for the payment of commission to the plaintiff an agent of a foreign company subject to the installation of such machinery, the defendant cannot refuse to pay the commission to the plaintiff when he has failed to provide the site for the installation of the machinery.[5]

When payable.—Ordinarily, the remuneration becomes due only on the completion of the act. But the question has arisen with reference to the several classes of agent as to what amounts to completion of the act. Especially with regard to the commission payable to brokers, the question has been repeatedly litigated. The general principle seems to be as laid down in *Green* v. *Bartlett*,[6] that, if the relation of buyer and seller is really brought about by the

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1. *Thomson* v. *Thomson*, (1802) 32 ER 190 : 5 RR 151. **See also** *Sykes* v. *Beadon*, (1879) 11 Ch.D. 170.
2. *Laljee* v. *Dadabhai Guzdar*, (1915) 43 Cal. 833 : 23 CLJ 190; *Karuthan Chettiar* v. *Chidambaram Chettiar*, (1938) 2 MLJ 79 : 48 LW 237 : (1938) MWN 576 : (1938) Mad. 725 (No commission for collecting old outstandings unless agreement to that effect); *Saraswathi Devi* v. *Moti Lal*, AIR 1982 Raj. 108 : 1982 Raj.LW 29 : 1981 WLN 629 : 1982 Raj.LR 251.
3. *Satchidananda Dutt* v. *Nritya Nath*, (1923) 50 Cal. 878 : (1924) Cal. 517 : 27 CWN 1007: 79 IC 287; *Baring* v. *Stanton*, (1876) 3 Ch. D. 502 (Custom as to commission on insurance premia); *Broad* v. *Thomas*, (1830) 131 ER 38 : 33 RR 399.
4. *Manson* v. *Bailee*, (1855) 2 Macq. 80 : 149 RR 120.
5. *Continental & Eastern Agencies* v. *Coal India Ltd.*, AIR 2003 Delhi 387, 393.
6. (1863) 143 ER 613 : 135 RR 868; **See** *Cooper* v. *Luxor, (Eastbourne Ltd.)* (1939) 1 AER 623; *George Trollope & Sons* v. *Caplan*, (1936) 2 KB 382 : (1936) 2 AER 842; *Musson* v. *Moxley*, (1936) 1 AER 64; *George Trollope & Sons* v. *Martyn*, (1934) 2 KB 436.

act of the agent, he will be entitled to commission, though the actual sale may not be effected by him. The transaction that is to say, must be the direct, though not the immediate, result of the agent's intervention.[1] As was said in *Municipal Corporation of Bombay* v. *Cuverji*,[2] the broker will have earned his commission, if he has succeeded in inducing the contracting mind, the willingness to open negotiations upon a reasonable basis. he must, within the time agreed upon, procure a willing and able purchaser[3] or in; the case of a loan, find a person willing to advance the money.[4] The fact that afterwards either owing to the caprice of the lender or the infirmity of title, the bargain is not put through will not derogate from the agent's right to commission.[5]

But, if there be sufficient justification for the principal not going on with the transaction, the right to remuneration will be negatived.[6] Where he has been unsuccessful in putting the transaction through, he cannot sue even on the basis of *quantum meruit;* for instance, commission on the sale of a house is payable only on a completed sale.[7] But where the principal refuses to complete

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1. *Liladhar* v. *Mathurdas,* (1934) 58 Bom. 583 : (1934) Bom. 158 : 36 Bom. LR 119 (Test is whether his work is the effective or efficient cause of the completion of the transaction); *Roopji & Sons* v. *Dyer Meaken,* (1930) ALJ 673 : 124 IC 35 : (1930) All. 545; *Jordan* v. *Ramachandra,* (1904) 8 CWN 831; *Andley Bros.* v. *Mc Cready,* (1928) Lah. 605 : 111 IC 99; *Wilkinson* v. *Martin,* (1837) 173 ER 373.
2. (1895) 20 Bom. 124; *Liladhar* v. *Mathurdas,* (1934) 58 Bom. 583; *Vasonji* v. *Kursondas,* (1928) 52 Bom. 627 : 30 Bom. LR 486; *Fazal Ilahi* v. *Maulvi Mahomed,* (1935) Pesh. 56 : 156 IC 131; *Howard* v. *Manx Isles Steamship Co.,* (1923) 1 KB 110; *Nightingale* v. *Parsons,* (1914) 2 KB 621.
3. *Stokes* v. *Soondernath,* (1898) 22 Bom. 540; *Farid Baksh* v. *Hargulal,* (1936) ALJ 1163; *Foucar & Co.* v. *M.C.T. Mudaliar,* (1924) 2 Ran. 45 : 79 IC 750 : (1924) Ran. 232; *Saraswati Devi* v. *Moti Lal,* AIR 1982 Raj. 108; *Abdullah Ahmed* v. *Animendra Kissen,* AIR 1950 SC 15.
4. *Elias* v. *Govind,* (1903) 30 Cal. 202; *Vasonji* v. *Kursondas,* (1928) 52 Bom. 627 : 30 Bom. LR 486 : (1928) Bom. 270.
5. *Foucar & Co.* v. *M.C.T. Mudaliar,* (1924) 2 Ran. 45 : 79 IC 750 : (1924) Ran. 232; *Elias* v. *Gobind,* (1903) 30 Cal. 202 : 7 CWN 297; *Mehta* v. *Cassimbai,* (1922) 24 Bom. LR 847 : (1922) Bom. 433 : 75 IC 193; *Nanda Lal* v. *Gurupada,* (1924) 51 Cal. 588 : (1924) Cal. 733; *Liladhar* v. *Mathurdas,* (1934) 58 Bom. 583 : (1934) Bom. 158 : 36 Bom. LR 119; *Martirosi* v. *Coupjon,* (1912) 15 CLJ 312; *Raghunandan* v. *Madan Mohan,* (1923) 76 IC 333 : 38 CLJ 139; *Fazal Ilahi* v. *Maulvi Muhammad,* (1935) Pesh. 56 : 156 IC 131 (Performance of contract between parties brought together by him is not the *sine qua non* for the earning of his commission). For English cases, see *Bray* v. *Chandler,* (1856) 139 ER 1553 : 107 RR 479; *Burchell* v. *Gowrie,* (1910) AC 614; *Coles* v. *Enoch,* (1939) 1 AER 614.
6. See *Cooper* v. *Luxor, (Eastbourne) Ltd.,* (1939) 1 AER 623.
7. *Ayyannah Chetty* v. *Subramania Iyer,* (1923) MWN 675 : 18 LW 560 : 76 IC 756 : (1924) Mad. 212 : 45 MLJ 409; *Satchidananda* v. *Nrityanath,* (1923) 50 Cal. 878 : (1924) Cal. 517 : 79 IC 287 : 27 CWN 1007. But see *Simpson* v. *Lamb,* (1856) 139 ER 1213 : 104 RR 806.

a transaction, without sufficient reasons, the agent will be entitled to damages.[1] Even in cases where the broker fails to prove the rate of commission agreed upon, the court may award reasonable commission. Provided it is satisfied that he did the work.[2]

INSURANCE AGENT.—As regards an insurance agent if under his contract with the company his duties do not cease with the first introduction of the customer, commission cannot be claimed on payments made by the customer after the agency ceases.[3]

An agent is not entitled to remuneration, if he is guilty of misconduct in the business of the agency.[4]

220. Agent not entitled to remuneration for business misconducted.—An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business, which he has misconducted.

Illustrations

(a) *A* employes *B* to recover 1,00,000 rupees from *C*, and to lay it out on good security, *B* recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby *A* loses 2,000 rupees. *B* is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to *B*.

(b) *A* employs *B* to recover 1,000 rupees from *C*. Through *B's* misconduct the money is not recovered. *B* is entitled

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1. *Annaswami* v. *Zamindar of Ayakudi*, (1910) MWN 199 : 6 IC 740, *Mehta* v. *Cassimbai*, (1922) 24 Bom. LR 847 : 75 IC 193 : (1922) Bom. 433; see also *Inchbald* v. *Western Nilgherry Coffee.*, (1864) 144 ER 203 : 142 RR 663; *Turner* v. *Goldsmith*, (1891) 1 QB 544; *Prickett* v. *Badger*, (1856) 140 LR 123 : 107 RR 668; *Reigate* v. *Union Mfg. Co.*, (1918) 1 KB 592; *Ronald Bampton* v. *Garner*, (1937) 3 AER 438; *Kahn* v. *Aircraft Industries Corpn.*, (1937) 3 AER 476.
2. *Khurshed Alam* v. *Asa Ram*, (1933) Lah. 784 : 146 IC 761.
3. *Provat Kamal Basu* v. *Phoenix Assurance Co.*, (1936) Cal. 246 : 40 CWN 694 : 162 IC 525; *Empire of India Life Assurance Co.* v. *Nanu Ayyar*, (1921) 44 Mad. 170.
4. (Cf.) *Andrews* v. *Ramsay*, (1903) 2 KB 635; *Harivallabhdas* v. *Bai Jivanki*, (1902) 26 Bom. 689; *Joachinson* v. *Meghjee*, (1909) 34 Bom. 292 : 11 Bom. LR 779 : 3 IC 801.

to no remuneration for his services, and must make good the loss.

Misconduct of agent—Effect.—An agent who is guilty of misconduct forfeits his commission and is further responsible to the principal for any loss sustained by the latter on account of the agent's misconduct. The foregoing section illustrates generally what misconduct is. Thus, where an agent for sale takes a secret commission from the other party, he loses his right to commission from the principal, and is further liable to account for the secret profit.[1] So too, where the agent sells his own property to the principal, without proper disclosure, he is disentitled to remuneration.[2] But if an agent retains discounts received in the *bona fide* belief that he may do so, he will not forfeit his remuneration.[3] **[835]**

As illustration (a) shows, where a single remuneration is agreed upon for the performance of several inseparable duties, misconduct in regard to anyone of them will entail forfeiture; but where there are several distinct and separable acts, he can claim remuneration in respect of those, which he has performed honestly.[4]

An agent will not lose his commission for that part of the transaction in which he has been honest provided the same can be separated from the other part in which he has been dishonest.[5]

221. Agent's lien on principal's, property.—In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

Agent's lien.—Under Sec. 217, the agent has a lien on the moneys of the principal, in his hands. This section gives a lien on all property, movable or immovable, of the principal in the agent's hands. The lien extends to commission, disbursements and services rendered in relation to the specific

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1. *Andrews* v. *Ramsay,* (1903) 2 KB 635; *Stubbs* v. *Slater,* (1910) 1 Ch. 632; *Joachinson* v. *Meghjee,* (1909) 34 Bom. 292 : 11 Bom. LR 779 : 3 IC 801.
2. *Ramsaroop* v. *Chajuram,* ILR (1937) 1 Cal. 632; *Joachinson* v. *Meghjee,* (1909) 34 Bom. 292 : 11 Bom. LR 779 : 3 IC 801. *Ramsaroop* v. *Chajuram,* ILR (1937) 1 Cal. 757 : 41 CWN 460 : 169 IC 827.
3. *Hippisley* v. *Knee Bros.,* (1905) 1 KB 1.
4. *Nitidals* v. *Bruster,* (1906) 2 Ch. 671.
5. *Hindustan Handloom Factory etc.* v. *Firm Rameshwar Dayal Sadhu Ram,* (1974) Cur. LJ 577.

property detained.[1] The "advances" mentioned in Sec. 217 are not to be found here; perhaps, they may be included in the caption of 'disbursements.' [837] An agent who purchased coal in favour of the principal with his own monies could claim lien under Sec. 221.[2] Agents right of lien over principals' properties being of passive and limited nature does not confer on him any right interest or title in respect of such properties empowering him to sell them.[3]

The general rules as to the creation and operation of liens have been already discussed. (Sec. 170 and 171 *supra.*)

CONDITIONS OF A VALID LIEN.—In order that an agent may have a valid lien on property in his hands, the following conditions *inter alia* must be satisfied (1) there should be no arrangement inconsistent with the retention of such property in the exercise of his lien[4] (2) the property on which the right of lien is claimed should belong to the principal to the knowledge of the agent; (3) it should have been received by the agent in his capacity as agent during the course of his ordinary duties as agent, (4) the agent should be holding the property for and on behalf of his principal and not for and on account of any known third party.

When arises.—Prior possession, obtained lawfully, is an essential requisite.[5] Where goods are delivered in some manner, even constructively to the agent by the principal[6] or an owner employs an auctioneer to sell goods at his (owner's) house.[7] There is possession sufficient for the lien to attach. But possession got by misrepresentation is ineffectual.[8] Again, where an agent of the managing owner of a ship makes the freight payable to himself without authority, the lien will not be available.[9] Further, if the goods have come into the agent's possession for a purpose inconsistent with the existence of the lien,

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1. **See** *In re. The Bombay Saw Mills,* (1889) 13 Bom. 314 (Lien claimed on goods and papers, and machinery of limited company, in respect of advances to the company—Held, no lien, because no disbursements and services had been made in respect of the goods and papers); *Shankar* v. *Ganga Bai,* AIR 1976 SC 2506 : (1976) 4 SCC 112 : 1977 (1) SCR 411.
2. *Southern Roadways Ltd.* v. *S.M. Krishnan,* AIR 1990 SC 673 : (1989) 4 JT 89.
3. *Kavitha Trehan* v. *M/s. Balsara Hygiene Products Ltd.,* AIR 1992 Delhi 92.
4. **See** *Pestonji* v. *Ravji,* [1933] Sind 235; *Weymouth* v. *Boyer,* (1792) 30 ER 414; *Official Liquidator* v. *Swarup Cold Storage,* AIR 1976 All. 88.
5. *Chidambaram Chettiar* v. *Tinnevelly Sugar Mills Co.,* (1908) 31 Mad. 123 : 18 MLJ 251 (Agent's lien not extinguished by an order for winding up of the company he serves).
6. **See** *Bryans* v. *Nix,* (1839) 150 ER 1634 : 51 RR 829.
7. **See** *Williams* v. *Millington,* (1788) 126 ER 49 : 2 RR 724.
8. *Madden* v. *Kempster,* (1807) 170 ER 859.
9. *Walsh* v. *Provan,* (1853) 155 ER 1595 : 91 RR 795; *Gibson* v. *May,* (1853) 43 ER 607 : 102 RR 246 (Solicitor, obtaining documents without the client's authority)

no lien can possibly arise.[1] As the lien is essentially possessory in its nature it follows that it does not carry with it the power to sell the goods.[2]

The extent of the lien is necessarily conditioned and limited by the extent of the principal's right in the goods. The principal must have had the right or power to create the lien; otherwise, the lien cannot attach.[3] Again, the lien is subject to all equities of third persons available against the principal at the time when the lien attaches.[4] An exception is however made in the case of negotiable securities, in which the equities of third parties will not prevail, if the agent acted *bona fide*.[5]

SUB-AGENT'S LIEN.—A sub-agent who has been employed without either express or implied authority of the principal, has no right of lien on the goods, as against the principal.[6] But, a sub-agent appointed with such express of implied authority, has the same right of lien, general or particular, against the principal, with regard to claims arising in the course of the sub-agency, as he would have had against the agent, if the agent had been the actual principal, and his lien will not in any way be affected by any arrangements made behind his back between the principal and the agent.[7] Where the sub-agent is unaware that his employer is an agent but justifiably believes him to be a principal, then the lien, particular and general, will attach to the same extent as if he agent were the owner,[8] where the sub-agent knows that his employer is only, an agent, the sub-agent's lien will be effective only to the extent of the agent's lien as against the principal.[9]

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1. *Pestonji* v. *Ravji,* [1933] Sind 235; *Brandeo* v. *Barnett,* (1846) 8 ER 1622 : 69 RR 204; *Frith* v. *Forbes,* (1862) 45 ER 1242: 135 RR 217.
2. (Firm) *Balla Mal* v. *Buda Mal,* [1926] Lah. 94 : 89 IC 409; *Mulchand* v. *Sheo Mal,* [1929] Lah. 666 : 123 IC 867. **But see** *Bar Dukan* v. *Gopal Singh,* [1928] Lah. 747 : 112 I.C. 642.
3. *Cunliffe Brooks & Co.* v. *Blackburn Building Society,* (1884) 9 AC 857.
4. *Hollis* v. *Claridge,* (1813) 128 ER 549 : 39 RR 662 (solicitor's lien); *Pratt* v. *Vizard,* (1833) 110 ER 989 : 39 RR 660; *London & County Bank* v. *Ratcliffe,* (1881) 6 AC 722 (Banker advancing on title deeds deposited as security for general balance, after getting notice of sale of the property); *Re Rapid Transport Co.,* (1909) 1 Ch. 96.
5. *Solomons* v. *Bank of England,* (1791) 104 ER 319 : 12 RR 341; *Bank of New South Wales* v. *Goulburn Valley Butter Factory,* [1902] AC. 543; *Misa* v. *Currie,* (1876) AC. 554.
6. *Solly* v. *Rathbone,* (1814) 105 ER. 392 (No lien even for duties paid).
7. *Fisher* v. *Smith,* (1878) 4 AC 1 (Insurance broker for an agent of the principal—Payment of premiums by the principal to agent—Lien of broker not lost); (Cf.) *Mildred* v. *Maspons,* (1883) 8 AC. 874 (No lien for general balance due from agent).
8. *Mann* v. *Farrester,* (1814) 171 ER. 20 : 15 RR. 724 (Case of insurance broker); *Westmood* v. *Bell,* (1815) 171 ER. 111; 16 RR 800; *Taylor* v. *Kymer,* (1832) 110 ER 120 : 37 RR 433; *Montagu* v. *Forwood,* (1893) 2 QB 350.
9. *Mildred* v. *Maspons,* (1883) 8 AC 874; *Levy* v. *Barnard,* (1818) 129 ER 340 : 19 RR 484; *Snook* v. *Davidson,* (1809) 170 ER 1134 : 11 RR 696.

Extinction of lien.—The principles already set out apply to the case of an agent's lien also. The lien is lost by voluntarily parting with possession of the goods.[1] But, where possession is given up because of fraud or other such invalidating cause, the lien is not extinguished.[2] Similarly, if the circumstances under which possession is parted with are consistent with the continuance of the lien and an intention to retain the same, the lien continues effective.[3] The lien may be lost by the agent entering into an agreement, which is inconsistent with the continuance of the lien.[4] Again, where the agent acts in a capacity, which is incompatible with the existence of the lien, the lien is extinguished.[5] Express or implied waiver may also extinguish the lien.[6] A waiver may be implied from the agent's taking other security for the claim, if the security taken or the circumstances in which it was taken, point to an intention to abandon the lien.[7] The lien is however, not lost by reason of the fact that, subsequent to the attaching of the lien, the principal becomes bankrupt[8] or is dispossessed of the goods.[9] If the goods are accidentally destroyed the lien is lost but the agent can claim his commission from the principal.[10]

The lien, as seen already, is a right accessory to the right, to receive payment, but is distinct from it. It would, therefore, follow that the lien may continue, though the right to payment may be barred by limitation.[11]

Right of stoppage in transit.—Where an agent has purchased with his own funds goods for his principal or where he has incurred personal

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1. *Bligh* v. *Davies,* (1860) 54 ER 346 : 126 RR 95; *Sweet* v. *Pym,* (1800) 102 ER 2 : 5 RR 497 (Agent delivering goods over which he has lien on board a ship for transport at the risk of the principal); *Hatheson* v. *Laing,* (1873) 17 Eq. 79; *Sakarchand* v. *Premji,* (1930) Sind 130 : 120 IC 502.
2. *Wallace* v. *Woodgate,* (1824) 171 ER 1323; *Re. Carter,* (1886) 55 LJ Ch. 230 (Possession obtained from agent unlawfully).
3. *Watson* v. *Lyon,* (1855) 44 ER 113 : 109 RR 122; *North Western Bank* v. *Poynter,* (1895) AC 56.
4. *The Rainbow,* (1885) 53 LT 91 (Shipmaster allowing his balance of wages to remain with the managing owners at interest—Loss of lien); *Forth* v. *Simpson,* (1849) 116 ER 1423 : 78 RR 496; *Howe* v. *Kirchner,* (1856) 14 ER 602 : 111 RR 10.
5. *Re Lawrence Bowker & Austin,* (1894) 1 Ch. 556.
6. *Weeks* v. *Goode,* (1859) 141 ER 499 : 120 RR 164 (Demand of chattel by principal—Agent claiming right to retain on some ground other than a lien); *Jacobs* v. *Latour,* (1828) 130 ER 1010.
7. *Re. Morris,* (1908) 1 KB 473 (Solicitor having lien for costs taking security for the costs, and not saying he intends to reserve his lien, is deemed to have waived the lien); *In re Douglas,* (1898) 1 Ch. 199; *Groom* v. *Chessewright,* (1895) 1 Ch. 730. **See also** *Cowell* v. *Simpson,* (1809) 33 ER 989 : 10 RR 181.
8. *Robson* v. *Kemp,* (1802) 170 ER 703 : 8 RR 831; *Re. Capital Fire Insurance Assn.,* (1883) 24 Ch.D. 408.
9. *West of England Bank* v. *Batchelor,* (1882) 51 LJ Ch. 199.
10. *Krishna Das* v. *Ganesh Ram,* AIR 1950 Pat. 481; *Mummey and Co.* v. *Varadarajulu,* AIR 1964 AP 17 : ILR (1962) AP 431.
11. *Spears* v. *Hartley,* (1798) 170 ER 545 : 6 RR 814; *Curwen* v. *Milburn,* (1889) 42 Ch.D. 424.

liability for the price, the agent stands towards the principal in the position of unpaid seller, and can therefore exercise the right of stoppage in transit.[1]

He has also the right of resale. If property in the goods had passed to the purchaser the agent gets the right of resale under Sec. 45 (2) of the Sale of Goods Act and if property had not passed the right of resale is *a fortiori.*[2]

PRINCIPAL'S DUTY TO AGENT

222. Agent to be indemnified against consequences of lawful acts.—The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustrations

(a) *B*, at Singapur, under instructions from *A* of Calcutta, contracts with *C* to deliver certain goods to him. *A* does not send the goods to *B*, and *C* sues *B* for breach of contract. *B* informs *A* of the suit and *A* authorises him to defend the suit. *B* defends the suit, and is compelled to pay damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

(b) *B*, a broker at Calcutta, by the orders of *A*, a merchant there contracts with *C*, for the purchase of 10 casks of oil for *A*. Afterwards *A* refuses to receive the oil, and *C* sues *B*. *B* informs *A*, who repudiates the contract altogether. *B* defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

Agent's right to indemnity.—The present and the two succeeding sections describe the cases in which the agent is entitled to be indemnified by

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1. *Jenkyns* v. *Brown,* (1849) 117 ER 193; *Cassaboglou* v. *Gibb,* (1883) 11 QBD 797; *Imperial Bank* v. *London & St. Katherine Docks Co.,* (1877) 5 Ch.D. 195; *Harparshad Tulsiram* v. *Jindar Parshad,* (1934) 15 Lah. 496 : 150 IC 109 : 36 PLR 348 : (1934) Lah. 191; **see also** *Mewar Textiles Mills Ltd, Bhilwara* v. *Sita Ram Basanti Lal Jain,* AIR 1982 Raj. 215 : 1982 Raj. LW 48.
2. *Balmukand* v. *Jagannath,* AIR 1963 Raj. 212 : ILR (1963) 13 Raj. 579.

the principal. In the first place, as enunciated in the section, the agent has a right to be indemnified against the consequences of *lawful acts done in exercise of the authority given.*[1]

FOR LAWFUL ACTS.—Where the agent makes cash payment on account of a wagering transaction (which is only void) for his principal, the principal is bound to reimburse the agent.[2] **[841]**

WITHIN HIS AUTHORITY.—It is a condition of the agent's right to reimbursement that he must have acted within the scope of his authority.[3] So, where an agent, in contravention of the principal's authority, makes settlements before the due date, he will not be entitled to reimbursement from the principal.[4] An agent authorised to purchase Binaula at specified rate has no authority to sell it; in case he sold it and incurred loss he is not entitled to be indemnified for such loss.[5]

It is also well settled that an agent can claim no indemnity against the consequences of his own wrong.[6] As pointed out by the Judicial Committee,[7] agents who engage in a fraudulent scheme to defraud their principal, forfeit their right to indemnity in respect of transactions, which form part of the fraud. But, if the principal chooses to ratify the act of the agent, the right to indemnity will revive.[8]

It may also be mentioned that the right to indemnity will cover losses incurred in the course of exercising the authority according to the customs and usages of the particular trade, if the custom be reasonable or known to the principal, but not otherwise.[9] It will extend also to the full amount of the liabilities incurred by him even through they may not actually have been enforced.[10]

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1. *Adamson* v. *Jarvis,* (1827) 130 ER 693 : 29 RR 503; *Smith* v. *Howes,* (1922) 1 KB 590; *Goodchild* v. *Roberts,* (1925) Ch. 592; *Reckitt* v. *Barnett,* (1929) AC 176; *Rughnath* v. *Ram Partab,* (1935) Sind 38; (Agent must prove that he has actually incurred loss); *Onkarlal* v. *Surajmal,* (1936) Nag. 37 (Execution of a *Sarkat* is as good as cash payment).
2. *Shibho Mal* v. *Lachman,* (1901) 23 All. 165 : (1901) AWN 33; *Chekka* v. *Gajjila,* (1904) 14 MLJ 326; *Bholanath* v. *Mulchand,* (1903) 25 All. 639 : (1903) AWN 161; A set-off or adjustment in accounts of third parties will stand on the same footing. **See** *Pirthi Singh* v. *Matu Ram,* (1932) Lah. 356 : 138 IC 241; *Bhagwan Das* v. *Deo Chand,* AIR 1951 Nag. 392.
3. *Shamas Din* v. *Agha Muhammad,* (1922) 59 IC 971 : 3 LLJ 141.
4. *Mathra Das* v. *(firm) Jiwan Mal,* (1928) 9 Lah. 7 : (1928) Lah. 196 : 112 IC 29. **See also** *Johnson* v. *Kearley,* (1908) 2 KB 82 & 514.
5. *Ganeshi Lal* v. *Joti Prasad,* 1969) All. LJ 1104.
6. *Duncan* v. *Hill,* (1873) 8 Ex. 242; *Ellis* v. *Pond,* (1898) 1 QB 426 (Wrongful sale of stock); *Lewis* v. *Samuel,* (1846) 115 ER 1031 : 70 RR 582 (Negligence of solicitor).
7. *Solloway* v. *Mc Laughlin,* (1938) PC 23 : 177 IC 754 : 47 LW 73.
8. *Hartas* v. *Ribbons,* (1889) 22 QBD 254.
9. *Davis* v. *Howard,* (1890) 24 QBD 691; *Seymour* v. *Bridge,* (1885) 14 QBD 460.
10. *Rughnath* v. *Ram Partab,* (1935) Sind 38; *Lacey* v. *Hill,* (1874) 18 Eq. 182; *British Union & National Insurance Co.* v. *Rawson,* (1916) 2 Ch. 476.

The right to indemnity is not affected by the fact that the payment, in respect of which indemnity is sought, is not a payment for which the principal could be made liable.[1]

223. Agent to be indemnified against consequences of acts done in good faith.—Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

Illustrations

(a) *A*, a decree-holder and entitled to execution of *B's* goods requires the officer of the Court to seize certain goods, representing them to be the goods of *B*. The officer seizes the goods, and is sued by *C*, the true owner of the goods. *A* is liable to indemnify the officer for the sum which he is compelled to pay to *C*, in consequence of obeying *A's* directions.

(b) *B*, at the request of *A*, sells goods in the possession of *A*, but which *A* had no right to dispose of. *B* does not know this, and hands over the proceeds of the sale to *A*. Afterwards *C*, the true owner of the goods, sues *B* and recovers the value of the goods and costs. *A* is liable to indemnify *B* for what he has been compelled to pay to *C* and for *B's* own expenses.

Acts unlawful, but done in good faith.—This section provides for the agent's indemnity in respect of acts done in good faith, in he exercise of this authority, which have the effect of causing injury to third parties. The principle is where expenditure is incurred by one in dealings for another the former is entitled to be indemnified for expenses *bona fide* incurred.[2] The principal underlying the section has been well expressed in the English case of *Betts* v. *Gibbins*.[3]

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1. *Adams* v. *Morgan*, (1924) 1 KB 751; *Brittain* v. *Lloyd*, (1845) 153 ER 683.
2. *State* v. *Chakiat Brothers*, AIR 1975 Ker. 13 : 1974 Ker. LT 539.
3. (1834) 111 ER 22 : 41 RR 381; *Firm Madhawji* v. *Yar Hussain*, (1926) Sind 40 : 88 IC 980; (Cf.) *Re. Famatina Development Corpn.*, (1914) 2 Ch. 271 (Costs of action on a libel made by agent in a report made on behalf of principal—Principal liable to pay).

"An act done with the knowledge that it is unlawful is not done in good faith, and gives no right to indemnity but where one party induces another to do an act which is not legally supportable, and yet is not clearly in itself a breach of law, the party so inducing shall be answerable to the other for the consequence."

The illustration (a) would appear to be based on the English case of *Collins* v. *Evans*.[1] The officer is in the position of an agent to the decree-holder, and is therefore entitled to indemnity.

It is hardly necessary to add that, where there is absence of good faith (*i.e.*,) where the agent knows the act to be unlawful, there can be no right to indemnity.[2] The same principle will apply in respect of expenses incurred in consequence of the agent's own neglect or default or breach of duty.[3] [745]

224. Non-liability of employer of agent to do a criminal act.—Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Illustrations

(a) *A* employs *B* to beat *C*, and agrees to indemnify him against all consequences of the act. *B* thereupon beats *C*. and has to pay damages to *C* for so doing. *A* is not liable to indemnify *B* for those damages.

(b) *B*, the proprietor of a newspaper, publishes, at *A's* request, a libel upon *C* in the paper, and *A* agrees to indemnify *B* against the consequences of the publication, and all costs and damages of any action in respect thereof. *B* is sued by *C* and has to pay damages, and also incurs expenses. *A* is not liable to *B* upon the indemnity.

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1. (1844) 114 ER 1459 : 64 RR 656.
2. *Josephs* v. *Pebrer*, (1825) 107 ER 870 (Purchase by agent of shares in a company known to be acting as such without charter); *Allkins* v. *Jupe*, (1877) 2 CPD 375 (Effecting an insurance known to be illegal); *Re. Parker*, (1882) 21 Ch.D. 408 (Election agent making illegal payments under the Corrupt Practices Act); *Ex parte Mather*, (1797) 30 ER 1060 (Agent buying smuggled goods for principal).
3. *Duncan* v. *Hill*, (1873) 8 Ex. 242 (Liability incurred through agent's own default); *Ellis* v. *Pond*, (1898) 1 QB 426.

Criminal acts.—Where the act, which the agent is employed to do, is criminal, there is no right of indemnity. Agreements to commit criminal acts are expressly and specifically excluded by Section 224 from the scope of any indemnity. An agent authorised to enter into forward contracts for dealing in oil seeds entering into such contracts is a criminal offence under the Bombay Forward Contracts Control Act, 1947 and the Oil Seeds (Forward contracts Prohibition Order). The agent incurring losses therein cannot claim indemnification from the principal.[1]

The section makes provision for cases where the agent is ignorant of facts, which make his act criminal. In English law, it would appear that a right to indemnity arises in favour of an innocent agent committing a crime in ignorance of the real facts.[2]

225. Compensation to agent for injury caused by principal's neglect.—The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Illustration

A employs *B* as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and *B* is in consequence hurt. *A* must make compensation to *B*.

Compensation for injury.—The injury complained of must be traceable to the principal's neglect or want of skill. If the agent himself is guilty of contributory negligence, he will be disentitled to relief under this section.[3] Nor can an agent recover for an injury resulting from the nature and course of employment (*e.g.*) common employment along with fellow servants. [843]

EFFECT OF AGENCY ON CONTRACT WITH THIRD PERSONS

226. Enforcement and consequences of agent's contracts.—Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in

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1. *Firm of Pratapchand Nopaji* v. *Firm of Kotrike Venkata Setty & Sons*, AIR 1975 SC 1223 : (1975) 2 SCC 208.
2. *Burrows* v. *Rhodes*, (1899) 1 QB 816.
3. *Tuff* v. *Warman*, (1858) 141 ER 231 : 116 RR 874.

the same manner and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

Illustrations

(a) *A* buys goods from *B*, knowing that he is an agent for their sale, but not knowing who is the principal. *B's* principal is the person entitled to claim from *A* the price of the goods, and *A* cannot, in a suit by the principal, set off against that claim a debt due to himself from *B*.

(b) *A*, being *B's* agent with authority to receive money on his behalf, receives from *C* a sum of money due to *B*, *C* is discharged of his obligation to pay the sum in question to *B*.

Principal bound by agent's contracts.—Since an agency is only for the purpose of bringing the principal in to legal relations with third parties, contracts entered into by the agent on behalf of the principal will bind the latter as if made by himself. All that is necessary is that the act should have been committed by the agent in the course of employment although the principal did not authorise or justify or participate in the act or even if he forbade it or disapproved of it.[1] Where an agent buys goods on behalf of the principal, the property in them vests in the principal as soon as they are appropriated.[2] The only conditions of their binding character are their lawfulness and their being within the scope of the authority. Thus, where a Station-master has power to accept bailment of goods, and he accepts the bailment, the Railway Company, his principals, will be liable for all the consequences flowing from such bailment.[3] The lapse on the part of telegraph department in communicating the telegraphic message must be treated as lapse of an agent rendering the person sending the message responsible as principal.[4]

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1. *Kailas Sizing Works* v. *Municipality of Bhivandi*, AIR 1969 Bom. 127 : ILR (1969) Bom. 564.
2. *Dhanpat Singh* v. *Hari Charan*, (1925) 29 CWN 121 : 82 IC 683 : (1925) Cal. 284; *Gordhan Das* v. *Dowlatram*, (1926) Sind 238 : 94 IC 287. **See** *Raghunath Prasad* v. *Seva Ram Tikamdas*, AIR 1980 All. 15.
3. *Munnalal* v. *E.I. Ry.*, (1923) All. 71 : 82 IC 772. **See also** *Hari Singh* v. *Secy. of State*, (1931) Lah. 34 : 133 IC 881 (Banking deposit by *A* as security for performance of contract with *B*—Failure of Bank—*B* liable to repay deposit as bank was his agent).
4. *V. Ramesh* v. *Convenor, EAMCET 1995, JNTU, Hyderabad*, AIR 1997 AP 79, 81 : 1997 (1) ALT 569 : 1996 (2) LS 537.

Similarly, in *Fazal Ilahi* v. *E.I. Ry.*,[1] where a Railway parcel clerk, contrary to the regulations, accepted a parcel of crackers for carriage by passenger train, but had to despatch the same only by goods train and the consignor who suffered loss because of the delay, sued the Railway for damages, it was held that the act of the clerk would bind the company as he was acting in the exercise of his apparent authority. So too, in a Patna ruling where the agent of a Mahant had executed a promissory note for moneys borrowed for and utilised for the litigation in which the Mahant was interested, it was held that only the Mahant was personally liable.[2] Apart from this, the motive of the agent is immaterial. Even where the agent acts fraudulently and in furtherance of his own interests, the principal will be bound if the third party has acted *bona fide*.[3] The principle of estoppel will apply to acts not authorised but within the scope of the agent's ostensible authority.[4] **[847]**

Where a consignor entrusted goods to the driver of a truck reasonably believing that the driver acted in the course of his employment when he entered into the contract of carriage, the owner of the truck in the event of loss of goods could not say that the owner acted without authority, especially when the owner had claimed the benefits of the contract of carriage entered into by the driver. The owner was held fully accountable for the loss.[5] In the absence of notice to the third party, the principal cannot by any instructions to his agent, escape liability for acts done by the agent, which fall within the apparent scope of his authority.[6]

Where, however, the act of the agent is not one in the ordinary course of business or falls outside the apparent scope of his authority, the principal is not bound by such act, unless he chooses to ratify it (*e.g.*) by taking the benefit of it or otherwise.[7]

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1. (1922) 43 All. 623 : 19 ALJ 654 : 64 IC 868 : (1922) All. 324.
2. *Nabakishore* v. *Jagannath*, (1934) Pat. 435 : 149 IC 898.
3. **See** *Hambro* v. *Burnand*, (1904) 2 KB 10.
4. *Mathias* v. *Kilacheri Agricultural Bank*, (1938) 1 MLJ 241 : (1938) Mad. 272 : 47 LW 88 : (1938) MWN 1252; *Reckitt* v. *Barnett*, (1929) AC 176; *Russo-Chinese Bank* v. *Li Yan Sam*, (1910) AC 174; *Underwood* v. *Bank of Liverpool*, (1924) 1 KB 775; *National Bolivian Navigation Co.* v. *Wilson*, (1880) 5 AC 177 (Principal will be bound except where third parties had notice of the limitations on the ostensible authority).
5. *Joseph Union File Works* v. *Kappal*, ILR (1978) 1 Kerala 373 : 1978) Ker. LT 117.
6. *Ahmednagar D.S.T. Co-operative Credit Society Ltd.* v. *General Secretary*, 1980 Mah. LJ 1890.
7. *Universal Fire and General Insurance Co.* v. *Shup Shin*, (1934) 12 Ran. 312 : (1934) Ran. 261; For English authorities **see** *Whitechurch* v. *Cavanogh*, (1902) AC 117; *Newsholme Brothers* v. *Road Transport & Co.*, (1929) 2 KB 356 (Not in ordinary course of business); *Jacobs* v. *Morris*, (1902) 1 Ch. 816 (Adoption of unauthorised act by taking benefit of it); *Refuge Assurance Co.* v. *Kettlewell*, (1909) AC 243 (Agent without authority receiving money from third parties—Principal bound if money received by him); *Liggett* v. *Barclays Bank*, (1928) 1 KB 48 (Principal bound if money unauthorisedly received has been applied for his benefit).

In an English case, where of two agents of a principal, one assented to a deed of assignment by a debtor, and the other did not, it was held that the principal was bound by the deed of assignment.[1]

In regard to deposits made by customers who open current account at its branches, the duty of a bank is to pay the customer at the branch where the account is kept subject to instructions to transfer the amount elsewhere. If the obligation to transfer is frustrated by local legislation or governmental action of the country where the account is kept the implied obligation to pay at the branch or office where the account is kept cannot be substituted automatically by an unconditional obligation of the principal to pay elsewhere by resorting to Section 226. This section permits enforcement of contracts as they stand and not their substitution by fresh contracts with different terms.[2]

227. Principal how far bound when agent exceeds authority.—When an agent does more than he is authorised to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority, is binding as between him and his principal.

Illustrations

A, being owner of a ship and cargo, authorizes *B* to procure an insurance for 4,000 rupees on the ship. *B* procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. *A* is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

Not bound for excess, if separable.—This section deals with one case of the agent acting in excess of authority. Where it is possible to separate the acts in excess of, and those within the authority, the latter will be binding on the principal. Where an agent authorised to stand surety for one person only exceeds his authority and stands surety for others also, the latter act may be separate, and the suretyship, which was authorised, will stand.[3] Where an agent unauthorisedly borrows money, the principal will be liable to the person advancing the money to the extent to which the money has been

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1. *Dunlop Rubber Co.* v. *Haigh & Son,* (1937) 1 KB 347.
2. *Indo Allied Industries Ltd.* v. *Punjab National Bank Ltd.,* AIR 1970 All. 108.
3. *Mayandi* v. *Raman Chettyar,* (1937) Ran. 499.

applied in discharge of the principal's legal liability. This is on the basis that as the money has found its way into the principal's possession and has been employed for his benefit, it is money received by him to the use of the plaintiff (lender).[1] **[752]**

228. Principal not bound when excess of agent's authority is not separable.—Where an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Illustration

A authorises *B* to buy 500 sheep for him. *B* buys 500 sheep and 200 lambs for one sum of 6,000 rupees. *A* may repudiate the whole transaction.

Not at all bound, if excess inseparable.—This deals with a second case of the agent exceeding his authority. If it is not possible to sever he acts within authority from those in excess of it, the section says that the act will not bind the principal. In an English case, *Baines* v. *Ewing*,[2] an insurance broker authorised to underwrite policies for amounts not above £ 100, underwrote one in favour of the plaintiff for £ 150. The court held the contract was not divisible, and that the plaintiff was not entitled to recover even the £ 100, the limit which had been fixed by the principal. This case has been followed in India. In *Premabhai* v. *Brown*,[3] where a partner of a firm, who had been authorised to draw bills to the amount of Rs. 200 only, drew a bill for Rs. 1,000 in the name of the firm it was held that the firm was not responsible even for Rs. 200. **[850]**

229. Consequences of notice given to agent.—Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.

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1. *Reid* v. *Rigby*, (1894) 2 QB 40; *Reversion Fund* v. *Maison Cosway*, (1913) 1 KB 364; *Marsh* v. *Keating*, (1834) 131 ER 1094 : 37 RR 75.
2. (1866) 1 Ex. 320 : 143 RR 754.
3. (1873) 10 BHCR 319. **See also** *Arlapa Naick* v. *Narsi Keshavji*, (1871) 8 B.H.C. A.C. 19 (Authority to enter into contract exceeded by agent—Contracting for delivery at an earlier date); *Fry* v. *Smellie*, (1912) 3 KB 282 (Pledge by agent for a sum less than that named by the principal).

Illustrations

(a) *A* is employed by *B* to buy from *C* certain goods, of which *C* is the apparent owner, and buys them accordingly. In the course of the treaty for the sale. *A* learns that the goods really belonged to *D*, but *B* is ignorant of that fact. *B* is not entitled to set-off a debt owing to him from *C* against the price of the goods.

(b) *A* is employed by *B* to buy from *C* goods of which *C* is the apparent owner. *A* was, before he was so employed, a servant of *C*, and then learnt that the goods really belonged to *D*, but *B* is ignorant of that fact. In spite of the knowledge of his agent, *B* may set-off against the price of the goods a debt owing to him from *C*.

Knowledge of the agent is knowledge of the principal.—The doctrine of 'imputed notice,' as it is called, dealt with in this section, is based on the assumption that, ordinarily, an agent who gets a notice or receives any information, does his duty and communicates the same at once to his principal, and therefore the knowledge of the agent is the knowledge of the principal; otherwise, the neglect of the agent whether designed or undesigned might operate prejudicially to the rights of third parties.[1] As the Judicial Committee observed in *Rampal Singh* v. *Balbhaddar Singh*[2]:—

> ".....It is a rule of law which imputes the knowledge of the agent to the principal, or in other words, the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings."

Intimation of rejection of part of the goods supplied as not conforming to the description given to the agent of the seller is intimation to the seller.[3]

But it is quite open to parties to stipulate that this presumption arising on general principles of public policy shall not apply and that notice must be given to the principal himself.

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1. *Rivers Steam Navigation Co.* v. *Bisweswar,* (1928) Cal. 371 : 116 IC 148.
2. (1902) 29 IA 203 : 25 All. 1 : 4 Bom. LR 832 : 6 CWN 849 (PC); followed in *Haroon Naji* v. *Meherali,* (1927) Sind 24 : 97 IC 577; *Co-operative Town Bank* v. *Shunmugam,* (1930) 8 Ran. 223 : 125 IC 365 : (1930) Ran. 265 (Knowledge of Chairman of bank imputed to bank).
3. *Kulsekarapatnam Hand Match Workers' Co-operative Cottage Industrial Society Ltd.* v. *Radhelal Lalloolal,* AIR 1971 MP 191 : 1971 MPLJ 552 : 1971 Jab.LJ. 529 : 1971 MP WB 524.

Where a proposal form signed by the assured carried a false statement and the form was filled up by the insurance agent himself without authority to that effect from the company, it was held that the knowledge of the agent as to the untrue statement cannot be imputed so as to amount to a waiver of the breach of warranty.[1]

Doctrine of imputed notice—Conditions.—(1) There must be a duty to communicate.—The knowledge must be of something, which it is the duty of the agent to communicate to his principal. In the case of a broker employed to effect an insurance, it is not his duty to communicate material facts coming to his knowledge to the principal, but only to the insurer, and therefore the broker's knowledge will not be imputed to his principal.[2] Similarly if a person is a secretary of two companies, knowledge obtained by him as secretary of one of the companies will not be imputed to the other company unless he knowledge was acquitted under circumstances which cast a duty to communicate it to the other company.[3] In respect of matters regarding the death of the opposite party acquired by a solicitor in another proceeding cannot be attributed to the plaintiff or appellant by invoking the doctrine of imputed notice.[4]

Similarly, where an underwriter sued to avoid a policy on the ground of non-disclosure of material facts, and it was found that the fact had been disclosed to his solicitor who had omitted to transmit the information, it was held that the underwriter was not bound by the disclosure to the solicitor, because it was no part of the ordinary duties of the solicitor to receive mercantile notices on behalf of his clients, about mercantile transactions.[5]

(2) Information must be material.—The circumstances must be material to the business in respect of which the agent is employed. Thus where a solicitor who was employed to transfer a mortgage knew that there were encumbrances subsequent to the mortgage, it was held that the solicitor's knowledge did not operate as notice of the encumbrances to the transferee because the subsequent encumbrances were not material to the transfer.[6]

ILLUSTRATIVE CASES.—Where co-vendees stand to each other as principal and agent, is notice to one is notice to the other. Notice is imputed to the principal, whether the knowledge is communicated to him or not by the agent.[7] Where the captain of a ship who knew that the ship had been damaged

1. *Manilaxmi Patel* v. *Hindustan Co-operative Insurance Society Ltd.*, AIR 1962 Cal. 625 : 66 Cal. WN 74.
2. *Blackburn* v. *Vigors*, (1817) 12 AC 531.
3. *Re. Fenwicke, Deep Sea Fishery Co's Claim*, (1902) 1 Ch. 507.
4. *Daulat Phumra* v. *Phani Bhusan Mandal*, 71 Cal. WN 31.
5. *Tate* v. *Hyslop*, (1885) 15 QBD 368.
6. *Wyllie* v. *Pollen*, (1863) 32 LJ Ch. 782; *Wilde* v. *Gibson*, (1848) 9 ER 897 : 73 RR 191.
7. *Rasila* v. *Haveli Ram*, (1929) Lah. 500 : 119 IC 754.

by an accident failed to communicate the same to the owner, and the latter had the ship insured subsequently, the knowledge of the agent was held to be the knowledge of the principal, and the plaintiff was held disentitled from recovering on the policy of insurance.[1]

Similarly, notice of the withdrawal of an application for shares given into the hands of the clerk at the registered office of the company was held to operate as notice to the company.[2] So too, a notice to quit served at the house of the tenant, upon a servant whose duty it is to deliver it to the tenant has been held good service on the tenant.[3] But in *Rahimbux* v. *Central Bank* [4] the fact that the person who was a member of the pledgor firm was also a member of the advisory committee of the pledgee bank was held not to fix the pledgee with imputed notice of the fraud played by the pledgor firm.

(3) Must have been obtained in the course of the business.— The proviso to the section requires "that the agent's knowledge must have been obtained in the course, of the business transacted by him for the principal." Therefore knowledge of an agent, not acquired in the matter for which he was agent, (i.e,) acquired otherwise than in the course of the employment cannot be imputed to the principal. This has been adverted to by the Judicial Committee in *Chabildas* v. *Dayal Mowji,*[5] 5here an agent's knowledge, acquired before the agency commenced, was unsuccessfully sought to be imputed to the principal.

The rule in English law appears to be the same,[6] except for the decision of the Court of Exchequer Chamber in *Dresser* v. *Norwood,*[7] in which it has been held, overruling the decision of the Court of Common Pleas, that the knowledge of the agent, however acquired, is the knowledge of the principal. [858]

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1. *Gladstone* v. *King,* (1813) 105 ER 13 : 14 RR 392.
2. *Truman's Case,* (1894) 3 Ch. 272.
3. *Tanham* v. *Nicholson,* (1872) 5 HL 561. **See also** *Re. Ashton, Ex.p. McGowan,* (1891) 64 LT 28 (Notice to solicitor's clerk is notice to the solicitor who has put the clerk in charge).
4. (1929) 56 Cal. 367 : 119 IC 23 : (1929) Cal. 497; *Bowden* v. *London & C. Assurance Co.,* (1892) 2 QB 534 (Agent's knowledge that insured was an one eyed man imputed to principal). **See also** *Apthorp* v. *Neville,* (1907) 23 TLR 575 (Contract by printer's agent for printing matter libellous to the knowledge of the agent—Printers held disentitled to recover the cost of work done under the contract).
5. (1907) 31 Bom. 566 : 9 Bom. LR 1062 : 11 CWN 1109 : 4 ALJ 750 : 17 MLJ 465. **See also** *Gunabai* v. *Motilal* , (1925) Nag. 398 : 89 IC 625; *Standard Oil Co.* v. *Haridas Velji,* (1921) Sind 121 : 16 SLR 235 : 79 IC 456 (Bill of lading signed by broker for shipowner—Latter liable).
6. **See** *Wells* v. *Smith,* (1914) 3 KB 722; *Societe de Paris* v. *Tramways Union Co.,* (1884) 14 QBD 424; *Young* v. *Payne,* (1904) 2 Ch. 608; *Newsholme Bros.* v. *Road Transport and General Insurance Co.,* (1929) 2 KB 356; *Houghton* v. *Notharad Lowe,* (1928) AC 1.
7. (1864) 144 ER 188, overruling 143 ER 570. **See also** *State of Orissa* v. *Goenka I&M Industries (P) Ltd.,* AIR 1983 Cal. 438.

(4) Not where agent privy to a fraud.—Where the agent is party or privy to the commission of a fraud on the principal, notice to the agent is not equivalent to notice to the principal. This has been pointed out by the Privy Council in *Taxes Company* v. *Bombay Banking Company.*[1] In a case where a solicitor practised a fraud on his client in the course of a transaction, it was held that his knowledge did not operate as notice to the client of the fraud.[2] Similarly where the directors of a company were guilty of misfeasance as against the company, their knowledge was held not to be the knowledge of the company.[3] In such cases, it is presumed that the agent who is guilty of fraud is hardly likely to confess the same to the principal. But where there is a duty to communicate, the fact that the agent may be interested in concealing the facts from his principal will not exclude the operation of the principal. Where a solicitor induced a client to lend money on a mortgage and later induced another client to advance money on the security of the same property, it was held that the latter client had notice of the earlier mortgage.[4]

Again where the party seeking to take advantage of the doctrine of imputed notice was aware that the agent intended to conceal his knowledge from the principal, knowledge is not imputed to the principal.[5]

(5) Time when knowledge is imputed.—In English law the principal is deemed to have notice as from the time when he would have received such notice if the agent had performed his duty and taken the necessary steps to communicate to the principal. Thus where an agent who had information, that the goods shipped by him had been lost, did not communicate the fact to his principal, who insured them in ignorance of the true fact, it was held that the insurance made after the time when he could have received telegraphic information of the loss from his agent was void for non-disclosure of material facts.[6] Section 229 however does not either expressly or by necessary implication defer the legal consequence until the expiry of a reasonable time needed for the agent to communicate to the principal.[7]

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1. (1920) 44 Bom. 139 : 22 Bom. LR 429 : 24 CWN 469 : (1920) MWN 70 : 11 LW 320 : 54 IC 121; *Sooleman* v. *Rahimtulla,* (1904) 6 Bom. LR 800 (Same person agent for mortgagor and mortgagee—Agent not disclosing flaw in title—Mortgagee not fixed with notice); *Shivlal Motilal* v. *Tricumdas,* (1912) 36 Bom. 564 : 14 Bom. LR 45 : 14 IC 353.
2. *Cave* v. *Cave,* (1880) 15 Ch.D. 639; *Williams* v. *Preston,* (1882) 20 Ch.D. 672.
3. *Re. Fitzroy Bessemer Steel Co.,* (1884) 50 LT 144.
4. *Rolland* v. *Nart,* (1871) 6 Ch. Ap. 678; *Bradley* v. *Richs,* (1873) 9 Ch.D. 189; *Dixon* v. *Winch,* (1900) 1 Ch. 736.
5. *Sharpe* v. *Foy,* (1868) 17 WR 65.
6. *Proudfoot* v. *Montefiore,* (1867) 2 LR QB 511.
7. *State of Orissa* v. *Goenka Investment and Mining Industries (P) Ltd.,* (1985) 58 Comp. Cas. 325.

230. Agent cannot personally enforce nor be bound by, contracts on behalf of principal.—In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to contrary.—Such a contract shall be presumed to exist in the following cases:

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(2) Where the agent does not disclose the name of his principal;

(3) Where the principal, though disclosed, cannot be sued.

Agent not personally liable.—In the absence of a contract to the contrary an agent is not personally liable under contracts entered into by him on behalf of the principal.[1] The opening words of the section "in the absence of a contract to the contrary" do not refer to the contract between the principal and the agent but to any contract between the contracting parties on which an action is based.[2] As the function of the agent is only to bring the principal into contractual relations with third parties, it would follow that as a rule, he is not personally interested in the contracts, which he makes on behalf of the principal. So, he cannot ordinarily enforce, or be liable under such contracts. For instance, where the principal sends goods to his agent and consigns them to the railway, the agent has no right to sue in case of non-delivery for the railway receipt went to him does not confer ownership on him.[3] It is however possible that the contract made by the agent may vest in him a power to sue or be sued personally though the contract is professedly made on behalf of the principal. Therefore the question whether in any particular case, the person is deemed to have contracted personally or only or a principal becomes important; and the answer depends upon the intention of the parties as gathered from the terms of the particular contract where it is in writing.

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1. *Pudukottah Textiles* v. *R.R. Adityan,* (1975) 1 MLJ 356; *Corporation of Madras* v. *Ratanlal Forma,* (1973) 2 MLJ 8.
2. *Union of India* v. *Central Gulf Steamship Corporation,* 83 Cal. WN 75.
3. *Maula Baksh* v. *Secretary of State,* (1929) Lah. 590 : 119 IC 731.

Where a suit was filed against the defendant owner and his agent for short landing of goods, the agent having a limited responsibility of loading and unloading cannot be made liable unless it is shown that the agent has undertaken the responsibility in making the delivery.[1]

Where a person representing himself as agent of a certain company enters into a transaction with a third party and the company does not deny the agency, in a suit for damages for breach of contract the person so representing *cannot be held* liable for damages.[2]

Exception (1) : When he contracts personally.—Where a person expressly contracts 'as agent' or 'on behalf of,' some other person, there is no doubt that he is not liable personally.[3] **[857]**

Where in a lease described as having been made on behalf of a principal, there was a clause to the effect that the agent would execute the lease, the contract was construed as one creating a personal obligation on the part of the agent.[4] Similarly, where the directors of a company signed a contract in the following form: "We, the undersigned, three of the directors, agree to £ 500 advanced by ... to the company," the directors were held personally liable.[5]

In this connection, the point also becomes material whether the agent has simply signed his name without any qualification or whether he has added any qualification along with the signature. In the latter case, he will not be taken to have contracted personally.[6] Where the bought and sold notes showed that the agent was acting for a disclosed principal the fact that he did not add the relevant description to his signature or used the expression "we" in the operative portion of the letters would not materially alter the fact spoken to in the notes and it would be to attach undue importance to the signature and the sure of the word "we".[7]

Auctioneers of property signing agreement of sale in their own names without qualification must be understood to contract personally and not as agent.[8]

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1. *Narayan Chandra Ghosh* v. *Biswajit Lahiri,* AIR 2006 Cal 94.
2. *Birsinghraj* v. *Irbhat Ali,* 1961 MPLJ (Notes) 285.
3. *Downman* v. *Williams* (1845) 7 QB 103 : 68 RR 413; *Gadd* v. *Houghton,* (1876) 1 Ex.D. 357; *Paquin* v. *Beauclerk,* (1906) AC 148 (where name and existence of principal is disclosed, no personal liability), **see** *Chaliha Rolling Mills Ltd.* v. *Bank of America,* AIR 1983 NOC 44 (Cal.); *Steel Authority of India Ltd.* v. *Transworld Marine Ltd.,* AIR 1982 Cal. 161.
4. *Norton* v. *Nerron,* (1825) 171 ER 1353 : 28 RR 797. **See also** *Tanner* v. *Christian,* (1855) 119 ER 217 : 99 RR 637.
5. *McCollin* v. *Gilpin,* (1881) 6 QBD 516.
6. *Universal Steam Navigation Co.* v. *Mc Kelvie,*(1923) AC 492; *Kimber Coal Co.* v. *Stone,* (1926) AC 414.
7. *Radhakrishna Sivadatta Rai* v. *Tayeballi Dawoodbhai,* AIR 1962 SC 538 : 1962 Suppl. (1) SCR 81; Cf. *Orissa Textile Mills Ltd.* v. *Ganesh Das,* AIR 1961 Pat. 107.
8. *Mowla Baksh* v. *Dharamchand Raniwala,* 63 Cal. WN 881.

In cases where the contract is signed by the agent *eo nominee* and without any qualifying words, the agent will be deemed to have contracted in his personal capacity, unless the language of the document plainly militates against such construction.[1] And the fact that the other party to the contract is aware that he is dealing with an agent makes no difference. Thus, where a charter-party was made between P., of the good ship 'C' and W., agent for E. W. & Son and was signed by W., without qualification, W., was held personally liable, in spite of the fact that the prinicpals were named, on the ground that there was nothing in the contract with an intention to contract personally.[2] So, also where the contract described the agent as consignee and agent on behalf of a certain named principal.[3] Where the contract was signed by the agent without qualification, "Sold to... 200 quarters wheat (as agent for ....Dantzig"). the Court of Exchequer unanimously held that the words "as agent ... etc.," were not sufficient to exclude an intention to contract personally, and that the agent was personally liable.[4]

Where the agent adds words to his signature, which show that he signs as agent for a principal, the contract is not construed as one made personally, unless it affords clear evidence of an intention to bind himself personally.[5] So where the contract was signed thus, "for A., of D., B. & Co., as agents, it was held that B. & Co., were not liable personally.[6] On the contrary, where there were qualifying words to signature, but the contract contained a clause that the agent should guarantee moneys due to the other party from the principal, he (the signatory) was held personally liable.[7]

The appellant M/s Link International, acted as an agent between the respondent Mandya National Paper Mills Ltd. and a foreign company M/s Sutherlands Company for the purchase of suction press roll machine. The foreign company refused to have any correspondence with the respondent company and routed the entire correspondence only through the appellant agent. The respondent was supplied, instead of full machinery, only shell of machinery because of the appellant facilitating playing of fraud. The respondent company filed a suit for the specific performance of the contract or in the alternative for damages. Before the trial court, the foreign company remained absent and the suit was contested by the appellant. It was argued

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1. *Hough* v. *Manzanos*, (1879) 4 Ex. D. 104; *Dutton* v. *Marsh*, (1871) 7 QB 361.
2. *Parker* v. *Winlow*, (1857) 119 ER 1497 : 110 RR 904.
3. *Kennedy* v. *Gouveia*, (1823) 26 RR 616 : 3 Dowl & Ry. 503.
4. *Paice* v. *Walker*, (1870) 5 Ex. 173; **But see** *Gadd* v. *Houghton*, (1876) 1 Ex.D. 357.
5. *Green* v. *Kopke*, (1856) 139 ER 1484 : 107 RR 404. **See also** *Hari Sadhan* v. *Lala Becha Lal*, (1925) Oudh 641 : 89 IC 380.
6. *Deslandes* v. *Gregory*, (1860) 121 ER 226; *Universal Steam Navigation Co.* v. *Mc Kelvie*, (1923) AC 492; *Ganpat* v. *Forbes*, (1930) 32 Bom. LR 336 : (1930) Bom. 569.
7. *Young* v. *Schuler*, (1883) 11 QBD 651.

by the appellant that they being the agents of a disclosed principal could not be personally be made liable. The trial Court held the appellant responsible for the loss suffered by the respondent company as it was kept in dark about the details of the sale transaction. In an appeal the Supreme Court held :

> "..... admittedly, the appellants had acted as agents. We will presume that they had not entered into the contract on behalf of the Principal. The fact still remains that two Courts have, on basis of evidence, concluded that the appellants had facilitated playing of a fraud upon the respondent. If that be so, the appellants as agents would be personally liable to the respondent for whatever loss is caused to the respondent. Section 233 of the Indian Contract Act permits respondents to recover either from the agent or from the Principal or from both. Nothing could be shown to us that the findings given by the trial Court and the High Court that the appellants had facilitated fraud are not correct. In this view of the matter, even if the reasoning given by the two Courts below is not correct, the appellants would still be liable to the respondent for the loss caused to them. We clarify that we have not concluded that the reasoning of the trial Court and the High Court is not correct".[1]

Unless an agent has entered into a contract on behalf of a principal who is un-named and undisclosed, he will be personally liable to the third parties for the contract entered into by him on behalf of his principal.[2]

Negotiable instruments.—Generally, in the case of negotiable instruments, where a person signs without making it clear that he is signing it only as an agent, even though he may be described in the body of the note as the agent, he would be liable personally as the maker of the note.[3] Section 28 of the Negotiable instruments Act provides that an agent who signs a negotiable instrument without indicating that he signs as agent is personally liable on the instrument except to those who induced him to sign upon the belief that the principal only will be held liable.[4] In *Sitaram* v. *Chimandas,*[5] the Bombay High Court following a decision of the Privy Council[6] held that in an action on

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1. *Link International* v. *Mandya National Paper Mills Ltd.,* AIR 2005 SC 1417 : (2004) 6 SCC 516.
2. *Tristar Consultants* v. *Vcustomer Services India Pvt. Ltd.,* 2007 (1) CTLJ 247 (Delhi).
3. *Mookkan Servai* v. *Muthayya Servai,* AIR 1938 Mad. 146 : 46 LW 851.
4. *Bank of Behar* v. *Madhusudanlal,* (1937) Pat. 428 : 170 IC 451; (Cf.) *Mookkan Servai* v. *Muthayya Servai,* (1937) MWN 1118 : 46 LW 851 : (1938) Mad. 146 (Agent not signing as such—Personal liability).
5. (1928) 52 Bom. 640 : 30 Bom. LR 1300 : (1928) Bom. 516 : 116 IC 400.
6. *Sadasuk* v. *Kishan Prasad,* (1918) 46 Cal. 663.

a negotiable instrument against a person whose name properly appears as party to the instrument, it is not open to show that the signatory was acting for an undisclosed principal. The question whether a principal can be proceeded against on a negotiable instrument executed by the agent in his own name was mooted, but not decided in a Madras case.[1] **[856]**

The corresponding English rule is that the agent is not liable on notes and bills of exchange unless he signs his own name, in which case the mere addition of qualifying words like agent, etc., will not detract from his liability.[2]

PAROL EVIDENCE—ADMISSIBILITY.—Where the contract made by an agent clearly shows an intention to contract personally, oral evidence of intention to exclude personal liability is inadmissible.[3] But, it has been held that the agent may, as an equitable defence, prove an agreement that he should not be sued on the contract.[4]

But though the terms of a written contract may show that the agent contracted only as an agent, it has been held that oral evidence may be admitted of a mercantile usage casting a personal liability on the agent, provided that the usage set up is not repugnant to the express terms of the contract.[5] For instance, in *Joylall & Co.* v. *Monmotha Nath,*[6] oral evidence was admitted of a trade custom in the gunny and hessian trade in the Calcutta market, entailing personal liability on brokers in the business.

Where an agent borrowed money on behalf of a disclosed principal and undertook no personal liability, and the creditor did not allege any fraud or misrepresentation, no decree could be passed against the agent personally.[7]

Proceedings before Consumer Forum.—Where the National Consumer Forum was of the view that the Contract Act has no application to the proceedings before the commission and an agent consequently cannot invoke Sec. 230 of the Contract Act, such view is erroneous.[8]

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1. *Krishna* v. *Krishnaswami,* (1900) 23 Mad. 597.
2. (Cf.) *Elliot* v. *Bax-Ironside,* (1928) 2 KB 301.
3. *Higgins* v. *Senior,* (1841) 151 ER 278 : 58 RR 884; *Holding* v. *Elliott,* (1860) 157 ER 1123: 120 RR 504; *Drughorn* v. *Rederiaktiebolaget Transatlantic,* (1919) AC 203. **See also** *Soopromoniam Chetty* v. *Heilgers,* (1879) 5 Cal. 71.
4. *Wake* v. *Harrop,* (1862) 158 ER 859 : 130 RR 461; *Collins* v. *Associated Greyhound Race Courses,* (1930) 1 Ch. 1.
5. *Hutchinson* v. *Tatham,* (1873) 8 CP 482; *Pike* v. *Ongley,* (1887) 18 QBD 708 (Custom in hop trade of broker being personally liable); *Imperial Bank* v. *London & St. Katherine Docks Co.,* (1877) 5 Ch.D. 195.
6. (1916) 20 CWN 365 : 35 IC 3.
7. *Bhoormal* v. *Chunilal,* ILR (1963) 13 Raj. 1150.
8. *Marine Container Services South (P) Ltd.,* v. *Go Go Garments,* AIR 1999 SC 80, 81 : (1998) 3 SCC 247 : 1998 (8) Supreme 544 : 1998 (8) SLJ 292.

(2) When acting for a foreign principal.—Where the agent has entered into a contract on behalf of a foreign principal (*i.e.,*) a principal resident abroad, the presumption is that the contract is made not on the credit of the unknown foreigner who is the principal, but on the credit of the local agent. As was said by Maule, J., in *Smith* v. *Anderson.*[1]

> "It is well known that in ordinary case, where a merchant resident abroad buys goods here through an agent, the seller contracts with the agent, and there is no contract or privity between him and the foreign principal."

In such cases, the foreign principal cannot sue or be sued.[2] But the presumption may be rebutted where the foreign principal is made the actual contracting party and the contract is made directly in his name.[3] In *Tutika Basavaraju* v. *Parry & Co.,*[4] a company which had its registered office in England and carried on a sugar refinery business in India, was held to be a corporate company resident abroad. On the facts, however, the agent in India, of the said company were held not personally liable because the foreign principals were themselves the contracting parties and the contract was made in their names. But, in *Bhojabhi* v. *Hayem Samuel,*[5] where the principal was an association in England, the Secretary of the Committee was held liable on a rental agreement made by him. In *Ganpat* v. *Forbes,*[6] the plaintiff entered into a service agreement with a foreign railway company acting through their agents, the defendants, and the contract was signed by the defendants as agents of the railway company. The plaintiff sued the agents for wrongful dismissal. It was held that the agents were not personally liable inasmuch as the agreement was with the foreign railway company direct and there was nothing in the document to raise an implication of personal liability on the part of the agent. **[869]**

In *Gnanasundara* v. *Derton Export Co.,*[7] the plaintiff agreed to purchase goods from a firm in the U.S. through its intermediary in India and paid an

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1. (1849) 137 ER 9. **See also** *Armstrong* v. *Stokes,* (1872) 7 QB 598; *Miller Gibb & Co.* v. *Smith & Tyres Ltd.,* (1917) 2 KB 141; *Mercer* v. *Wright,* (1917) 33 TLR 343; *Thompson* v. *Davenport,* (1829) 109 ER 30 : 32 RR 578.
2. **See** *Elbinger* v. *Claye,* (1876) 8 QB 473; *Hutton* v. *Bulloch,* (1837) 9 QB 572; *Mildred* v. *Maspons,* (1883) 8 AC 874.
3. *Gadd* v. *Houghton,* (1876) 1 Ex. D. 357. **See also** *Ogden* v. *Hall,* (1879) 40 LT 751; *J. Thomas & Co.* v. *Bengal Jute Baling Co.,* AIR 1979 Cal. 20 : 82 Cal. WN 864.
4. (1903) 27 Mad. 315; *Gordhandas* v. *Gorio,* (1934) Bom. 420 : 36 Bom. LR 834.
5. (1898) 22 Bom. 754.
6. (1930) Bom. 569 : 32 Bom. LR 336 : 128 IC 550. **See also** *Deoki Nandan* v. *Ram Lal,* (1923) Lah. 296 : 73 IC 885; *Universal Steam Navigation Co.* v. *McKelvie,* (1923) AC 492.
7. AIR 1964 Mad. 113.

amount as advance; when the goods arrived they were found not to conform to the description in the order or indent. A clause in the contract gave absolute immunity to the agent for damages arising from causes like late delivery, delivery of goods other than those ordered or of inferior quality; there was however no protection to the agent as to liability to return the advance against which the goods had not been delivered. It was held that the case one of an agent acting on behalf of a disclosed foreign principal *ab initio* and though the agent had immunity as to the damages flowing from a breach of contract, he would be equally liable with the principal regarding the return of the advance.[1]

Where the agent purporting to act on behalf of a foreign principal has disclosed the identity of the principal and expressed his unwillingness to undertake personal liability while entering into the contract the agent cannot be held personally responsible for the breach of contract.[2]

Where a suit has been filed against the foreign principal claiming damages for short landing of goods, the agent is automatically relieved of the liability as both the principal and agent cannot be sue in view of the election to sue the foreign principal having been exercised by the plaintiff.[3]

(3) When acting for an undisclosed principal.—As third parties cannot possibly look to the credit of a principal undisclosed, the law presumes that the third party relied on the credit of the known agent and so, a presumption of personal liability on the part of the agent arises in such circumstances.[4] So in *Bhojabhai* v. *Hayem Samuel,* already cited, the secretary in India of an association in England was held liable. In *Gordhandas* v. *Gorio,*[4] where the evidence showed that the defendants were acting as agents of an undisclosed (foreign) principal, and that they had undertaken to carry out the transaction on behalf of the principal, it was held that the defendants were liable. Similarly, where company promoters contract on behalf of a company not yet in existence, they will be personally liable.[5] But the presumption as to personal liability may be rebutted.[6] The mere fact of signing "for principal" will not suffice to rebut the presumption.[7] Further there is no room for the

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1. **See** *Trilok Chand Jain* v. *Rameshwar Lall Tulsiyan,* AIR 1975 Pat. 196 : 1975 BLJR 98; *Wheels India Ltd.* v. *Khemchand Rajkumar,* (1970) 2 MLJ 648.
2. *Midland Overseas* v. *V. M. "CMBT Tana",* AIR 1999 Bom. 401, 402 : 1999 (3) All. Mah LR 662 : 1999 (3) Bom. LR 502.
3. *W.B.Essential Commodities Supply Corpn. Ltd.* v. *Koren F.T. Corpn.,* AIR 2002 Cal. 211.
4. (1934) 36 Bom. LR 834 ; (1934) Bom. 420.
5. *Kelner* v. *Baxter,* (1866) 2 CP 174; *Lakshmi Shankar* v. *Motiram,* (1904) 6 Bom. LR 1106.
6. *Mackinnon* v. *Lang,* (1881) 5 Bom. 584; *Hasonbhoy* v. *Clapham,* (1882) 7 Bom. 51; *Soopromaniam Chetty* v. *Heilgers,* (1879) 5 Cal. 71.
7. *Gubhoy* v. *Avetoom,* (1890) 17 Cal. 449; *Pater* v. *Gordon,* (1870) 7 MHC 82. **But see** *Hari Sadhan* v. *Lala Becha,* (1925) Oudh 641 : 89 IC 380.

presumption where the other contracting party is aware that the agent is acting *qua* agent.[1] Where a person sold and delivered goods to the secretary of a social club for the purposes of the club, and not for the secretary's personal needs, it was held that he could not hold the secretary personally liable.[2] **[871]**

Where the defendant purporting to act as an agent purchased rice in response to the order placed by the plaintiff, the defendant is liable for breach of contract for having failed to disclose the name of the principal for whom he was acting at the time the contract was complete.[3]

Where the managing members of a Hindu joint family contract in their own names on behalf of a joint family business, the managing members may enforce the contract and it is not necessary to make the other members of the family, parties to the action,[4] for the managing members are in the position of agents for the undisclosed members.

In *Patiram* v. *Kankinarrah Co.*,[5] it was observed that the section is applicable to a broker who enters into a contract of sale on behalf of his principal.

(4) When acting for a principal who cannot be sued.— Where he principal is disclosed, but cannot be sued (*e.g.*,) if he is a person not ordinarily amenable to the processes of court by virtue of being a foreign sovereign or ambassador, it is the agent who will be presumed to be personally liable.[6] **[872]**

In the case of an unregistered body or committee of persons, the individual members will be liable, and not the agent or servant acting for them.[7]

Where the contract expressly provides that the obligations of the contract signed by the agent on behalf of the foreign principal shall not be binding on the agent, the agent cannot be made liable.[8]

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1. *Bidhu Bushan* v. *Mofizuddin,* (1938) 92 CWN 1263; *Mackinnon* v. *Lang,* (1881) 5 Bom. 584; *Layllpur Sugar Co.* v. *Mul Raj,* (1924) 65 IC 473 (Lah.); *Meerkhan* v. *Munden,* (1867) 30 PR.
2. *N.W.P. Club* v. *Sadullah,* (1898) 20 All. 497 : (1898) AWN 136.
3. *Nagnath Kaulwar and Sons* v. *Govindram Shyamsunder (Firm),* 2004 (2) CTLJ 306 (Bom).
4. *Gopal Das* v. *Badri Nath,* (1904) 27 All. 361 : 2 ALJ 3 : (1904) AWN 282.
5. (1915) 42 Cal. 1050 : 19 CWN 623 : 31 IC 607. **See also** *Nanda Lal* v. *Gurupada,* (1924) 51 Cal. 588 : 81 IC 721 : (1924) Cal. 733. **But see** *B.C.G.A.* v. *Bharat Trading Co.,* (1938) Lah. 253 (Transaction by Pacca Arhatia—Section has no application).
6. *Ramchand* v. *Ismail Khan,* (1928) Sind 189 : 113 IC 345; *Abdul Ali* v. *Goldstein,* (1910) 4 IC 902 : (1901) 43 PR; *Raghbar Dayal* v. *Firm of Pyare Lal,* (1933) Lah. 93 : 145 IC 178; *Mallhu* v. *Meghraj,* (1920) 55 IC 992 (Lah.).
7. *Roghbir Dayal* v. *Firm of Pyare Lal,* (1933) Lah. 93 : 145 IC 178.
8. *M/s. Nandan Iron & Metal Industries* v. *M/s. Fenestry Inc.,* AIR 1992 Delhi 364.

In India where a contract is void because of non-compliance with Art. 299(1) of the Constitution, it has been held ha no presumption of the agent's personal liability can be drawn.[1]

(5) Where authority is coupled with interest.—The agent has *locus standi* to sue in his own name in all cases where he has an interest in the subject matter of the agency.[2] For instance, an auctioneer can sue in his own name for the value of goods sold at an auction.[3] He may also be sued for failure to give delivery or for conversion.[4] **[874]**

Where the name of the principal a carrier of goods was disclosed in the Bill of lading by the agent who entered into a contract on behalf of the principal, the agent does not incur personal liability on the basis of agency coupled with interest merely because the agent received commission.[5]

(6) Payment by agent under a mistake.—The agent has a right of personal action where he has paid money for the principal under a mistake of fact or owing to a fraud having been practised upon him.[6] Conversely, it a third person pays money to an agent under a mistake of fact, the agent is personally liable to repay it,[7] unless he has already paid it over to the principal.[8]

(7) When principal is company yet to come into existence.—In *Mahabir Prasad Mawandia* v. *Satyanarain Kotriwala,*[9] it was held that if the promoters of a company entered into any contract on behalf of such company yet to be incorporated, such promoters would be personally liable for the obligations they create under any contract with any one, because the principal has no legal existence. Not even subsequent ratification by the company when it comes into existence can relieve that liability.

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1. *State of U.P.* v. *Murari Lal & Bros. Ltd.,* (1972) 1 SCJ 264 : AIR 1971 SC 2210; Cf. *C.V. Jasani* v. *Parasram,* AIR 1954 SC 236 (Petty contract entered into by officer on behalf of Government can be ratified).
2. *Subramania* v. *Narayana,* (1901) 24 Mad. 130; *Durga Prasad* v. *Cawnpore Flour Mills,* (1929) Oudh 417 : 6 OWN 599; *Hardayal* v. *Kishan Gopal,* (1938) Lah. 673; *Union of India* v. *Chinoy Chablani & Co.,* AIR 1982 Cal. 365; *Union of India* v. *Chinoy Chablani & Co.,* AIR 1976 Cal. 467 : (1976) 1 Cal. LJ 494 : 80 Cal.WN 819; *Chaliha Rolling Mills Ltd.* v. *Bank of America,* AIR 1983 NOC 44 (Cal.).
3. *Williams* v. *Millington,* (1788) 126 ER 49 : 2 RR 724; *Kharas* v. *Bhawanji,* (1926) Sind 6 : 92 IC 394. **See also** *Coorla Spinning and Weaving Mills* v. *Vallabhdas,* (1925) 27 Bom. LR 1168 : (1925) Bom. 547 : 94 IC 575.
4. *Woolfe* v. *Home,* (1877) 2 QBD 355; *Consolidated Co.* v. *Curtis,* (1892) 1 QB 495.
5. *Jaytee Exports* v. *Natvar Parekh Industries Ltd.,* AIR 2001 Cal. 150,154.
6. *Colonial Bank* v. *Exchange Bank,* (1885) 11 AC 84; *Holt* v. *Ely,* (1853) 118 ER 634 : 93 RR 398.
7. *Taylor* v. *Metropolitan Rail Co.,* (1906) 2 KB 55.
8. *Pollard* v. *Bank of England,* (1871) 6 QB 623.
9. AIR 1963 Pat. 131.

Nature and incidents of the agent's right of suit.—In all cases where the agent has subjected himself to liability, he has also the right of suit, if any,[1] and the principal's renunciation of the contract does not derogate from the agent's right.[2] In such a suit, the other party will have the same rights as against the principal. The principal's admissions will be evidence against the agent.[3] It will be open to the principal to intervene at any stage, and the agent's right ceases on such intervention. An adjustment of the claim with the principal will be an effective answer to the agent's suit.[4] But where the agent has a right of lien on the subject-matter of the contract any settlement with the principal, which will prejudice the agent's rights, will not be recognised.[5] Thus, where an auctioneer sued for the price of goods sold, and the defendant pleaded payment before suit to the principal, he was held liable, because the auctioneer would have a lien on the proceeds for his charges and the payment direct to the principal prejudiced such right.[6]

Public agents.—The Act does not make any mention of public agents. Ordinarily, in cases of contracts with a public servant the presumption is that it is made not on the credit of the particular officer but on the responsibility of the Government he serves. And so, the public agent will not be personally liable. Another reason suggested for the rule against personal rights and liabilities in such cases is that it will be to the detriment of public service if public agents are to be saddled with personal liability in regard to contracts, entered into on behalf the Government. In all such case, authority to make the contract must be proved.[7]

231. Rights of parties to a contract made by agents not disclosed.—If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

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1. *Agacio* v. *Forbes,* (1861) 14 Moo. PC 160 : 134 RR 35; *Brandt* v. *Morris,* (1917) 2 QB 784; *Nasiruddin* v. *Durga Prasad,* (1937) Lah. 607 : 39 PLR 457 : 168 IC 458 (where order not placed through agent the latter cannot sue third party, though agent might have agreed with principal to pay him, if purchaser does not).
2. *Short* v. *Spackman,* (1831) 109 ER 1400.
3. *Smith* v. *Lyon,* (1813) 170 ER 1447 :14 RR 810; *Bauerman* v. *Radenius,* (1798) 101 ER 1186.
4. *Rogers* v. *Hadley,* (1861) 159 ER 94 : 133 RR 652; *Atkinson* v. *Colesworth,* (1825) 107 ER 873 : 27 RR 350.
5. *Atkyns* v. *Amber,* (1796) 170 ER 431.
6. *Robinson* v. *Rutter,* (1855) 119 ER 355 : 99 RR 849; *Grice* v. *Kenrick,* (1870) 5 QB 340; *Webb* v. *Smith,* (1885) 30 Ch. D. 192.
7. *Secy. of State* v. *Sulemanji,* (1902) 26 Bom. 80 : 4 Bom. LR 706.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

Scope.—Except in special cases, the general rule of law is that the principal can enforce the contract entered into by his agent with a third party even though the agent had not disclosed the name of the principal. This principle is embodied in Section 231, which lays down that the principal can enforce the contract even when the third person neither knows, nor has reason to believe that the person with whom he has made the contract was an agent.[1] The second para of the section has to be read in the context of the first para and the expression "if the principal disclosed himself before the contract is completed" in para 2 must be read in the context where the agent made the contract with a person who did not know or had reason to believe that he was an agent.[2]

Principal's right to intervene.—Where the agent enters into a contract with a third party who had no reason to think he is an agent, the principal may intervene and claim performance, subject to any equities existing between the agent and the third party.[3] For instance, he may continue proceedings already begun by the agent.[4]

As Lord Lindley observed in *Keighley* v. *Durani*[5] :—

> "There is an anomaly in holding one person bound to another of whom he knows nothing and with whom he did not in fact intend to contract. But middlemen through whom contracts are made are common and useful in business transactions and in the great mass of contracts, it is a matter of indifference to either party whether there is an undisclosed principal or not. If he exists, it is, to say the least, extremely convenient that he should be able to sue and be sued as principal and he is only allowed to do so upon terms which exclude injustice."

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1. *Maganbhai* v. *Chetanlal,* AIR 1968 Raj. 81 : 1968 Raj.LW 62.
2. *Sirkar* v. *Sar's Estate,* AIR 1960 Cal. 752.
3. (Cf.) *East India Railway* v. *Baldeo,* (1928) 92 IC 1007 (All.); *Ferrand* v. *Bischoffsheim,* (1858) 140 ER 1271 : 114 RR 908.
4. *Godhanram* v. *Jaharmull,* (1912) 40 Cal. 335 : 16 IC 583; *Sadler* v. *Leigh,* (1815) 171 ER 63.
5. (1901) AC 240. **See also** *Paterson* v. *Gandasequi,* (1812) 104 ER 768 : 13 RR 368; *Addison* v. *Gandasequi,* (1812) 128 ER 454 : 13 RR 639.

Where the principal thus intervenes before completion of the contract, the other party may repudiate the contract on proving that he would not have contracted at all, if he had known who the principal was.

Extent of right.—Though the section gives the undisclosed principal the right to intervene, there is nothing in the section to debar him from proceeding against the agent under Sec. 211, if the case can be brought within the purview of that section.[1]

"Discloses himself.—As to what is 'disclosure' within the meaning of the section, it has been held that a principal cannot be said to disclose himself if the other party gets knowledge about him, not from the principal himself but from some other source.[2] **[866]**

232. Performance of contract with agent supposed to be principal. —Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Illustration

A, who owes 500 rupees to B, sells 1,000 rupees' worth of rice to *B*. *A* is acting as agent for *C* in the transaction; but *B* has no knowledge nor reasonable ground of suspicion that such is the case. *C* cannot compel *B* to take the rice without allowing him to set-off *A's* debt.

Scope of the section.—A comparison of this section with the preceding section will show that there is a certain amount of overlapping. The same matter is stated in one case, in the form of rights of a third party, and in the other, as limitations on the rights of the principal. However, Marriott, J., observed[3]:

> ....."I do not think that Sec. 232 is a repetition of the first para of Sec.231. It is, I think, a qualification of the first portion of

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1. *Makhanlal Basak* v. *Bashudharanjan Das,* (1934) 61 Cal. 504 : 152 IC 33 : (1934) Cal. 721.
2. *Kapurji Magniram* v. *Pannaji Devichand,* (1929) 53 Bom. 110 : 30 Bom. LR 1560 : 113 IC 341 : (1929) Bom. 177; *Lakshmandas* v. *Lane,* (1904) 32 Bom. 356 : 6 Bom. LR 731; *P.P. Deo* v. *Narayan,* (1929) Nag. 170 : 116 IC 669.
3. *Premji* v. *Madhowji,* (1880) 4 Bom. 447.

that paragraph which gives a principal a general right to enforce a contract entered into by his agent. Sec. 232 qualifies that general right by making it subject to the rights and obligations subsisting between the agent and the other contracting party."

Rights of undisclosed principal.—The undisclosed principal who intervenes and seeks to enforce the contract of the agent must take it subject to all equities between the agent and the other party to the contract.[1] Thus, a third person dealing with a factor who sells goods in his own name, may claim in an action by the principal, a set-off of sums due from the agent.[2]

Knowledge or reason to suspect.—The section seems to vary slightly the English rule, under which there has to be a specific allegation that the agent was allowed by the principal to conduct himself as principal and that the defendant believed he was the principal.[3] There is no necessity for an averment regarding absence of knowledge or reason to suspect.

233. Right of person dealing with agent personally liable.—In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them liable.

Illustration

A enters into a contract with *B* to sell him 100 bales of cotton, and afterwards discovers that *B* was acting as agent for *C*. *A* may sue either *B* or *C*, or both, for the price of the cotton.

Principal responsible even where agent personally liable.—This section, and the succeeding one provide that the principal's responsibility to third persons is not affected by the fact that the agent had also rendered himself personally liable, except in cases where such third parties have led the principal to act on the belief that only the agent will be held liable. The creditor may therefore elect to proceed against either. As has been said, "The law which super adds the liability of the agent does not detract from the liability of the principal." **[860]**

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1. *Sims* v. *Bond*, (1833) 110 ER 834 : 39 RR 511. **See** *Ladhomal* v. *Chandumal*, (1931) Sind 4 : 130 IC 548.
2. *George* v. *Clagett*, (1797)101 ER 1109 : 4 RR 462 (Sale by factor of undisclosed principal); *Montagu* v. *Forwood*, (1893) 2 QB 350; *Snook* v. *Davidson*, (1809) 170 ER 1134 : 11 RR 696.
3. *Borries* v. *Imperial Ottoman Bank*, (1873) 9 CP 38. **See also** *Cooke* v. *Eshelby*, (1887) 12 AC 271.

It has accordingly been held that moneys borrowed by a liquidator under authority, in the course of winding up proceedings are recoverable from the company.[1] Similarly, with advances made to the agent of a company duly authorised to borrow.[2]

Nature of liability.—ENGLISH AND INDIAN LAW.—The liability of the principal and agent is, under English law, not joint but alternative. The rule is this—that if the creditor chooses to sue the agent contracting in his own name, to judgment, he cannot bring second separate action against the principal.[3] This bar of fresh suit operates as the Privy Council pointed out in *Somasundaram* v. *Subramanian,*[4] even if the judgment against the agent does not result in satisfaction of the debt.[5] Even the creditor's ignorance of the existence of the principal at the time of suing the agent has been held to be ineffectual to prevent the operation of the bar.[6] But where the proceedings against the agent are discontinued or are dismissed, fresh proceedings may be initiated against the principal.[7] It is also incumbent on a party to sue the undisclosed principal within a reasonable time after discovering him.[8] In *Kutti Krishnan* v. *Appa Nair,*[9] Coutts-Trotter, C.J., pointed out that the third person may sue both principal and agent alternatively in a case where he is not sure whom his exact remedy is against, but he cannot get judgment against both of them jointly. In a Madras ruling, however, it has been doubted whether, in the

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1. *In re. Ganges Steam Tug Co.,* (1891) 18 Cal. 31.
2. *Purnanundas* v. *Cormack,* (1881) 6 Bom. 326.
3. *Priestly* v. *Fernie,* (1865) 159 ER 820 : 140 RR 793; *Moore* v. *Flanagan,* (1920) 1 KB 919; *Morel Bros.* v. *Westmoreland,* (1904) AC 11; *French* v. *Howie,* (1906) 2 KB 674.
4. (1926) MWN 832 : 25 LW 163 : 99 IC 742 : (1926) PC 136.
5. *Bir Bhaddar* v. *Sarju Prasad,* (1887) 9 All. 681; *Purmanundas* v. *Cormack,* (1881) 6 Bom. 326; *Kendall* v. *Hamilton,* (1879) 4 AC 504; *Morel* v. *Westmoreland,* (1904) AC 11; *R.M.K.R.M. Firm* v. *M.R.M.V.L. Firm,* (1926) AC 761.
6. *Shivlal* v. *Birdichand,* (1917) 19 Bom. LR 370.
7. *Curtis* v. *Williamson,* (1874) 10 QB 57. **See** *Raman* v. *Vairavan,* (1883) 7 Mad. 392.
8. *Smethurst* v. *Mitchell,* (1859) 120 ER 1043 : 117 RR 374; *Irvine* v. *Watson,* (1880) 5 QBD 414 (Creditor precluding himself by conduct from proceeding against the principal); *Gardiner* v. *Heading,* (1928) 2 KB 284 (Merely giving credit to a supposed principal will not amount to election).
9. (1926) 49 Mad. 900 : 97 IC 475 : 24 LW 451 : (1926) MWN 729 : (1926) Mad. 1213 : 51 MLJ 311. **See also** *Lachhman* v. *Bhagirath,* (1926) Oudh 41 : 90 IC 487; *Ananthachari* v. *Rathnam & Sarathy,* (1923) 18 LW 674 : 75 IC 161 : (1923) Mad. 713 : 45 MLJ 83; *Pattinson* v. *Bindhya,* (1933) 12 Pat. 216 : 146 IC 56 : (1933) Pat. 196; *Raghunath Jha* v. *Kesori Lal,* (1934) Pat. 269 (In case of doubt, both should be made defendants, and if principal is not liable, agent should be sued for breach of warranty of authority).

face of the clear language of the section, the English rule of alternative liability can be applied in India;[1] and another Bench of the same court has expressly dissented from the earlier case and held that it is open to the plaintiff to sue both principal and agent jointly.[2] In a Bombay ruling where the action was on a negotiable instrument against a person whose name properly appeared as a party, it was held that it was open to him to show that another person was liable and that the signatory acted only for an undisclosed principal.[3]

It may also be mentioned that even the rule of alternative liability as laid down in *Kendall* v. *Hamilton* and other cases, applies only where the principal is sued on the footing of the contract made by the agent. It will have no application where the principal is sought to be held liable on the equitable ground that by reason of the agent's wrongful or unauthorised act money belonging to the plaintiff has come into the hands of the principal. In such cases, the rule in England is one of joint and several liability of principal and agent. *A fortiori,* on the language of the section, the rule in India will be the same.[4]

Election.—In *Thompson* v. *Davenport,*[5] Lord Tenterden said:

> "If, at the time of the sale, the seller knows not only that the person who is nominally dealing with him is not principal, but agent, and also knows who the principal really is, and, notwithstanding all that knowledge chooses to make the agent his debtor, dealing with him and him alone; then ..... the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had he power of choosing between the one and the other."[6]

In one Madras case[7] the plaintiff had owed the first defendant a certain sum, which he paid to second defendant (agent of the first defendant). The

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1. *Paboodan* v. *Miller,* (1938) 2 MLJ 688 : 48 LW 666 : (1938) MWN 1023 : (1938) Mad. 966.
2. *Md. Shamsuddin* v. *Shaw Wallace,* (1939) 1 MLJ 509 : 49 LW 343 : (1939) MWN 209.
3. *Sitaram* v. *Chimanlal,* (1928) 52 Bom. 640 : 30 Bom. LR 1300 : (1928) Bom. 516 : 115 IC 400.
4. *Paboodan* v. *Miller,* (1938) 2 MLJ 688 : 48 LW 666 : (1938) MWN 1023 : (1938) Mad. 966.
5. (1829) 109 ER 30 : 32 RR 578, *Calder* v. *Dobell,* (1871) 6 CP 486 (Election is question of fact).
6. **See also** *Paterson* v. *Gandasequi,* (1812) 104 ER 768 : 13 RR 368; *Addison* v. *Gandasequi,* (1812) 128 ER 454 : 13 RR 639.1. *Kulandaivelu* v. *Ramaswami,* (1923) MWN 235 : 17 LW 448 : (1923) Mad. 551 : 72 IC 770 : 44 MLJ 496.
7. *Kuladaivelu* v. *Ramaswami,* (1923) MWN 235 : 17 LW 448 : (1923) Mad. 551 : 72 IC 770 : 44 MLJ 496.

second defendant did not account for it to his principal. The first defendant obtained a decree against plaintiff, who had failed to appear and plead discharge by payment to the agent. The plaintiff thereupon sued the principal and agent together. The court held he could not recover, because he ought to have pleaded discharge in the suit by the principal. The *ratio decidendi* would appear to be that the agent's failure to account to his principal will not entitled the third party to recover the amount paid to him; for the third party has got an independent right to plead payment to the agent as a defence.

234. Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.—When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

Estoppel.—Under the previous section, the third party had the right to elect to hold either the agent or the principal or both liable. This section limits the right and provides that in certain cases, the election may be taken away. It formulates a rule of estoppel. It certainly stands to reason that, if the third party by inducing in the principal a belief that the agent alone will be held liable, makes the principal alter his position in regard to the agent (*e.g.*) settling with him, the party whose conduct has so caused the principal to alter his position ought not to be permitted to hold him responsible.[1] **[862]**

235. Liability of pretended agent.—A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

Warranty of authority.— This section gives legislative expression to the rule laid down in the well-known case of *Collen* v. *Wright* [2]:

> "..... A person professing to contract as agent for another, impliedly, if not expressly, undertakes to, or promises the person

1. See *Heald* v. *Kenworthy,* (1855) 156 ER 638 : 102 RR 800; *Wyatt* v. *Hertford,* (1802) 102 ER 553 (Third party leading principal to believe that the debt will be paid by the agent); *Hopkins* v. *Ware,* (1869) 4 Ex. 268 (Principal altering his position to his prejudice on the representation of third party); *Davison* v. *Donaldson,* (1882) 9 QBD 623.
2. (1857) 120 ER 241 : 110 RR 611.

who enters into such contract, upon the faith of the professed agent being duly authorised that the authority which he professes to have, does, in point of fact, exist."[875]

Essentials of the section.—

(1) The agent must have made an untrue representation; and the representation must relate to a matter of fact, and not of law. The cases of *Manibhai* v. *Rupaliba*[1] and *Hajee Ismail* v. *Short*,[2] are illustrations in point.[775]

The rule will apply even to cases of misrepresentation as to the *extent of the authority.* Thus, in *Ganpat* v. *Sarju*[3] where the agent represented that he had authority to sell at a particular price, he was held liable under the section. So, too, the good faith of the agent makes no difference to the liability.[4] In one Madras case,[5] Pandalai, J., applied the principle of the section to a case where a person purported to act as agent of a Devasthanam, and the creditor advanced money on the faith of such representations and it turned out that the person had no authority.

(2) The third party must have been induced to deal with the agent on the faith of such representation. Thus, if, at the time of purporting to contract, the agent expressly disclaims any present authority, or if the agency is of any well-known and recognised legal character (*e.g.*) solicitor or director of a company, no question of liability on an implied warranty of authority can arise[6] save perhaps, in cases where fraud in fact is made out.[7] Similarly, where the person knows that the agent could not have such authority because, to his knowledge, the donor of the authority was a minor, there will be no liability.[8] In *Bheek Chand* v. *Parbhunji*[9] the plaintiff sued three persons R, P and M on the basis of a khata under the *bona fide* belief that all the three constituted a

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1. (1899) 24 Bom. 166. **See also** *Beattie* v. *Ebury,* (1872) 7 HL 102; *Rashdall* v. *Ford,* (1866) 2 Eq. 750 (Directors of company having no borrowing powers inducing X to lend—X's knowledge that company has no borrowing powers—Directors not liable).
2. (1910) 8 MLT 353 : (1910) MWN 513.
3. (1911) 34 All. 168 : 9 ALJ 8 : 13 IC 94. **See also** *Firbank* v. *Humphreys,* (1887) 18 QBD 54; *Richardson* v. *Williamson,* (1871) 6 QB 276.
4. *Starkey* v. *Bank of England,* (1903) AC 114; *Oliver* v. *Bank of England,* (1902) 1 Ch. 610; (Cf.) *Yonge* v. *Toynbee,* (1910) 1 KB 215; *Simmons* v. *Liberal Opinion Ltd.,* (1911) 1 KB 966 (Authority which had ceased without agent's knowledge); *British & Mission Gazette* v. *Associated Newspapers,* (1933) 2 KB 616.
5. (*Muttavi*) *Venkatacharyulu* v. (*Vemavarapu*) *Ramakrishna Rao,* (1930) Mad. 439 : 121 IC 153; *Maya Ram* v. *Mahomed,* (1934) Pesh. 49 : 151 IC 58.
6. *Halbot* v. *Lens,* (1901) 1 Ch. 344, applying *Beattie* v. *Lord Ebury,* see footnote 1.
7. *Dunn* v. *MacDonald,* (1897) 1 QB 555.
8. *Manibhai* v. *Rupaliba,* (1899) 24 Bom. 166 : 1 Bom. LR 646.
9. AIR 1963 Raj. 84.

partnership firm and relied on an acknowledgement signed by P who had untruly represented that he was the authorised agent of the firm. It was found that the firm had only one partner R, that the acknowledgement signed by P was not binding on the firm and that the suit was, as against R, time-barred. It was held that under Section 235 the plaintiff was entitled to compensation from P, the pretended agent.

(3) The principal must have refused to ratify the transaction.[1]

(4) The plaintiff must have suffered loss in consequence.

Principal benefited.—Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent had authority, thought turns out that his act was not authorised, or ratified or adopted by the principal, then, though the principal cannot be sued at law, yet in equity to the extent to which the money borrowed has been applied in paying the legal debts of the principal, the lender is entitled to stand in the same position as if the money had been originally borrowed by the principal.[2] The rule is now well established that where by any wrongful or unauthorised act of an agent the money or property of a third person comes to the hands of the principal or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or the value of such money or property.[3]

Damages.—The third party is entitled to get by way of damages the loss sustained by reason of the misrepresentation.[4] The damages are arrived at by considering the difference in the position he would have been in, had the representation been true and the position he is actually in, in consequence of its being untrue.[5] He is entitled to all the damages, which are the natural and proximate consequence of the false assertion of authority.[6] For instance, where the agent buys goods without authority and the principal refuses to ratify, the agent is liable to pay the difference between the contract rate and the market value of the goods.[7] The costs of proceeding against the principal in respect of the transaction are also recoverable from the agent.[8]

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1. *Ratan Singh* v. *Haji Hafizullah,* (1924) Oudh 184 : 72 IC 1011; *Ramdas* v. *Kodanmal,* (1933) Sind 207 (Section appears to contemplate a named principal).
2. *Kasam* v. *Narayan,* (1930) Nag. 42 : 122 IC 444; *Reid* v. *Rigby,* (1894) 2 QB 40.
3. **See** Bowstead on Agency Art. 104; *Paboodan Goolachand* v. *Miller,* (1938) 2 MLJ 688 : 48 LW 666 : (1938) Mad. 966 : (1938) MWN 1023; *Rahim Ullah Khan* v. *Chuni Lal,* (1937) Lah. 570 (Section 70 invoked).
4. *Godwin* v. *Francis,* (1870) 5 CP 295; *Meek* v. *Wendt,* (1888) 21 QBD 126; *Firbank* v. *Humphreys,* (1887) 18 QBD 54; *Fernie* v. *Gorlitz,* (1915) 1 Ch. 177.
5. *Firbank* v. *Humphreys,* (1887) 18 QBD 54.
6. *Ex parte Panmure,* (1883) 24 Ch.D. 367; *Spedding* v. *Navell,* (1869) 4 CP 212.
7. *Simons* v. *Patchett,* (1857) 119 ER 1357 : 110 RR 730. (**See also** *Ex parte Panmure,* (1883) 24 Ch.D. 367.
8. *Hughes* v. *Graeme,* (1864) 33 LJ QB 335 : 144 RR 747; *Salvesen* v. *Rederi,* (1905) AC 302.

In *Hasonbhay* v. *Clapham,*[1] persons who had signed a charter-party, as agents were held liable for breach of warranty and the damages were assessed at the amount that could have been recovered if in fact they were duly authorised.

In *Kishori* v. *Secretary of State,*[2] where the defendant falsely representing that he had his father's authority guaranteed to the postal authorities the payment of working losses in the running of a branch telegraph office at the defendant's place, it was held, following *ex parte Panmure,* that the measure of damages was the entire loss sustained by the authorities.

Limitation .—A suit for compensation against a pretended agent under this section was held to be governed by Art. 115 of the Limitation Act of 1908.[3]

236. Person falsely contracting as agent not entitled to performance.—A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

Unauthorised agent cannot enforce performance.—The language of the section is quite clear and allows no room for the application of the English decisions, which are not quite uniform. In fact, the Calcutta High Court has specifically held that the section is not confined to cases where the agent has purported to act for a principal named.[4] The same court has also ruled that, in a case of a person contracting for an undisclosed principal if it turns out that the agent has been acting on his own account, the section will immediately come into operation.[5] The Madras High Court also has pointed out that the section is meant to apply to cases where a person enters into a contract with another on the basis that other person is acting as agent for somebody else.[6]

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1. (1882) 7 Bom. 51.
2. ILR (1938) 1 Cal. 463 : (1938) Cal. 151 : 42 CWN 116 : 176 IC 990 : 66 CLJ 592.
3. *Vairavan Chettiar* v. *Avicha Chettiar,* (1915) 38 Mad. 275 : 25 MLJ 256 : (1913) MWN 88 : 21 IC 65.
4. *Nanda Lal* v. *Gurupada,* (1924) 51 Cal. 588 : (1924) Cal. 733 : 81 IC 721; *Sewdutt* v. *Nahapiet,* (1907) 34 Cal. 628 : 11 CWN 609.
5. *Ramji Das* v. *Janki Das,* (1912) 39 Cal. 802 : 18 CWN 263 : 17 IC 973; *Ramdas* v. *Kodanmal,* (1933) Sind 207.
6. *Kota Chinna Lakshmiah* v. *Nalam Viswanatham,* (1917) 42 IC 357 (Mad.).

Contract voidable.—The effect of the section is that while the contract is not enforceable by the agent in the circumstances set out, it might still be open to the other party to enforce it against the agent. In other words, the contract is not void but voidable only.[1]

237. Liability of principal inducing belief that agent's unauthorized acts were authorized.—When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Illustrations

(a) *A* consigns goods to *B* for sale, and gives him instructions not to sell under a fixed price. *C*, being ignorant of B's instructions, enters into a contract with *B* to buy the goods at a price lower than the reserved price. *A* is bound by the contract.

(b) *A* entrusts *B* with negotiable instruments endorsed in blank. *B* sells them to *C* in violation of private orders from *A*. The sale is good.

Liability arising by holding out or by estoppel.—The liability created by this section is one based on estoppel. Where a person is held out as being employed in a certain capacity, persons who do business with him are entitled to assume that he has authority to act within the apparent scope of his employment in the absence of notice of any restriction of such authority.[2] It is hardly necessary to add that the section can apply only if the relationship of principal and agent is proved in the first instance. So, where a wife had handed over shares to the husband for safe custody, and the latter pledged

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1. **See** *Ramdas* v. *Kodanmal*, (1933) Sind 207.
2. **See** *Pickering* v. *Busk*, (1812) 104 ER 758 : 33 RR 364; *Meyer & Co.* v. *The Sze Hai Tong Banking and Insurance Co.*, (1913) AC 847; *Re. Drabble Bros.*, (1930) 2 Ch. 211 (Principal liable for fraudulent preference by agent); *Howard* v. *Sheward*, (1866) 2 CP 148; *Australian Bank of Commerce* v. *Perel*, (1926) AC 737; *Weiner* v. *Harris*, (1910) 1 KB 285; **see also** *Rupram Kailash Nath* v. *Co-operative Union*, AIR 1967 All. 382.

them, the pledgee could not invoke this section.[1] It is of the essence of an authority created by "holding out" that the other party should have been induced to enter into the contract by reason of the "holding out".[2] It may even happen that the agent had no real authority at all: the only question will be whether the principal held him out as authorised to do certain things.

It is also on the principal of estoppel that the principal becomes liable in respect of acts done by the agent within the scope of his apparent authority but in excess of the actual authority. An illustration is furnished by the case of *Ram Pertab* v. *Marshall* [3] in which the right of a third party against the principal on the contract of his agent, though made in excess of his authority was nevertheless enforced, as it appeared from the evidence that the contracting party had been led into an honest belief in the existence of the authority to the extent apparent to him. In *Darbari Lal* v. *Shariff Husain*[4] it has been held that where a licensed auctioneer sells a house by auction to third persons for an amount less than that authorised by the owner, and the owner admits the authority given for sale of the house, thereby inducing and the parties to believe that the auction sale was within the scope of the agent's authority, the owner is bound by the auction sale and is liable to the third party for breach of contract.[5]

Where the agent who was given power of attorney to deal with only one property has manipulated forging to include the other property and executed sale of deed in respect of both the properties in favour of the defendants, the plea of the plaintiff principal to declare the execution of sale deed as null and void cannot be accepted when he has by his words or conduct induced the third parties to believe that the acts of his agent are within the scope of agent's authority.[6]

Where a principal wrote to a third party saying that he had asked his agent to settle a certain claim (between the principal and the third person), and privately instructed the agent not to settle under a certain figure, and the third party concluded a settlement below the figure given, the principal was

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1. *Benaras Bank* v. *Prem,* (1937) All. 255 : (1937) ALJ 150 : 168 IC 156; *Govindram* v. *Pratap Singh,* (1937) Sind 151.
2. *K.S.R.M. Chettiar Firm* v. *A.T.K.P.L.S.P. Chettiar Firm,* (1934) 12 Ran. 7 : (1934) Ran. 61.
3. (1899) 26 Cal. 701; *Russo-Chinese Bank* v. *Li Yau Sam,* (1910) 14 CWN 381 : 5 IC 789 : (1910) AC 174.
4. (1929) Lah. 822 : 121 IC 511.
5. *Fazal Ilahi* v. *E.I. Ry.,* (1921) 43 All. 623 : 6 IC 868 : 19 ALJ 654 : (1922) All. 324; *Chotey Lal* v. *R.K. Ry.* (1932) 54 All. 540 : (1932) ALJ 526 : (1932) All. 540 : 138 IC 439; *River Steam Navigation Co.* v. *Bisweswar,* (1928) Cal. 371 : 116 IC 148.
6. *Clifford George Pinto* v. *M.R. Shenava,* AIR 2005 Kant 167 : 2005 (3) CCC 498 (Karn) : 2005 AIRKant HCR 316 : 2005 (1) Kant.LJ 458 : 2005 (2) ICC 197.

held bound by the settlement.[1] Again, where an agent under his power of attorney possessed implied authority to raise money by loan for the purpose of carrying on the business affairs entrusted to him, (which authority under circumstances of emergency must be deemed to include power to borrow on exceptional terms outside the ordinary course of business), it was held by the Judicial Committee that the lender was not bound to inquire whether the emergency had arisen or not, but that he could recover from the principal if he lent to the agent *bona fide* and without notice that the agent was exceeding his authority.[2] Where a statutory rule prohibited an LIC agent from collecting premium on behalf of LIC, no inference as to implied authority by LIC authorising to collect premium on its behalf can be raised.[3]

It is also settled that a principal cannot derogate from the general authority conferred by him, by secret instruction to the agent.[4]

Where the party contracting has notice of the agent's excess of authority there is obviously no room for invoking the section.

238. Effect, on agreement, of misrepresentation or fraud by agent.—Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Illustrations

(a) *A* being *B's* agent for the sale of goods, induces *C* to buy them by a misrepresentation, which he was not authorised by *B* to make. The contract is voidable, as between *B* and *C*, at the option of *C*.

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1. *Trickett* v. *Tomlinson,* (1863) 143 ER 263 : 134 RR 688; *Ramchandran* v. *Registrar of Co-op. Societies,* AIR 1963 Mad. 105 : (1962) 2 MLJ 487 : 1962 MWN 487 : 75 MLW 406.
2. *Montaignac* v. *Shitta,* (1890) 15 AC 357. **See also** *Bryant* v. *Quebec Bank,* (1893) AC 179; *Manchester Trust* v. *Furness,* (1895) 2 QB 539; *Morarji* v. *Mulji,* (1924) 48 Bom. 20.
3. *Harshad J. Shah* v. *LIC of India,* AIR 1997 SC 2459, 2464 : (1997) 5 SCC 64 : 1997 (89) CC 109 : 1997 (2) SCJ 25 : 1997 (3) CLT 360 (SC) : 1997 (3) Supreme 587 : 1997 (4) JT 505.
4. *Edmunds* v. *Bushell,* (1865) 1 QB 97 : 148 RR 603.

(b) *A* the captain, of *B's* ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between *B* and the pretended consignor.

Liability of principal for fraud of agent.—A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent.[1] The Calcutta High Court, has laid down that the principal is liable to third parties for the fraud, misrepresentation and other misfeasance's of his agent in the course of his employment though the principal may not have authorised or known of such misconduct, and he had even expressly forbidden it, and that the principal is not liable for the torts of the agent in any matter beyond the scope of the agency unless he had expressly authorised them or adopted them subsequently.[2] And following the English rule, it has also been laid down that the principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent.[3] In *Seth Bansiram* v. *Official Assignee, Madras*[4] this principle has been affirmed by the Madras High Court.

On the same principle, it has been held in an English case that the principal will be liable even for his agent's forgery.[5]

Admissions made by agents.—Any admission made by an agent in the course of the business transacted for the principal will bind the principal.[6] **[853]**

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1. *National Bank of Lahore Ltd.* v. *Sohan Lal Saigal,* AIR 1962 Punj. 543 : ILR (1962) 1 Punj. 566 : *Dina Bandhu Saha* v. *Abdul Latif,* (1923) ILR 50 Cal. 258.
2. *Sherjan* v. *Alimuddi,* (1915) 43 Cal. 511 : 23 CLJ 225 : 34 IC 598 : 20 CWN 268; *Ramaswami* v. *Kanthayyan,* (1899) 9 MLJ 57. For English cases **see** *Re. Drabble Bros.,* (1930) 2 Ch. 211; *Mair* v. *Rio Grande Rubber Estates,* (1913) AC 853; *Pearson* v. *Dublin Corporation,* (1907) AC 351. As to liability for agent's torts, **see** *Parkes* v. *Prescott,* (1869) 4 Ex. 169 and cases in the next note.
3. *Dina Bandhu* v. *Abdul Latif,* (1923) 50 Cal. 258 : 27 CWN 18 : 68 IC 439 : (1923) Cal. 157; *Morrison* v. *Verschoyle,* (1901) 6 CWN 429. As to English authorities **see** *Lloyd* v. *Grace Smith & Co.,* (1912) AC 716; *Houldsworth* v. *City of Glasgow Bank,* (1880) 5 AC 317 (False imprisonment by agent—Principal liable); *Barwick* v. *English Joint Stock Bank,* (1867) 2 Ex. 259; *Swire* v. *Francis,* (1877) 3 AC 106; *London County Freehold & Leasehold Properties Ltd.* v. *Berkeley Property and Investment Ltd.,* (1936) 2 AER 1039; *Radheshyam* v. *Union of India,* AIR 1980 MP 95 : 1979 MPLJ 793.
4. (1933) MWN 1246. **See also** *Swedish Match Co.* v. *Adamjee Hajee,* (1926) 4 Ran. 381 (400) : 99 IC 727 : (1927) Ran. 49; *Vurdhman* v. *Radhakishen,* (1924) Nag. 79 : 79 IC 139.
5. *Uxbridge Permanent Benefit Building Society* v. *Pickard,* (1939) 1 KB 266.
6. *Blackstone* v. *Wilson,* (1857) 26 LJ Ex. 229; *Welsback Incandescent Gas Lighting Co.* v. *New Sunlight Incandescent Co.,* (1900) 2 Ch. 1 (Admission made under principal's authority will be binding); *Barnett* v. *South London Tramways Co.,* (1887) 18 QBD 815 (Admission in excess of authority will not bind principal); *Re. Davala Provident Gold Mining Co.,* (1883) 22 Ch.D. 593 (Statement by agent to principal cannot be used as an admission against the principal).

Agent's misconduct—Rights of principal.—Where it comes to the knowledge of the principal that the agent has received bribe or other illegal gratification in connection with a contract made by him, the principal may avoid the contract.[1] But it is equally open to the principal to affirm such contract. In such a case, the principal may recover from the third party the promised bribe. He has got distinct causes of action against the agent and the third party.[2] Of course, a suit will not lie at the instance of the agent to recover the promised bribe.[3] The principal has a right to follow his property into the hands of parties, subject to the provisions of any law.[4]

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1. *Blackstone* v. *Wilson,* (1857) 26 LJ Ex. 229; *Welsback Incandescent Gas Lighting Co.* v. *New Sunlight Incandescent Co.,* (1900) 2 Ch. 1 (Admission made under principal's authority will be binding); *Barnett* v. *South London Tramways Co.,* (1887) 18 QBD 815 (Admission in excess of authority will not bind principal); *Re. Davala Provident Gold Mining Co.,* (1883) 22 Ch.D. 593 (Statement by agent to principal cannot be used as an admission against the principal).
2. *Ganga Baksh* v. *Maula Baksh,* (1926) Oudh 337 : 92a IC 612 (Principal not bound by a settlement made in collusion with the other party); *Shipway* v. *Broadwood,* (1899) 1 QB 369; *Smith* v. *Sorby,* (1875) 3 QBD 552; *Shriram Refrigeration Industries Ltd.* v. *S.B.I.,* AIR 1983 Pat. 203.
3. *Salford* v. *Lever,* (1891) 1 QB 233.
4. *Harrington* v. *Victoria Dock Co.,* (1878) 3 QBD 549.

CHAPTER XI

Of Partnership

Chapter XI (Secs. 239—266) has been repealed by Sec. 73 and Schedule II of the Indian Partnership Act (IX of 1932).

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THE SALE OF GOODS ACT, 1930

(III OF 1930)

An Act to define and amend the law relating to the sale of goods

WHEREAS it is expedient to define and amend the law relating to the sale of goods; it is hereby enacted as follows:

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement.—(1) This Act may be called the [1][xxx] Sale of Goods Act, 1930.

(2) It extends to the whole of India, except the State of Jammu and Kashmir.

(3) It shall come into force on the first day of July 1930.

History of the Act—Previous law.—Prior to the passing of this Act, the law-regulating sale of goods was contained in Sections 76—123 comprising Chapter VII, of the Indian Contract Act, 1872. That chapter reproduced generally the rules of the English Common Law on the subject. But in 1893, the law relating to sale of goods was codified in England in the Sale of Goods Act.[2] Under that Act, some of the Common Law rules were superseded by new rules more adapted to the needs and requirements of modern business. In India, as years elapsed, the necessity for a complete Code dealing with the law as to sale of goods was felt, and in 1928 a bill was drafted, closely following the English Act.

1. The word 'Indian'omitted by Act 33 of 1963, S. 2.
2. (56 and 57 Vict. c. 71).

The adoption of the British model was found to be advantageous in more ways than one.

In the first place, the English Act has been uniformly regarded as a very successful and correct codification of this branch of English Mercantile Law. As the Select Committee Report pointed out, the English Act had stood the test of nearly thirty-five years of practical application. Striking evidence of the completeness and universal suitability of the provisions of the Act is afforded by the fact that the English Act had been re-enacted with slight local adaptations in many of the Colonies and Overseas Dominions and also in the United States. Again, with a view to attain uniformity of law which, more than anything else, is the prime requisite of all well-ordered mercantile transactions, the Select Committee approved of the proposal to adopt the English Act as the basis.

The Act was placed on the Indian Statute book in January, 1930 and brought into force on 1st July 1930.

Difference between the English and Indian Acts.—In adopting the English Act, the Committee was not unmindful of the needs and exigencies of commercial life in this country. For instance, the rule as to "market overt' obtaining in English Law, has not been adopted. Again, the case law that has arisen in connection with the English Act has been availed of so as to clear ambiguities in wording or expression. Further, such of the provision of the Contract Act as are necessary because of special conditions in India, have been retained.

Chief differences between the Act and Chap. VII of the Contract Act.—

1. The present Act embodies the principal that the question whether a contract for the sale of goods does or does not pass the property in the goods from the buyer to the seller must in all cases be determined by the intention of the parties to the contract. The provisions of old Chapter VII of the Contract Act were vague and conflicting on this point. Under the present Act, parties are free to bargain as they please, but where parties have formed no intention or failed to express it, the Act lays down clear rules for the determination of the question.

2. The present Act has sought to make clear the distinction between a sale and an agreement to sell.

3. Chapter VII of the Contract Act used the term 'warranty' in a rather vague sense. The present Act has removed the ambiguity by clearly bringing out the distinction between warranty and condition.

4. Section 108 of the Contract Act was obscure in phraseology. The present Act in Section 27 to 30 has tried to simplify the law on the subject.

5. The rules as to delivery to carriers, stoppage in transit and auction sales have also been elaborated in the Act.

6. The Act is without illustration; and the courts are left to construe the sections as they stand.

Scope of the Act.—The Preamble states that it is intended to define and amend the law relating to sale of goods. It may be useful to compare it with the preamble to the Contract Act, which says that it is intended to define and amend *certain parts* of the law relating to contract. It would therefore appear that the present Act is intended to deal exhaustively with the law as to sale of goods, except to the extent to which is its provisions are made to depend on other enactments for the time being in force. [See Sec. 66(d) of the Sale of Goods Act.]

Rules of Construction.—See commentaries on Sec. 1 of the Indian Contract Act *supra.* To construe an agreement the Court has to look at the substance of essence of it rather than to its form.[1]

Act, if retrospective.—Sec. 66. Clause (i), Sub-clauses (a), (b) and (c) show that the Act has no retrospective operation. Generally, enactments affecting substantive rights are not retrospective.[2]

Conflict of laws.—The general rule is that sales of movables are regulated by the law of the country where they take place.[3] With regard to the formalities attending on the transfer of property in the goods, the *lex situs* (*i.e.,*) the law of the country where the goods are at the time of sale will be the governing factor.[4] But the rights and obligations flowing out of a contract will be governed by the *lex contractus* (*i.e.,*) the law which the parties contemplated. This is generally the *lex loci contractus.*[5] But these rules are merely in the nature of presumptions, subject to the intention of parties.[6] So far as matters of evidence are concerned, it is the law of the place where the action is brought, which will govern the contract.[7]

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1. *C.I.T.* v. *Panipat Woollen & General Mills Co. Ltd.,* (1976) 2 SCJ 106 : AIR 1976 SC 640. **See also** *Khedut Sahakari Ginning & Pressing Society* v. *State of Gujarat,* AIR 1972 SC 1786 : 1972 (1) SCR 714 : (1971) 3 SCC 480 : 1972 UJ 144.
2. *Lal Mohan* v. *Jogendra,* (1887) 14 Cal. 636.
3. *Embiricos* v. *Anglo-Austrian Bank,* (1905) 1 KB 677.
4. *Cammell* v. *Sewell,* (1860) 157 ER 1371 : 120 RR 799.
5. *Re. Missouri Steamship Co.,* (1889) 42 Ch.D. 321.
6. *Abdul Aziz* v. *Appayasami,* (1903) 27 Mad. 131 : 18 CWN 186 : 6 Bom. LR 7 (PC) citing *Lloyd* v. *Guibert,* (1865) 1 QB 115; (Cf.) *Benaim* v. *Debono,* (1924) AC 514.
7. *Leroux* v. *Brown,* (1852) 138 ER 1119 : 92 RR 889.

2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

(1) "buyer" means a person who buys or agrees to buy goods;

(2) "delivery" means voluntary transfer of possession from one person to another;

(3) goods are said to be in a "deliverable state" when they are a such state that the buyer would under the contract be bound to take delivery of them;

(4) "document of title to goods" includes a bill of lading, dock-warrant, warehouse-keeper's certificate, wharfingers certificate, railway receipt, [multimodal transport document][1] warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery the possessor of the document to transfer or receive goods thereby represented;

(5) "fault" means wrongful act or default;

(6) "future goods" means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale;

(7) "goods" means every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale;

(8) a person is said to be "insolvent" who has ceased to pay his debts in the ordinary course of business, or cannot

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1. Ins. by Multimodal Transportation of Goods Act, 1993 (28 of 1993) which amends the Sale of Goods Act. (w.e.f. 16-10-1992).

pay his debts as they become due, whether he has committed an act of insolvency or not;

(9) "mercantile agent" means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods;

(10) "price" means the money consideration for a sale of goods;

(11) "property" means the general property in goods and not merely a special property;

(12) "quality of goods" includes their state or condition;

(13) "seller" means a person who sells or agrees to sell goods;

(14) "specific goods" means goods identified and agreed upon at the time a contract of sale is made; and

(15) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872, have the meanings assigned to them in that Act.

Definition of terms.—In the old Chapter VII of the Contract Act there was no such corresponding section. Only a few terms, like 'goods', 'sale,' etc. were defined. The definitions in this section have been taken from Sec. 62 of the English Sale of Goods Act. The terms "Mercantile agent" and "Document of Title" were defined in the English Factors Act and those definitions have been adopted here with slight additions. It will be noticed that the definitions have been arranged in alphabetical order. Where the definitions are exhaustive, the word *"means"* alone is used, while in cases where the definition is intended to be descriptive, the words *'means and includes'* are used.

(1) Buyer.—As the definition of a 'Contract of Sale' in Sec. 4 includes both a sale and an agreement to sell the definition of buyer is so worded as to include a person who buys as well as one who agrees to buy goods but not a person who has only the *option to buy* goods.

(2) Delivery.—The essence of delivery is voluntarily parting with possession. In the words of Sir Frederick Pollock, delivery is "voluntary dispossession in favour of another." Therefore, in case of theft, there is no

delivery, though there is a transfer of possession. Possession generally includes custody and in the Factors Act of 1889 possession is in terms defined as custody. But there may be custody without possession (*e.g.,*) a servant put in charge of his master's goods[1] and *vice versa.* See Section 33 *infra.*

Delivery may be actual or symbolic or constructive. "Symbolic delivery" is sometimes said to be an instance of constructive delivery. It consists:

"Of such a transfer of control in fact, as the nature of the case admits and as will practically suffice for causing the new possessor to be recognised as such."[2]

For instance delivery of the key of a warehouse where the goods are kept, amounts to delivery of the goods. The transfer of a bill of lading is another example of symbolic delivery.[3]

Delivery is said to be constructive where there is a change in the character of the possession without any change of actual physical custody. Delivery by attornment is one instance of constructive delivery, for example (a) where a seller in possession of goods continues after sale to hold the goods as bailee,[4] or (b) where a third party in possession of the goods as bailee of the seller attorns to the buyer and continues to hold them as bailee of the latter, (c) where a buyer who is already in possession of the goods, holds them on his own account after sale to him.[5] **[1075]**

(3) Deliverable state.—In the repealed Sec, 80 of the Contract Act, the expression used in relation to this was "a state in which the buyer is to take them." This expression occurs in Secs. 20, 21, 22, 23, (1) and 36 (5) of the Act.

(4) Document of title to goods.—Sec. 62 of the English Act defines the term as having the same meaning as it has in the Factors Act; the Indian Act has taken and expanded the definition from Sec. 4 Clause (4) of the Factors Act of 1889, which reads:

> "1 (4). The expression 'document of title' shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other

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1. *Biddomoyee* v. *Sittaram,* (1878) 4 Cal. 497.
2. Pullock & Wright on Possession, p. 61; *Wrightson* v. *M.C. Arthur,* (1921) 2 KB 807.
3. *The Prinz Adalbert,* (1917) AC 586.
4. *Elmore* v. *Stone,* (1809) 127 ER 912 : 10 RR 578; *Castle* v. *Sworder,* (1861) 158 ER 341 : 123 RR 860.
5. *Dublin City Distillery Co.* v. *Doherty,* (1914) AC 823; *Marvin* v. *Wallis,* (1856) 119 ER 1035 : 105 RR 784.

document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented."

It will be seen that the definition in the Indian Act is wider.

BILL OF LADING :—

"A bill of lading is a receipt for goods actually delivered over and shipped aboard the ship named therein signed by the captain of the steamer or his representative."[1]

The assignment of a bill of lading operates as constructive delivery of the goods.[2] But, as pointed out in *Gurney* v. *Behrend*,[3] it is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a *bona fide* transferee for valuable consideration without regard to the title of the parties who make the transfer.

DOCK-WARRANT.—It is a document issued by a dock owner to the effect that the goods specified in the document with details of weights, measurements, etc., are deliverable to the person named therein or the assignee of such person. Such a warrant is not a symbol of the goods, as a bill of lading is. It is only an authority to receive possession.

WAREHOUSE-KEEPER'S CERTIFICATE.—This is a document where by a warehouse-keeper acknowledge that certain goods are deposited at his warehouse. It will not amount to a document of title, unless it is in the nature of a warrant, as distinct from a bare acknowledgment.

WHARFINGER'S CERTIFICATE.—The definition in the English Factors Act does not include this. The Indian Act has thus expanded the definition in the English Act. Like the warehouse-keeper's certificate, it is only an acknowledgment by a wharfinger that particular goods are lying at his wharf. It must however, be remembered that,

"as between buyer and seller a warehouse-keeper's certificate, dock-warrant, or delivery order or any similar document does not, like a bill of lading, represent the goods themselves, and so does not *per se* transfer possession; it operates

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1. For Lord Blackburn's definition **see** *Jute and Gunny Brokers Ltd.* v. *Union of India,* AIR 1961 SC 1214 : 1961 (3) SCR 820 : 1962 (32) CC 845.
2. *Ramdas* v. *Amerchand,* (1916) 40 Bom. 630 (637); *Nissim* v. *Haji,* (1916) 40 Bom. 11 : 17 Bom. LR 249 : 28 IC 433. **See also** *Sandars* v. *Maclean,* (1883) 11 QBD 327.
3. (1854) 118 ER 1275 : 97 RR 687. **See** *J.V. Gokhal & Co.* v. *The Asst. Collector of Sales Tax,* AIR 1960 SC 595 : 1960 SCJ 671 : 1960 (2) SCR 852 : 1960 (1) STC 186.

merely as an authority to receive the goods referred to in the document."[1]

RAILWAY RECEIPT.—Here again, the definition in the English Act does not specifically mention railway receipt. The Indian Act makes special mention of it, in accordance with a decision of the Privy Council in *Ramdas* v. *Amerchand,*[2] wherein there Lordships held that a railway receipt was an instrument of title within the meaning of Sec. 103 of the Indian Contract Act.

DELIVERY ORDER.—As Martin, B., observed in *Morgan* v. *Gath* [3] :—

"A delivery order is an order from the vendor to the warehouseman to deliver the goods to the vendee."

Although a delivery order is not (in the absence of proof of a special custom) a document of title at common law it is a 'warrant or order for the delivery of goods' within the statutory definition in Section 2 (4).[4] Pucca delivery orders, which would not enable a person to obtain delivery of goods on payment of price, would not be documents of title under the Sale of Goods Act.[5]

MATE'S RECEIPT.—A mate's receipt is a mere acknowledgment of the receipt of goods on board the ship, and the person in possession of it is generally entitled on surrendering the receipt to get a bill of lading.[6]

Ordinarily, the holder of the mate's receipt is the person entitled to the bill of lading.[7] The select Committee decided that a mate's receipt must not be

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1. **See** *Farina* v. *Home,* (1846) 153 ER 1124 : 73 RR 433; *Gunn* v. *Bolchow,* (1875) 10 Ch. Ap. 491.
2. (1916) 40 Bom. 630 : 18 Bom. LR 670 : 20 CWN 1182 : 31 MLJ 541 : (1916) 2 MWN 110: 4 LW 342 : 14 ALJ 1045 : 24 CLJ 320 : 35 IC 954 (PC); *Mercantile Bank of India* v. *Central Bank of India,* ILR (1938) Mad. 360 : 42 CWN 321 : 172 IC 745 : (1938) ALJ 273: 66 CLJ 510 : 40 Bom. LR 713 : 19 Pat. LT 147 : 47 LW 329 : (1938) MWN 552 : (1938) PC 52 : (1938) 1 MLJ 268. **See** *Morvi Mercantile Bank Ltd., by Official Liquidator* v. *Union of India,* AIR 1965 SC 1954 : 1965 (3) SCR 254 : 1965 (35) CC 629; *Calcutta Port Commr.* v. *G.T.C.,* AIR 1964 Cal. 290; *Union of India* v. *The West Punjab Factories Ltd.,* AIR 1966 SC 395 : 1966 (1) SCR 580.
3. *Morgan* v. *Gath,* (1865) 159 ER 726 : 140 RR 714. **See also** *Anglo-India Jute Mills* v. *Omademull,* (1910) 38 Cal. 127 : 10 IC 859; *Imperial Bank* v. *London & St. Katherine Docks Co.,* (1877) 5 Ch. D. 195. **See also** *Bayyana Bhimayya* v. *Government of A.P.,* AIR 1961 SC 1065; *State of A.P.* v. *Kolla Sri Ramamurthy,* AIR 1962 SC 1585.
4. *Bank of Baroda* v. *Official Receiver,* (1978) 2 Karn. LJ 171.
5. *Jaggilal Kamlapat* v. *Pratapmal Rameshwar,* AIR 1978 SC 389 : (1978) 1 SCC 69 : (1978) 2 SCR 219.
6. *Juggernath* v. *Smith,* (1906) 33 Cal. 547; *Natcheappa* v. *Irrawaddy Flotilla Co.,* (1914) 41 Cal. 670.
7. *Craven* v. *Ryder,* (1816) 128 ER 1103 : 16 RR 644; *Ruck* v. *Hatfield,* (1822) 106 ER 1321: 24 RR 507.

included in the definition of document of title. The reason, which weighed with the Select Committee, was that on the issue of a bill of lading without the mate's receipt having been surrendered, there will be two documents of title in relation to the same goods, which would be inconvenient from the business point of view.

"ANY OTHER DOCUMENT" ETC.—The latter portion of the definition must be construed as qualifying each of the particular documents already mentioned. To bring any document within the description of "document of title," it must be shown that it is used in the ordinary course of business as proof of possession or control or goods.

(6) Future goods.—Though the expression is not particularly happy, it has been retained as 'convenient'.[1] The English definition has been expanded by the addition of the word "produced" so as to include specifically agricultural products.

The term 'future goods' is used in juxtaposition to "existing goods." It may also be noticed that future goods are not the same as unascertained goods (*e.g.*,) the future crop of a particular named orchard is a class of future goods, midway between specific and unascertained goods. It is quite open to a person to sell or offer to sell goods, which he expects or hopes to acquire. Thus he may contract to sell crops that will be grown in future.[2] Or he may contract to sell oil, not yet pressed from seeds in his possession.[3] **[970]**

(7) Goods.—Here again, the Indian Act varies the English definition and adds to it. Thus stocks and shares, which are not goods in English law, are expressly included in the term. The Select Committee observes that this was done in accordance with the decision in *Fazal* v. *Mangaldas,*[4] where, with reference to the Contract Act, the Bombay High Court observed that the term 'goods' has a much wider sense than in English law. **[972]**

Shares are goods[5] store in their then condition or after breaking up,[6] and even electricity[7] have been held to be goods.

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1. *Ajello* v. *Worsely,* (1898) 1 Ch. 274.
2. *Watts* v. *Friend,* (1830) 109 ER 156 : 34 RR 477.
3. *Wilks* v. *Atkinson,* (1815) 128 ER 935.
4. (1922) 46 Bom. 489 : 23 Bom. LR 1144 : 66 IC 726 : (1922) Bom. 303. **See also** *Manekji* v. *Wadi Lal,* (1926) 50 Bom. 360 : 82 IC 977 : 25 Bom. LR 414 : (1923) Bom. 873 : (1926) PC 38; *Domingo* v. *De Souza,* (1928) 50 All. 695 : (1928) All. 481. **See also** *Badri Prasad* v. *State of M.P.,* AIR 1970 SC 706; *State of Maharashtra* v. *Champa Lal,* AIR 1971 SC 908 : (1971) 2 SCJ 657.
5. *P.L. Thakore* v. *Vasudeo,* (1973) 14 Guj. LR 363; *Manechji* v. *Wadilal,* AIR 1926 PC 538.
6. *Kulkarni* v. *The State,* AIR 1957 MP 45; *Madholal Sindhu* v. *Official Assignee,* AIR 1950 FC 21.
7. *Associated Powers Co. Ltd.* v. *Ram Saran Roy,* AIR 1973 Cal. 75 : 73 Cal. WN 701. **See** contra, *Maharashtra Bhupal Electric Supply Co.* v. *State of Rajasthan,* AIR 1973 Raj. 132.

MOVEABLE PROPERTY.—This has not been defined in the Act, but the General Clauses Act, Sec. 3 Clauses (25) and (34) defines the term by a process of elimination. **[950]** The interest of a partner in partnership assets consisting of immovable property is regarded as movable property.[1]

DECREE.—It has been held that a decree is movable property and as such falls within the definition of goods.[2]

MONEY.—This has necessarily to be excluded from the definition because in a transaction of sale, the contract is between the goods and the money paid for them. Of course, it is only current coin that is thus excluded.[3] Old coins which are in the nature of curios (*e.g.,*) a jubilee five pound gold piece, may well come within the definition of goods.[4] So also foreign money or currency.

Where however a particular sum of money is entrusted by one to another, the former may follow it or an equivalent of it in the hands of third parties to whom it has been given or claim a charge on any property acquired with the sum entrusted. To this extent, money is in the nature of goods.[5]

SHIP.—It has been held by Wright, J., in *Behnke* v. *Bede Ship Building Co.,*[6] that a ship is within the definition of goods." But it is not an ordinary chattel. As pointed out by Chalmers, it is a question English Law how far a ship can be properly said to come under the denomination "goods."[7]

ELECTRICITY, GAS, WATER.—It has been doubted whether these can be classed as goods for the purposes of the English Act.[8] The Calcutta High Court has observed that it is doubtful whether the Sale of Goods Act is applicable to electricity.[9] **[953]**

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1. *Narayanappa* v. *Bhaskar Krishnappa,* AIR 1966 SC 1300 : 1966 (3) SCR 400.
2. *Vithaldas* v. *Jagjivan,* (1939) 41 Bom. LR 33.
3. *Empress* v. *Joggessur,* (1878) 3 Cal. 379 (Currency notes are not 'goods' within the meaning of S. 76, Contract Act); *Koti Venkataramaniah* v. *Official Assignee,* (1909) 19 MLJ 283 : 2 IC 611.
4. *Moss* v. *Hancock,* (1899) 2 QB 111; *R.* v. *Dickinson,* (1920) 3 KB 552; *In re Mathur Lal Bai,* (1901) 25 Bom. 702 : 3 Bom. LR 392.
5. *Banque Belge* v. *Hambrouck,* (1921) 1 KB 321; (Cf.) *Knatchbull* v. *Hallett,* (1881) 13 Ch.D. 696.
6. (1927) 1 KB 649.
7. **See** observations of Turner, LJ, in *Hooper* v. *Gumm,* (1867) 2 Ch. Ap. 282.
8. **See** *Ferens* v. *O'Brien,* (1883) 11 QBD 21; *County of Durham, Electric Power Co.* v. *Commissioners of Inland Revenue,* (1909) 2 KB 604; *Erie County Fuel Co.* v. *Carroll,* (1911) AC 105; *Read* v. *Croydon,* (1938) 4 AER 631. (Sale of water is within the Act).
9. *Rash Behari Shaw* v. *Emperor,* (1936) Cal. 753 : 41 CWN 225; *Commr. of Sales Tax, M.P.* v. *M.P. Elec. Board,* AIR 1970 SC 732. **See also** cases cited under definition of goods.

THINGS ATTACHED TO, OR FORMING PART OF THE LAND.—Under this heading will come fixtures, and buildings sold as materials. In this connection the following remarks in Halsbury's Laws of England about the definition in the English Act are worthy of note.

> "The concluding words of the definition appear to give a general rule for dealing with all things attached to the land, other than emblements and industrial growing crops, and to get rid of subtleties as to whether they were to be severed by the buyer or seller or whether they were to get any benefit from remaining attached to the land before severance. Under the Act, the sole test appears to be whether the thing attached to the land has become by agreement, goods by reason of the contemplation of its severance form the soil".

It has been pointed out by the Rangoon High Court that the provisions of a special Act like the Sale of Goods Act, cannot, except in the branch of the law to which it specially applies, overrule a statute of the nature of the General Clauses Act.[1]

In *Mahadeo* v. *State of Bombay,*[2] the agreement was a complex one involving conveyance of tendu leaves, timber bamboos etc., soil for making bricks as well as the right to build on land and occupy it for the purpose of business and the rights were spread over many years. The Supreme Court held that it was not a contract for sale of goods simpliciter.[2]

ACTIONABLE CLAIMS.—Vide the definition in Section 3 of the Transfer of Property Act. **[952]**

(8) Insolvent.—The explanation to Sec. 96 of the Contract Act defined the term Insolvency for the purposes of that Act. The present definition is on the lines of the English Act.

It must be remembered that the word "Insolvent' is not used in the technical sense of the law of insolvency, but only in the broad sense of general inability to pay one's debts. Failure to pay one's debt admittedly due is held to be evidence of such general inability. There is no necessity for a formal adjudication.[3] Nor is it necessary that a person must have committed what is called an "act of insolvency". It has been held that the fact that the buyer had stopped payment is an act of insolvency such as to justify stoppage *in transitu*.[4]

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1. *Swami Iyah Nadar* v. *Commissioners of the Port of Rangoon,* (1931) 9 Ran. 13 : (1931) Ran. 109 : 134 IC 511.
2. 1959 SCJ 1021 : AIR 1959 SC 735.
3. *Queen* v. *Sadlers Co.,* (1863) 11 ER 1083 : 138 RR 217; *Biddlecombe* v. *Bond,* (1835) 111 ER 811 : 43 RR 351; *Nixon* v. *Verry,* (1876) 29 Ch.D. 196.
4. *Newsom* v. *Thornton,* (1805) 102 ER 1189 : 8 RR 278; *Dixon* v. *Yates,* (1833) 110 ER 806 : 39 RR 489; *Bird* v. *Brown,* (1850) 154 ER 1433 : 80 RR 775.

(9) Mercantile agent.—This definition is taken from the English Factors Act (1889), Sec. 1, Clause (1). It is necessitated by Secs. 27 and 30 which have modified old Sec. 108 of the Contract Act.

It may be mentioned that the Indian definition omits the word 'his' found in the English definition (*viz.*,) "in the customary course of *his* business." Whether the omission is designed or accidental, it does not make much practical difference.

Willes, J., observed in *Heyman* v. *Fleucker*[1] as follows:

> "The term agent does not include a mere servant or caretaker, or one who has possession of goods for carriage, safe custody or otherwise, as an independent contracting party, but only persons whose employment, corresponds to that of some known kind of commercial agent like that class (factors) from which the Act has taken its name."

(10) Price.—The 'Price' of a thing is its value as agreed upon between the parties, and expressed in terms of the currency of the country. No sale can take place without a price. It is this, which differentiates a sale from barter, or exchange where goods of one kind are given and goods of another variety are taken in return.[2] But it would appear that a sale may be made in consideration of receiving in return partly goods and partly money or either goods or money in the alternative.[3] Where there is no consideration given for parting with the goods it becomes a case of gift and the rules relating to sale of goods have no application at all.

(11) Property.—The definition follows the English Act. It is used in the sense of 'ownership'. The term 'special property' has been long in use in English law. For instance, where an owner of property pledges it, the former has the general property in the article, while the pledgee has a special property in the same.[4] Again, it is possible to transfer the general property in goods to one person subject to a special property or interest in the same goods in favour of another person.[5] As has been pointed out,[6] it would have been better to have used the term "special interest".

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1. (1863) 143 ER 205 : 134 RR 629. See also *Wood* v. *Ratcliffe*, (1846) 67 ER 1132 : 77 RR 68. *Lamb* v. *Attenborough*, (1863) 121 ER 922 : 124 RR 772. A broker in jewellery is a mercantile agent. See *Solaiman* v. *Ma Yaw*, (1934) Ran. 198 : 151 IC 413; *Sitaram Co.* v. *Ratilal Ramlal*, AIR 1969 Cal. 472.
2. *Harrison* v. *Luke*, (1845) 153 ER 423.
3. See *Aldridge* v. *Johnson*, (1587) 119 ER 147b : 110 RR 875; *South Australian Insurance Co.* v. *Randell*, (1869) 3 PC 101.
4. *Halliday* v. *Holgate*, (1868) LR 3 Ex. 299.
5. *Franklin* v. *Neate*, (1844) 153 ER 200 : 67 RR 683.
6. See *The Odessa*, (1916) AC 145.

Further, a distinction has to be made between a right of property in goods and a right to possession of them. It is quite possible that the two rights may vest in different persons.[1]

(12) Quality of goods.—There is a distinction between the description of goods in a contract and the quality of goods. In *Manchester Lineres* v. *Rea*.[2] Lord Dunedin observed:

> "The tender of anything that does not tally with the specified description is not compliance with the contract. But when the article tendered does comply with the specified description, and the objection on the buyer's part is to the quality alone, then Sec. 14(1) [corresponding to Sec. 16(1) of the Indian Sale of Goods Act] settles the standard and the only standard by which the matter is to be judged."

The definition is necessitated by Secs. 16 and 17 *infra*.

(13) Specific goods.—The definition in the English Act is the same. The contrast is between specific and generic or unascertained goods, (*i.e.*), goods defined only by description.[3] Generally, 'future goods' will be outside the category of 'specific goods'. There is, however authority for the view that the term 'specific goods' may be applied to the unascertained product of what is specific, and is not necessarily confined to goods actually existent.[4]

Specific and unascertained goods—Distinction.—In case of a sale of specific goods, since ownership passes to the buyers the seller must actually deliver the goods agreed upon, failing which a suit for specific performance will lie. But, if the contract is for unascertained goods, no property can be transferred till the goods are ascertained and it is sufficient if the seller delivers goods answering the description in the contract. A contract for sale of unascertained goods is not a complete sale but only an agreement to sell.[5]

3. Application of provisions of Act IX of 1872.—The unrepealed provisions of the Indian Contract Act, 1872 save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts for the sale of goods.

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1. *Mulliner* v. *Florence*, (1878) 3 QBD 484; *Nyberg* v. *Handelaar*, (1892) 2 QB 202.
2. (1922) 2 AC 74 (80).
3. *Lal Chand Deep Chand* v. *Baij Nath Jugal Kishore*, (1936) 63 Cal. 736 : 169 IC 128 : (1937) Cal. 140.
4. *Howell* v. *Coupland*, (1876) 1 QBD 258. **But see** *In re. Wait*, (1927) 1 Ch. 606; *Kursell* v. *Timber Operators*, (1927) 1 KB 298.
5. *Ram Narain Mahto* v. *State of Madhya Pradesh*, (1970) 2 SCJ 367 : (1970) 1 SCC 5.

Contract Act applicable.—Though the law as to sale of goods has been codified in a separate enactment, it does not cease to be part of the general law of contracts: and so this section provides that the general principles of the law of contracts will continue to apply to contracts of sale of goods. So, the rules as to formation, the capacity of parties, etc., will equally govern contracts for the sale of goods. Again in case of breach of a contract of this kind, the measure of damages will be that indicated generally in Secs. 73 and 74 of the Indian Contract Act.

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CHAPTER II

FORMATION OF CONTRACT

CONTRACT OF SALE

4. Sale and agreement to sell.—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Analogous law.—Sec. 1 of the English Act runs thus.—

> "1. (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another."

Clauses (2), (3) and (4) same as in the Indian Act.

Sub-section (1)—Contract of sale.—The expression is a generic term comprising both executory and executed contracts of sale. Where it is executory, the contract has been called in the present Act, an "agreement to sell," meaning, "contract to sell". It may be mentioned here that the Sale of Goods Act does not maintain the distinction made in the Indian Contract Act between 'agreement' and 'contract'. **[955]** Under the Sale of Goods Act, normally a transaction of sale is effectuated only where in pursuance of the contract of sale the transfer of property in the goods takes place on the payment of the price.[1]

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1. *Madanlal Agarwala* v. *Union of India,* 1974 (4) CWR 365; *Hindustan Handloom Factory* v. *Rameshwar Dayal,* (1974) Cur. LJ 577.

For a sale of goods there must be an agreement between the parties for the sale of the very goods in which eventually property passes.[1]

The existence of a contract of sale is a *sine qua non* for the coming into existence of a sale.[2]

Where a document which is in the nature of a receipt discloses the particulars of buyer, seller, property and sale price and also indicates the date of sale transaction, the defendant cannot argue that the document in question does not amount to an agreement to sell, when it contains all features of agreement to sell.[3]

Essentials of a contract of sale.—

(i) TRANSFER OF PROPERTY.—There must be a transfer of the absolute of general property in the thing sold. The transfer of any special property in the thing (*e.g.*) a pledge will not amount to a sale. It has been held that the transactions under the statutory orders are no sales.[4]

(ii) BY THE SELLER TO THE BUYER.—The essence of sales is transfer of property from one person to another. The seller and buyer must be different persons. It must, therefore follow that as a general rule a person cannot purchase his own goods.[5] Thus, where a club supplies liquor for a price to a member, the transaction is not one of sale.[6] But there are some exceptions. The section itself provides for one such (*viz.*) that one part-owner may sell to another. Thus in the case of partners, one of them may sell to the firm or the firm may sell to him.[7] Another exception is that a person whose goods are sold

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1. *State of Gujarat* v. *Variety Body Builders,* AIR 1976 SC 2108.
2. *Ram Naresh Rai* v. *State of Bihar,* AIR 1979 Pat. 130.
3. *Sanjay Puri* v. *Radhey Lal,* 2006 (2) CTLJ 159 (Del).
4. *Chhitter Mal Narain Das* v. *Commissioner of Sales Tax,* AIR 1970 SC 2000 : 1971 (1) SCR 671 : (1970) 3 SCC 809 : 1970 (26) STC 344; *New India Sugar Mills Ltd.,* v. *Commr.Sales Tax, Bihar,* AIR 1963 SC 1207 : 1964 (1) SCJ 644 : 1963 (14) STC 316 : 1963 Suppl. (2) SCR 459; *State of Rajasthan* v. *Karam Chand Thappar,* AIR 1969 SC 343 : 1969 (1) SCR 861 : 1969 (23) STC 210; *Andhra Sugars Ltd.* v. *State of A.P.,* (1968) 1 SCJ 694 : AIR 1968 SC 599; **see** *Indian Steel and Wire Products Ltd.* v. *State of Madras,* AIR 1968 SC 478 : 1967 (21) STC 138.
5. *King* v. *England,* (1864) 122 ER 654 : 129 RR 923; *Plasycoed Colleires Co.* v. *Partridge Jones Co.,* (1912) 2 KB 345; *Moore* v. *Singer Mfg. Co.,* (1904) 1 KB 820. **See also** *Nyberg* v. *Handelaar,* (1892) 2 QB 202; *State of Gujarat* v. *Variety Body Builders,* AIR 1976 SC 2108 : 1976 Suppl. SCR 131 : (1976) 3 SCC 500 : 1976 (38) STC 176.
6. *Graff* v. *Evans,* (1882) 8 QBD 373; *Davies* v. *Burnett,* (1902) 1 KB 666; *Humphrey* v. *Tudgay,* (1915) 1 KB 119; *Farrars* v. *Farrars,* (1888) 40 Ch.D. 395 (409); *Andrew Yule & Co.* v. *Ardeshir,* (1914) 16 Bom. LR 178 (185); *Commercial Officer* v. *Enfield India Ltd.,* AIR 1968 SC 838.
7. *Cooper, Ex. p., Re. McLaren,* (1879) 11 Ch.D. 68.

in execution may purchase them himself. Similarly an insolvent may buy back from the assignee in bankruptcy; so also the pledgor of goods may buy, at a sale pledged by the pledgee of the goods. The law, however, on grounds of public policy forbids the seller from purchasing himself.[1] **[954]**

Transaction between two partnerships having identical partners is not a sale.[2]

(iii) FOR A PRICE.—In a contract of sale, the most essential element is the price and where there is no evidence as to price, there is no binding contract.[3] A transaction will be a sale only where for money consideration property is transferred under a contract of sale.[4] Supply of goods by a building contractor in execution of the construction of the building is not a sale of goods.[5] The price must be in terms of money, paid or promised. Where consideration other than money is given, it is not a case of sale.[6] Where no consideration is given, it is a gift.[7] It has, however, been held that the consideration may consist partly of goods and partly of money.[8]

It is necessary to distinguish sale from various transactions, which have some elements common to it.

Sale and exchange. —In exchange or barter, the consideration for the transfer of goods is the delivery of other goods. The essential element of exchanging price in terms of money is wanting here. Thus, in *Volkart Bros.* v. *Vettivelu*,[9] where a dealer delivered cotton to the owner of a cotton press, and the property in it vested in the owner, who was to give in exchange cotton of like quantity and quality, it was held that it was not a sale transaction, but an agreement for exchange. The exchanging of money in one form for money in another form, (*e.g.*), currency notes for coins, is not a sale. As was said in a Calcutta case, "Either form being legal tender, it is impossible to say that one

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1. *Moore Nettlefold & Co.* v. *Singer Manufacturing Co.*, (1904) 1 KB 820; *Plasycoed Colleries Co.* v. *Partridge Jones & Co.*, (1912) 2 KB 345.
2. *Mahendrakumar Co.* v. *State of Madras*, AIR 1968 Mad. 241.
3. *Trevellion* v. *Minck*, (1934) All. 203 : (1934) ALJ 43 : 147 IC 982.
4. *New India Sugar Mills Ltd.* v. *Commissioner of Sales Tax*, AIR 1963 SC 1207, 1211 : 1964 (1) SCJ 644 : 1963 (14) STC 316 : 1963 Supp. (2) SCR 459.
5. *State of Madras* v. *Gannon Dunkerley*, AIR 1958 SC 560 : 1958 SCJ 696 : 1959 SCR 379: 1958 (9) STC 353. **See also** AIR 1979 All. 174.
6. *Empress* v. *Appavu*, (1885) 9 Mad. 141 (Payment of wages in liquor is not a sale of liquor).
7. *Cochrane* v. *Moore*, (1890) 25 QBD 57 (Distinction between sale and gift); *Stoneham* v. *Stoneham*, (1919) 1 Ch. 149.
8. *Aldridge* v. *Johnson*, (1857) 119 ER 1476 : 110 RR 870. **See also** *South Australian Insurance Co.* v. *Randell*, (1869) 3 PC 101; *Dawson (Clapham) Ltd.* v. *Dutfield*, (1936) 2 AER 232.
9. (1887) 11 Mad. 459.

is the price of the other."[1] But money, which is not current coin of the realm, may be the subject of sale, (*e.g.*), foreign currency or uncurrent obsolete coins may be sold as goods.[2] **[954]**

Sale and contract for work and materials.—This distinction has been debated as early as the time of the Roman Jurists and opinions have varied as to the exact test of differentiation. In *Lee* v. *Griffin*,[3] a lady ordered a set of false teeth to be made and fitted to her mouth, but died before they were fitted. It was held that it was not a contract for work and materials, but for sale of a chattel. Since the decision in this case, the accepted test seems to be that, "if the contract is intended to result in transferring for a price an article in which the transferee had no previous property, it is a contract of sale." **[830]** The above case has been followed in a Nagpur case where the facts were *ad idem*.[4]

In an English case, *Robinson* v. *Graves*,[5] an oral commission for painting a portrait for a sum fixed was held to be a contract for work and labour. But, even in the case of a contract to do work, it is possible that the property in any article incidentally produced may pass to the party for whom the work is done. Thus, where an architect is employed to carry out alterations in a building after preparing plans therefor, the property in the plans will pass to the owner of the house on payment of the remuneration.[6]

Sale and bailment.—In both, there is a delivery of property by one person to another. But the delivery in case of bailment is for a certain purpose and the bailee has to redeliver the goods after the purpose of the bailment is over.[7] In case of sale, there is, of course, no question of specific return of the chattel. **[958]**

Sale and hire purchase agreement.—The hire purchase contract is a development of modern commercial transactions. The chief feature of this contract is that though the chattel has been delivered over, the property in it remains with the owner until the fulfilment of certain conditions by the person who has taken delivery.[8] **[958]**

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1. *Empress* v. *Joggessur*, (1878) 3 Cal. 379; *Moss* v. *Hancock*, (1899) 2 QB 111.
2. *Re. Mathur Lal*, (1901) 25 Bom. 702 : 3 Bom. LR 392; (Cf.) *Koti Venkataramaniah* v. *Official Assignee Madras*, (1909) 33 Mad. 196 : 19 MLJ 283.
3. (1861) 121 ER 716 : 124 RR 555; *Anglo-Egyptian Navigation Co.* v. *Rennie*, (1875) LR 10 CP 271; (Cf.) *Tripp* v. *Armitage*, (1839) 150 ER 1597 : 51 RR 762; *Dixon* v. *London Small Arms Co.*, (1876) 1 AC 632; *Clarke* v. *Bulmer*, (1843) 152 ER 793; *State of Gujarat* v. *Variety Body Builders*, AIR 1976 SC 2108 : 1976 Supp. SCR 131 : (1976) 3 SCC 500 : 1976 (38) STC 176.
4. *Baretto* v. *Prue*, (1939) Nag. 19.
5. (1935) 1 KB 579. Cf. *Camera House Bombay* v. *State of Maharashtra*, AIR 1969 Bom. 437.
6. *Gibbon* v. *Pease*, (1905) 1 KB 810.
7. **See** *South Australian Insurance Co.* v. *Randell*, (1869) 3 PC 101 and *Comber* v. *Leyland*, (1898) AC 524.
8. *Gopal Tukaram* v. *Sorabji*, (1904) 6 Bom. LR 871.

In a typical hire-purchase agreement property does not pass when the agreement is made but only passes when the option is finally exercised after complying with all the terms of the agreement.

Where the petitioner is not a dealer of motor vehicles but is only an independent business of finance providing money to the petitioner to enable him to buy a car under an arrangement in the form of hire purchase agreement, the petitioner is the owner of the car but not the hirer despite the execution of the hire purchase agreement, since the hirer hiring the goods gets an option to buy the goods whereas when the person borrows money from the lender and pays to the seller the transaction between the buyer and the lender will be that of a transaction of loan.[1]

The position of the owner of the goods under a hire purchase agreement is that of a person who has made an irrevocable offer to sell. There is thus an obligation to sell, but no obligation to buy.[2]

A hire-purchase agreement is a contract of bailment plus something more, the hirer has the benefit of hiring, being the bailment part of the contract and the option of purchase constituting a separate and proprietary right capable of independent assignments.

In the case of a hiring agreement *simpliciter,* the hirer has the right to terminate the hiring whenever he pleases, and relieve himself from liability for future instalments.[3] And where the agreement provides a right to seize the goods on default of payment of the hire, he owner may retake possession without prejudice to his right to recover arrears of hire.[4]

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1. *Tarun Bhargava* v. *State of Haryana,* AIR 2003 P&H 98, 103 : 2003 (1) Civ. CR 758 (P&H).
2. *Helby* v. *Mathews,* (1895) AC 471. **See also** *Belsize Motor Supply Co.* v. *Cox,* (1914) 1 KB 244; *Brooks* v. *Beirnstein,* (1909) 1 KB 98; *Auto Supply Co.* v. *Raghunatha,* (1928) 52 Mad. 829 : (1929) Mad. 884 : 57 MLJ 618 : 30 LW 317 : 121 IC 539; (Cf.) *Lee* v. *Butler,* (1893) 2 QB 318.
3. *Mahabali Prasad* v. *Palmer,* (1932) 54 All. 781 : 141 IC 615 : (1932) All. 607; *Tiwari* v. *Remington Rand,* (1934) Nag. 151 : 30 NLR 343 : 150 IC 66; *Balmukund* v. *Mahesh Narayan,* (1934) Oudh 133 : 148 IC 793 : 11 OWN 454; *Telco* v. *Bharat Mining Corporation,* AIR 1980 Bom. 168; *K.L. Johar & Co.* v. *Dy. Commercial Tax Officer,* AIR 1965 SC 1082 : 1965 (2) SCR 112 : 1965 (16) STC 213.
4. *Brooks* v. *Beirnstein,* (1909) 1 KB 98; *Abdul Quader* v. *Watson,* (1930) 8 Ran. 236 : 125 IC 361 : (1930) Ran. 193; *Auto Supply Co.* v. *Raghunatha,* (1929) 52 Mad. 829, **see** Note 7, p. 1013. **See also**, *Masseys Ltd.* v. *Krishnaswami Iyer,* (1935) MWN 803 : 42 LW 578 : 158 IC 1001 : (1935) Mad. 603 : 69 MLJ 69 (A demand for arrears of hire after a notice determining the hire purchase agreement does not amount to a waiver of the notice); *South Bedfordshire Electrical Finance Co.* v. *Bryant,* (1938) 3 AER 580.

But it happens that some of the hire purchase agreements so called are really binding contracts of sale, with liberty to pay the price in instalments. It is a question of construction in each case, whether it is a contract of sale or hire.[1]

Where under a loan agreement relating to purchase of vehicle, forcible repossession of the property without having recourse to the court's intervention is an offence in view of the borrower having become the owner and the rulings of the Apex Court that in cases of hire purchase agreement that no owner can be held guilty of his own property has no application when the transaction in substance is loan transaction.[2]

The distinction assumes importance where the so-called hirer parts with the goods to third parties acting *bona fide.* Where the contract is one of sale, third parties will get a good title under Sec. 30(2).

It is open to the hirer to assign his interest under the agreement in the absence of a contract to the contrary.[3]

The law on this subject has been separately codified in England in the Hire Purchase Act 1938.[4]

Sale and agency.—The true relationship has to be gathered from the nature of the contract, terminology used by the parties is not decisive of the legal relationship.[5] Where goods were delivered by A to B for resale in the United Kingdom and the contract fixed a definite price for the goods, made time essence of the contract and fixed the responsibility for the quality of the goods on the seller, it was held that the legal relationship between the parties was that of a seller and purchaser and not that of a principal and agent and that B was not an agent of A.[6] Where a Co-operative Society received cotton

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1. *McEntire* v. *Crossley Bros.*, (1895) AC 457; *McKenzie* v. *Mohammad Ali Khan*, (1929) 4 Luck. 510 : 115 IC 102 : (1929) Oudh 155; *Cole* v. *Nanalal*, (1927) 49 Bom. 172; *Bhimji* v. *Bombay Trust Corporation*, (1930) 54 Bom. 381 : 124 IC 800 : (1930) Bom. 306; (Cf.) *A.G.* v. *Pritchard*, (1928) 97 LJKB 561; *Manikchand* v. *Berar Motor Supply Co.*, (1938) Nag. 18; *Mahomed Ismail* v. *Provincial Automobile Co.*, (1937) Nag. 198; 171 IC 781; *Navnitdas* v. *Manchursa*, (1934) Nag. 78 : 30 NLR 213 : 148 IC 822; *Anand* v. *Commercial Credit Corporation*, (1935) Lah. 861 : 37 PLR 293.
2. *Tarun Bhargava* v. *State of Haryana*, AIR 2003 P&H 98, 112 : 2003 (1) Civ. CR 758 (P&H).
3. *Whiteley* v. *Hilt*, (1918) 2 KB 808.
4. 1 & 2 Geo. VI Ch. 53.
5. *Sri Tirumala Venkatewara Timber & Bamboo Firm* v. *C.T.O.*, AIR 1968 SC 784 : (1968) 2 SCJ 344 : Cf. *Modi Vanaspati Manufacturing Co.* v. *Kaithar Jute Mills*, AIR 1969 Cal. 496; *Bhopal Sugar Industries Ltd.* v. *Sales Tax Officer, Bhopal*, AIR 1977 SC 1275 : 1977 (3) SCR 578 : (1977) 3 SCC 147 : 1977 (40) STC 42.
6. *Gordon Woodroffe & Co.* v. *Shaik M.A. Majid & Co.*, AIR 1967 SC 181 : (1967) 2 SCJ 387.

from its members, pressed it into bales and thereafter sold the bales, the transaction was not one of purchase from its members, pressed it into bales and thereafter sold the bales, the transaction was not one of purchase from its members by the Society. The Society acted only as the common agent of its members.[1]

Where the real effect of a transaction is to transfer to a person all the rights of an owner of property in return for a price, the transaction will be deemed to be a sale, though it may be called an agency or guarantee.[2] Again, a person who guarantees the payment of the price for goods sold through him is only an agent, perhaps of the *del credere* type, and is in no sense a purchaser.[3] In *Ex parte White*[4] there is an interesting exposition of the principles by which a contract of "sale or return" is to be distinguished from a contract of agency. **[966]**

Ostensible sale.—AMBIGUOUS CONTRACTS.—Sec. 66(3) of the Act provides that the Act has no application to a transaction, which though in form a contract of sale, is intended to operate as a mortgage or pledge or other security. So it may be open to the seller in any particular case to plead that no property was intended to pass, and that the transaction was really a bailment.[5] Similarly, the buyer may plead he was a mere agent.[6] In *Weiner* v. *Harris,*[7] where articles of jewellery had been sent to one Fisher on "sale or return", the Court held that in the circumstances, it was a case of agency for sale, and not of sale outright.

It is a question of real substance and not of mere form, whether a given contract is one of sale or some other kind of contract.

Conditions precedent concurrent and subsequent.—As a contract of sale includes both a sale and an agreement to sell, it follows that both of them may be conditional. As the contract of sale is made by the *consensus* of parties, the parties may mutually agree upon whatever terms they please as governing the contract. Thus, in the case of an agreement to sell, a person may contract unconditionally to sell goods to be acquired; or he may contract to sell conditionally on the acquisition by him of such goods. Sale of goods "to arrive" is an instance. Again, parties may attach certain consequences to the non-fulfilment of conditions, (*e.g.,*) mutual discharge of obligations.[8]

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1. *Khedut Sahakari Ginning & Pressing Society* v. *State of Gujarat,* AIR 1972 SC 1786 : (1971) 3 SCC 480 : 1972 (1) SCR 714.
2. *Hutton* v. *Lippert,* (1883) 8 AC 309; *Pye* v. *British Automobile Syndicate,* (1906) 1 KB 425.
3. *Ex parte Bright, In re. Smith* (1879) 10 Ch.D. 566.
4. (1870) 6 Ch.A. 397. **See also** *Weiner* v. *Harris,* (1910) 1 KB 285; *Lamb* v. *Goring Brick Co.,* (1932) 1 KB 710 and Note 1, p. 464 *ante.*
5. *Lee* v. *Lancashire & Yorkshire Rail Co.,* (1871) 6 Ch. App. 527.
6. *Miller* v. *Newman,* (1842) 134 ER 266.
7. (1910) 1 KB 285.
8. **See** *Calcutta & Co. Ltd.* v. *De Mattos,* (1863) 139 RR 752 : 32 LJQB 322.

Conditions may be divided into three classes, (i) Conditions precedent or suspensive conditions; (ii) Conditions concurrent; (iii) Conditions subsequent or resolutive conditions. the effect of a condition precedent is to keep in abeyance or suspend the obligations of one party till the fulfilment by the other of certain conditions. For instance, where goods are sold by weight or measure, the weighment and measurement are conditions precedent to any liability cast on the other party. In case of non-fulfilment of a condition precedent, the other party is discharged from his obligations. Concurrent conditions are in the nature of reciprocal promises, which have to be simultaneously performed. In the modern conception of a sale, payment and delivery are in the nature conception of a sale, payment and delivery are in the nature of concurrent conditions. Conditions subsequent or resolutive conditions are those which provide for the defeasance of a certain right on the happening of a specified even (*e.g.*,) where goods are sold with a condition that they may be return if not approved, there is an actual sale here and property has passed, but it is subject to defeasance on fulfilment of the condition subsequent (*viz.*), non-approval.[1] Another instance is that of an auction on condition that the goods will be resold on default of payment by a fixed time.[2]

Conditions may be express or implied Secs. 11 to 17 of the Act deal with conditions implied by law.

Sub-clauses (3) and (4)—Sale and agreement to sell.—The Special Committee remarked:

> "The distinction between a sale and an agreement to sell which was not clear in Chap VII of the Contract Act has been clearly brought out. The distinction is very necessary to determine the rights and liabilities of the parties to the contract."

Where the property in the goods is transferred *in praesenti* to the buyer, the transaction is a sale. But, if the property in the goods is to be transferred at a future time or the transfer, is to take place subject to some conditions thereafter to be fulfilled, the transaction is an agreement to sell. The distinction is thus grounded on the passing of the property in the goods. **[957]**

An agreement of sale is different from sale and in the former title to the property agreed to be sold still vests with the vendor whereas in the later title to the property vest with the purchaser.[3]

WHEN AGREEMENT TO SELL BECOMES A SALE.—It is open to the parties to make any arrangement they please as to the passing of

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1. *Head* v. *Tattersall,* (1871) LR 7 Ex. 7.
2. *Lamond* v. *Davall,* (1847) 115 ER 1569 : 72 RR 502; *Cooper* v. *Dickenson,* (1615) 81 ER 60.
3. *B.R. Koteshwara Rao* v. *G. Rameshwari Bari,* AIR 2004 AP 34.

property. Where the intention of parties is not clear, certain broad rules for determination of the question have been enunciated in secs. 18 to 25 *infra*.

Under a contract of sale where the intention of the seller and buyer is clearly manifested that no property in goods was to pass until the price of goods was finally paid, the property in goods remains with the seller, although physical possession of goods is with the buyer.[1]

In a Nagpur ruling, it has been held that it is not open to a party to take up for the first time in appeal or revision, the plea that an agreement is not a sale but only an agreement to sell.[2]

Quasi contracts of sale.—Neither the Indian nor the English Act deals with quasi contracts of sale. Chalmers describes it thus:

> "By a quasi contract of sale is meant a transaction to which, independently of the will of the parties, the law annexes consequences similar to those which result from a sale. A satisfied judgment in trover, trespass or detinue operates as a sale."[3]

FORMALITIES OF THE CONTRACT

5. Contract of sale how made.—A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed.

(2) Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

Analogous Law.—The English Sale of Goods Act, Sec. 3 runs thus :–

> "Subject to the provisions of this Act and of any statute in that behalf, contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly by word of

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1. *Asea Brown Boveri Ltd.* v. *O.L. Polysters Ltd.*, AIR 2002 NOC 56 (Guj).
2. *Mahomed Ismail* v. *Provincial Automobile Co.*, (1937) Nag. 198 : 171 IC 781.
3. (Cf.) *Brinsmead* v. *Harrison*, (1871) LR 6 CP 584; *Ex. p. Drake*, (1877) 5 Ch.D. 866; *Cohen* v. *Roche*, (1927) 1 KB 169; *Lee* v. *Shore*, (1822) 107 ER 36 : 25 RR 317. **See** *Indian Steel and Wire Products Ltd.* v. *State of Madras*, AIR 1968 SC 478 : 1968 (1) SCR 479 : 1968 (21) STC 138.

mouth, or may be implied from the conduct of the parties. Provided that nothing in this section shall affect the law relating to corporations."

Previous law compared.—The first part of the section reproduce in clearer language old Sec. 78 of the Contract Act. The Special Committee felt that the enumeration of the circumstances constituting a sale in the old section was neither accurate nor complete, and that the rule as to passing of property was vague and indefinite. Moreover the old section referred both to the making of the sale and the passing of property. The Special Committee decided to keep the two distinct. Besides, the section mixed up acceptance of goods with acceptance of an offer to sell goods.

It will be noticed that clause (1) of the section has no analogue in the English Act. It is based on the general principle of the Contract Act that a contract is effected by offer and acceptance, accompanied by consideration.

The second part of the section is based on Sec. 10 of the Indian Contract Act and Sec. 3 of the English Act. The proviso in the English Act that it does not affect the law relating to corporations has been omitted in the Indian Act in view of the opening words of the clause, "subject to the provisions of any law for the time being in force."

Formalities.—The section makes it clear that a contract of sale can be made by mere offer and acceptance. There must be acceptance both of the purchase and the price.[1] Neither payment nor delivery is necessary for the purpose.[2] Though passing of title is an essential ingredient of sale physical delivery of the goods is not essential.[2] Nor are any special formalities necessary for the formation of a contract of sale, except where the provisions of any other law in force require it (*e.g.,*) shares under the Companies Act, bills of exchange, cheques etc., under the Negotiable Instruments Act, patent rights under the Indian Patents Act, etc.

Writing.—Sec. 3, Clause (58) of the General Clauses Act provides that writing includes printing, lithography, photography and other modes of representing or reproducing words in a visible form.

Whereas contract is partly in print and partly in hand-writing greater effect should be given to the written words, as they are the result of deliberation. But the printed words are not to be altogether disregarded.[3] The court must construe the document as a whole.

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1. *A.R.G.K. & Co. Ltd.* v. *Ramanarayan,* AIR 1961 AP 408 : 1960 ALT 882.
2. *District Board* v. *Hira Singh,* AIR 1968 Punj. 289.
3. See the principles discussed in *Glynn* v. *Margetson,* (1893) AC 351; *Noorbhai* v. *Allabux,* (1917) 19 Bom. LR 845 : 42 IC 820; *Mohanlal* v. *Krishna Premji,* (1928) 30 Bom. LR 415 : (1928) Bom. 170 : 109 IC 470; *Paul Bier* v. *Chotalal,* (1906) 30 Bom. 1 : 6 Bom. LR 948.

Contract implied from conduct.—A contract of sale may be implied from the conduct of parties as an inference of fact [1] or as an inference of law.[2] There need not be even any intention to make a contract. Where a person so conducts himself as to be estopped from denying that he is the buyer or seller, there is what may be called a sale by estoppel.[3]

Earnest.—Sec. 78 of the Contract Act made mention of 'earnest' in connection with a contract of sale. The subject of earnest and deposit has been already dealt with.

SUBJECT-MATTER OF CONTRACT

6. Existing or future goods.—(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods.

(2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

Analogous law.—Section 5 of the English Sale of Goods Act provides.—

> "(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."

Clauses (2) & (3), same as in the Indian Act.

Clause (1)—Goods owned or possessed by the seller.—Sales of goods possessed, but not owned by the seller, may be instanced in sales by agents, pledgees, etc.

Sale of future goods.—A present sale of future goods may be made. Strictly it does not amount to a sale for a person cannot sell what he has not

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1. *Brogden* v. *Metropolitan Railway Co.*, (1877) 2 AC 666; *Falcke* v. *Scottish Imperial Insurance Co.*, (1887) 34 Ch.D. 234.
2. *Gore* v. *Gibson*, (1845) 153 ER 260 : 67 RR 762.
3. *Farquharson* v. *King & Co.*, (1902) AC 325; *Henderson* v. *Williams*, (1895) 1 QB 521.

got.[1] It is only an agreement of sale.[2] A person may sell or offer to sell goods of which the is not the owner but which he expects or hopes to acquire.[3] A contract for sale of goods to be delivered at a future date is not invalid merely by reason of the fact that the seller has not got the goods in present possession, nor has contracted for their purchase nor has any expectation of getting them otherwise than by purchase after the making of the contract in question.[4]

Again, though the subject of sale has no present existence, yet if it be the natural product or expected increase of something, to which the seller has a present vested right, the sale will be good. Thus a valid sale may be made of the wine that a vineyard is expected to produced or the grain that a field is expected to grow, or the mild that a cow may yield during the coming year, or the future young that shall be born of the sheep, or the wool that shall grow upon them.[5] So also, an expectation, which is dependent on chance, may be sold *(e.g.,)* a fisherman agreeing to sell the casting of his net before casting it. **[970]**

Clause (2)—Contingent contracts.—See Secs. 31 to 36 of the Indian Contract Act.

Clause (3)—Present sale of future goods.—This section makes it clear that a present sale of future goods operates only as an agreement to sell. As it has been put in Halsbury's Laws of England:

> "A man cannot sell what he has not got but he can agree to sell property which he expects to acquire, and then, when the property is acquired, the agreement to sell attaches."[6]

Where a present sale of future goods is made, the property in them does not pass until the seller appropriates the goods to the contract or the buyer takes possession to them under a licence to seize, in which case the seizure will be equivalent to delivery by the buyer.[7]

Sub-section (3) is merely a particular instance of the sale of future goods and postulates that there can be a sale of future goods and there can also be a contingent contract.[8]

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1. *Bhimayya* v. *Government of Andhra Pradesh*, AIR 1957 AP 389 : ILR (1957) AP 63.
2. *Moti Ram* v. *Kalawati Ram*, AIR 1967 All. 484.
3. *Ajello* v. *Worsley*, (1898) 1 Ch. 274.
4. *Hibble White* v. *M'Morine*, (1839) 151 ER 380 : 55 RR 578.
5. *Grantham* v. *Hawley*, (1615) 80 ER 281. See *Moti Ram* v. *Kalawati Ram*, AIR 1967 All. 484.
6. **See also** *Lunn* v. *Thornton*, (1845) 135 ER 587 : 68 RR 721.
7. *Langton* v. *Higgins*, (1859) 157 ER 896 : 118 RR 515; *Congreve* v. *Evetts*, (1854) 156 ER 457 : 102 RR 590; *Union of India* v. *Tarachand*, AIR 1976 MP 101.
8. *Bhaskar Rao* v. *C.V.K. Rao*, AIR 1964 AP 77 : (1963) 2 An. WR 288.

A promise to supply the goods as soon as the goods were received from the mill indicates merely the process of delivery and cannot be construed to contemplate the possibility of the goods not being delivered at all.[1] The words "will be shipped to your friends as soon as delivered to us" would not make the contract conditional.[2]

Equitable assignments.—In this connection, we may mention that in English law, what are called equitable assignments are recognised, and in present sale of future goods, for instance, when the goods become identified, the vendee becomes entitled to the benefit interest and may invoke equitable remedies to protect the same.[3] Of course, the section as such will not apply to such cases. But, the principle has been applied in India.[4]

7. Goods perishing before making of contract.—

Where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract.

Analogous law.—Section 6 of the English Act provides:—

> "6. Where there is a contract for the sale of specific goods and the goods, without the knowledge of the seller have perished at the time when the contract is made, the contract is void."

Scope and principle of the section.—The Select Committee observe that the rule enunciated by the section is based either on the ground of mutual mistake or on the ground of impossibility of performance.

In a English case, *Barrow* v. *Phillip*,[5] Wright, J., observed with reference to Sec. 6 (corresponding to Sec. 7 of the Indian Act):

> "The section says that as the contact has reference to specific goods and as those goods without the knowledge of seller are not in existence at the date of the contract, there is nothing on which the contract can operate and it is void. In other words, because

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1. *Ganga Saran* v. *Ram Charan Ram Gopal*, AIR 1952 SC 9 : 1952 SCR 36 : 1951 SCJ 799.
2. *Nathulal & Co.* v. *Kishanchand & Co.*, AIR 1956 Bom. 151.
3. (Cf.) *Holroyd* v. *Marshall*, (1862) 11 ER 999 : 138 RR 108; *Collyer* v. *Isaacs*, (1881) 19 Ch.D 342; *In Re. Wait*, (1927) 1 Ch. 606; *Tailby* v. *Official Receiver*, (1888) 13 AC 523.
4. (Cf.) *Baldeo* v. *Miller*, (1904) 31 Cal. 667; *Velji* v. *Bharmal*, (1896) 21 Bom. 287; *Maradugula Venkataratnam* v. *Kotla Ramanna*, (1911) 21 MLJ 413; *Palaniappa* v. *Lakshmana*, (1892) 16 Mad. 429 (434).
5. (1929) 1 KB 582.

> the parties recontracting about something which, unknown to them, has no existence in fact, the intention of both of them is completely frustrated and there is no contract between them. The rule has been established for many years that, where a contract relates to specific goods, which do not then exist, the case is not to be treated as one in which the seller warrants the existence of those specific goods, but as one in which there has been a failure of consideration and mistake.

It may be well to recall to cases of contracts vitiated by mutual mistake as to a matter of fact essential to the contract.[1] **[241]**

Specific goods.—The section applies only in the cases of specific goods and has no application to unascertained goods. **[972]**

Where out of a large mass of imported milk powder a portion was sold, the contract of sale having been made while the consignment was still on the high seas and the clearing agent delivered the goods on their arrival to the buyer, the contract was held not to be one for the sale of specific goods since ascertainment was only at the time of the delivery.[2]

"Perished".—With regard to this, the Special Committee state:—

> "Some writers observe that goods must be deemed to have 'perished' not only if they are physically destroyed, but also if they have ceased to exist in a commercial sense, that is, if their merchantable character, as such has been lost (*e.g.*,) dates contaminated with sewage, and therefore unsaleable, as dates,[3] or cement which had lost through moisture its properties as such,[4]..... There seems to be a strong opinion in favour of the view that the import of the word is not to be restricted to mere physical destruction. We have accordingly made it clear that the goods must have been either physically destroyed or so damaged as not to answer the description given in the contract." **[973]**

Similar questions have arisen under the Railways Act, in relation to claims under risk notes, where the question of loss becomes a material factor. In *M. & S.M. Ry. Co.* v. *Subba Rao,*[5] it was remarked that if the article consigned lost its identity as such, it would amount to 'loss'.

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1. *Couturier* v. *Hastie,* (1856) 10 ER 1065 : 101 RR 329; *Williams* v. *Cohen,* (1871) 25 LT 300; *Strickland* v. *Turner,* (1852) 155 ER 919 : 86 RR 619; *Scott* v. *Coulson,* (1903) 2 Ch. 249.
2. *Arun P. Ltd.* v. *State,* AIR 1961 Mad 216.
3. *Asfar* v. *Blundell,* (1896) 1 QB 123.
4. *Duthie* v. *Hilton,* (1868) LR 4 CP 138; *Montreal Light & Power Co.* v. *Sedgwick,* (1910) AC 598.
5. (1920) 43 Mad. 617 : 38 MLJ 360 : (1920) MWN 360 : 12 LW 64 : 56 IC 957.

PARTIAL LOSS.—The question whether a partial loss of the goods would suffice to make the contract void within the meaning of the section arose for decision in the case of *Barrow* v. *Philip.*[1] The crucial point would appear to be whether the contract was one entire or divisible. In *Howell* v. *Coupland,*[2] the view had been held that in a contract for sale of specific goods, where a portion is lost, the seller must deliver what he could. But in *Lovatt* v. *Hamilton,*[3] a sale of "goods to arrive," where only a portion arrived, the court held that it was an entire contract for the whole, and that the fractional quantity could not be accepted.

Price if recoverable.—As the contract is void from inception, money paid thereunder will be recoverable on the ground of mistake.[4]

C.I.F. Contracts.—By virtue of Sec. 62 *infra*, C.I.F. contracts are saved from the operation of this section.

Auction Bid.—A bidder cannot question the validity of an auction sale after making a bid on the ground that the goods sold at auction were damaged, as it is the responsibility of the bidder to inspect such goods before making the bid.[5]

8. Goods perishing before sale but after agreement to sell.—Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided.

Analogous law.—Sec. 7 of the English Sale of Goods Act provides :—

> "7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer the agreement is thereby avoided."

Sections 7 and 8 compared.—Both sections deal with specific goods. But Sec. 7 deals with cases where the goods have ceased to exist at the time of the contract, while Sec. 8 deals with cases where they perish after the formation of the agreement to sell, and before the actual sale. Further, Sec. 7 embraces both an actual sale and an agreement to sell, but Sec. 8 is confined to agreements to sell.

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1. (1929) 1 KB 574.
2. (1874) 9 QB 462.
3. (1839) 151 ER 271 : 52 RR 865.
4. *Strickland* v. *Turner,* (1852) 155 ER 919 : 86 RR 619.
5. *Santosh Kumar Chopda* v. *State of M.P.,* 2003 (2) Civil LJ 378 (MP).

Principle of section.—The section deals with cases of impossibility of performance subsequent to the formation of the contract. As a rule, supervening impossibility is no excuse for non-performance of an unconditional contract. But as the court observed in *Timplin* v. *Anglo-Mexican Petroleum Co.*[1] a court may infer from the nature of the contract and the surrounding circumstances that a condition, which is not expressed, was a foundation on which the parties contracted. In other words, where the continued existence of a particular set of circumstances is the foundation of the contract, so that parties must be deemed to have contracted only on that assumption, where that set of circumstances ceases to exist, the contract becomes impossible and performance is excused.[2]

Before risk passes.—Sec. 26 of the Act deals with the incidence of the risk. Generally, goods remain at the seller's risk till the property in them passes to the buyer; when however, the property in them has been transferred to the buyer, the risk passes therewith though delivery may not have been made.

Time of avoidance.—Under the section, the contract is avoided (*e.g.*,) performance is excused only as from the time the goods perish. The rights, which might have accrued due earlier, will not be affected. Thus, in *Chandler* v. *Webster,*[3] one of the Coronation cases, the rent of the flat (engaged for the purpose of viewing the coronation procession) was payable at a date prior to the date on which notice of the abandonment of the procession was given, and it was therefore held that the rent was recoverable.[4]

THE PRICE

9. Ascertainment of price.—(1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Analogous law.—The English Act, Sec 8 runs as follows :—

9 (1)—Same as Sec. 9, Cl. (1) of the Indian Act.

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1. (1916) 2 AC 397.
2. **See** *Howell* v. *Coupland,* (1876) 1 QBD 258.
3. (1904) 1 KB 493.
4. **See also** *Blackley* v. *Muller,* (1903) 2 KB 760 (Notes); *Stubbs* v. *Hollywell Ry.,* (1867) 2 Ex. 311; *French Marine* v. *Compagnie Napolitaine,* (1921) 2 AC 494.

"(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case."

Fixing of the price.—There are four possibilities :—

(1) The price may be expressly stated in the contract. The parties may fix any price they please, and the Court will not embark on an investigation as to the adequacy of the price.[1] An alternative price, if in the nature of a wager will avoid the contract.[2]

(2) The contract may provide for the manner in which the price is to be fixed. The agreement may be to pay as much for the goods as other pay. In such a case, notice must be given to the buyer as to how much others pay.[3]

(3) The price may be determined by the course of dealing between the parties.[4] Thus in *Browne* v. *Byrne,*[5] a usage to deduct discount in determining the price was implied from the course of dealings.

(4) When no price is fixed, the buyer must pay a reasonable price. As was said in *Hoadly* v. *McLaine,*[6] a contract for the sale of a commodity of which the price is left uncertain is in law a contract for what the goods shall be found to be reasonably worth". The market price of the goods will be *prima facie* evidence of a reasonable price,[7] but a reasonable price may not agree with the current price. The current price may be highly unreasonable from accidental circumstances.[8] Where there is no evidence as to price or value the court may presume that the goods of the lowest value of the kind delivered have been sent.[9] Mere difficulty in fixing a reasonable price is no reason for refusing a decree.[10]

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1. *Jones* v. *Gordon,* (1877) 2 AC 616.
2. *Rourke* v. *Short,* (1856) 119 ER 717 : 103 RR 798; *Brogden* v. *Marriott,* (1836) 132 ER 343 : 43 RR 599. **See also** *Cave* v. *Coleman,* (1828) 32 RR 709 : 7 LJKB 25.
3. *Murphy* v. *Hurley* (1877) 2 AC 616.
4. *Joyce* v. *Swann,* (1864) 144 ER 34 : 142 RR 258; *Anderson* v. *Morice,* (1876) 1 AC 713.
5. (1854) 118 ER 1304 : 97 RR 715.
6. (1834) 131 ER 982 : 38 RR 510. **See also** *Valpy* v. *Gibson,* (1847) 136 ER 737 : 72 RR 740.
7. *Chidambaram Chettiar* v. *Steel Bros.,* (1936) Ran. 419 : 165 IC 308 (Mixed contract for storage of paddy and subsequent sale at seller's option at the current buying rate of the buyer. In absence of such purchase, price will be reasonable rate).
8. *Acebal* v. *Levy,* (1834) 131 ER 949 : 38 RR 469.
9. *Clunnes* v. *Pezzey,* (1807) 170 ER 857.
10. *New Beerbhoom Coal Co.* v. *Bularam,* (1880) 5 Cal. 932.

The Government also may fix the price through notifications issued under various Control Orders.[1]

Where the Government agreed to allot alluminium subject to the condition that the price payable shall be the price ruling on the date of delivery and postponed delivery for no valid reasons after issuing delivery orders, the allottees cannot be compelled to pay increased price.[2]

Under a contract of sale where the seller and the buyer have agreed that the payment will be made by the buyer according to the ruling price at the date of delivery and when there was a delay in making the delivery and the buyer was ready to accept the delivery notwithstanding the delay is liable to pay the escalated price prevailing on the date of delivery.[3]

Although according to Section 4 readwith Section 2 (10) of the Sale of Goods Act payment of consideration money must be provided in the contract of sale, but under Section 9 of the Act parties are permitted not to fix the price at the time of transfer and the determination of the amount of consideration can be made at a later date.[4]

Where D agreed to pay P whatever price was claimed by P for the sale of the goods, though the agreement may be void, nevertheless D was liable to pay a reasonable price.[5]

Effect of altered customs duties on price.—In the absence of an agreement to the contrary, where in the interval between the making of the contract and the delivery under it, there is an alteration in the rate of customs duty, the price may be correspondingly added to or decreased.[6]

Underselling.—As the law is jealous to preserve the freedom of contract it allows a person to sell his goods at any price he pleases. Thus, for the purpose of competitive underselling, a person may even sell at a loss,[7] Similarly, he may engage with a retail dealer that the latter shall sell only at certain listed prices.[8]

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1. *Indian Steel & Wire Products Ltd.* v. *State of Madras,* AIR 1968 SC 478 : 1968 (1) SCR 479 : 1968 (21) STC 138.
2. *Alluminium Industries Ltd.* v. *Minerals & Metals Trading Corp. of India Ltd.,* AIR 1998 Mad. 239.
3. *Hindustan Petroleum Corpn. Ltd.* v. *University of Hyderabad,* AIR 2003 NOC 448 (AP).
4. *M.S. Madhusudhanan* v. *Kerala Kaumidi Pvt. Ltd.,* AIR 2004 SC 909.
5. *Mallayya* v. *Ramaswami & Co.,* AIR 1964 SC 818 : (1963) 2 SCJ 483.
6. **See** *Jhamandas* v. *Tirathdas,* (1933) Sind 404; *Trikamlal* v. *Kalidoss,* (1897) 21 Bom. 628; *Probhudas* v. *Ganidada,* (1925) 49 MLJ 43 : 27 Bom. LR 855 : 52 Cal. 644 : 41 CLJ 618 : (1925) MWN 477 : (1925) PC 157; (Cf.) *Chin Gwan & Co.* v. *Adamjee,* (1933) 11 Ran. 201 : 146 IC 440 : (1933) Ran. 79.
7. *Ajello* v. *Worsley,* (1898) 1 Ch. 274.
8. *Sorell* v. *Smith,* (1925) AC 700.

10. Agreement to sell at valuation.—(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided:

Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in fault.

Analogous law.—English Sale of Goods Act, Secs. 9—Same as Sec. 10 of the Indian Act.

Principle of the Section.—The Special Committee Report says:

> "This ..... is a corollary to the preceding clause [Sec. 9]. It is not uncommon for the parties to agree that the price of the goods may be fixed by valuers appointed by them. In such cases, they are bound by the bargain, and the price so fixed is as much part of the contract as if fixed by themselves. But it is essential for the formation of the contract that the price should be fixed in accordance with this agreement and if the parties appointed as valuers fail or refuse to act, the agreement becomes void. This principle is provided for in Sec. 9 of the English Sale of Goods Act and has been reproduced here."

Case-law.—Where the defendant contracted to purchase at a price to be ascertained in a specified mode, and no price was fixed in the mode, it was held that as price is of the essence of a contract of sale, there could be no concluded contract, which the court could enforce.[1]

Where the valuer fails or refuses to act, the contract, whether it be an actual sale or an agreement to sell, will be avoided.[2] As Benjamin says[3]:

> "There does not seem to be any authority to show whether, in the case of an actual sale at a valuation, the failure of the valuer to act would entitle the seller or buyer to avoid the contract and revert the property in the seller. It would probably depend on

1. *Milnes* v. *Gery,* (1807) 33 ER 574 : 9 RR 307.
2. *Thurnell* v. *Balbirnie,* (1837) 150 ER 975.
3. Benjamin on Sale (7th Edn. 1931) p. 160.

the construction of the contract whether the provision for valuation is in this case collateral to the contract or whether there is an implied conditions subsequent justifying avoidance."

Where there has been delivery to the buyer, this proviso says that he must pay a reasonable price.[1]

The duty of fixing a value cannot be delegated by the valuer.[2]The valuation of the third party is not in the nature of an arbitration.[3]

> "If a man is, on account of his skill in such matters, appointed to make a valuation, in such a manner that, in making it he may, in accordance with the appointment solely by the use of his eyes, his knowledge and his skill, he is not acting judicially he is using the skill of a valuer, not of judge."[4]

Sub-clause (2).—There is authority in English law for the view that the party in fault may be restrained from preventing the valuer from acting.[5] But, ordinarily, no suit for specific performance will lie, because it is not a contract but a mere agreement.[6]

Two valuers.—In cases where under the agreement two valuers have to function, one for each party, each of the parties must give notice to the other, of his having appointed a valuer.[7] And in such cases, in the absence of a contract to the contrary, valuation by one alone is futile.[8]

CONDITIONS AND WARRANTIES

11. Stipulations as to time.—Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

Analogous law.—English Act, Sec. 10 (1). Same as Sec. 11 of the Indian Act.

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1. (Cf.) *Clarke* v. *Westrope*, (1856) 139 ER 1572 : 107 RR 507.
2. *Ess* v. *Truscott*, (1837) 150 ER 806 : 46 RR 630.
3. *Collins* v. *Collins*, (1858) 53 ER 916 : 122 RR 727.
4. *Re. Dawdy*, (1885) 15 QBD 426 (430); *Boss* v. *Helsham*, (1866) 2 Ex. 72 : 143 RR 817; *Gordon* v. *Whitehouse*, (1856) 139 ER 1564 : 107 RR 495 (Mere fact that figures are left to be added up does not mean that valuation is incomplete).
5. See Fry on Specific Performance, pp. 1157 and 1158; *Smith* v. *Peters*, (1875) 20 Eq. 511.
6. *Vickers* v. *Vickers*, (1867) 4 Eq. 529.
7. *Thomas* v. *Fredericks*, (1847) 116 ER 294 : 74 RR 502; *Tew* v. *Harris*, (1847) 116 ER 376: 75 RR 270.
8. *Tew* v. *Harris*, see Note 7 above.

Conditions and Warranties.—The English Act does not contain a definition of the term "condition" but the framers of the Indian Act have laid down a definition, which clearly brings out the distinction between a warranty and a condition. Of course both these must be distinguished from mere representations as they are called, which do not form part of the contract. **[843]**

Time, essence of the contract.—(i) TIME OF PAYMENT.— The section provides that, in the absence of any intention to the contrary, the time of payment is not deemed to be of the essence of a contract. The reason is, as stated in the laws of England, that failure in punctual payment does not go to the whole consideration for the sale.[1] But it is open to the parties to make payment on the date fixed an essential condition.[2]

In one case it is held that the intention of the parties is the decisive factor in regard to the time of payment, whereas in regard to the time of the delivery of the goods the terms of the contract is the decisive factor.[3]

A contract of sale cannot be said to be complete unless the parties to the contract had agreed as to the time for payment of the price and for taking delivery of the goods. In the absence of agreement between the parties as to the time for payment of the price and for taking delivery of the goods the plaintiff cannot unilaterally fix such time.[4]

(ii) OTHER STIPULATIONS REGARDING TIME.— Generally speaking stipulations other than those relating to time of payment are deemed to be of the essence of the contract in mercantile transactions. As was observed in *Bowes* v. *Shand* [5]:

"Merchants are not in the habit of placing on their contracts stipulations to which they do not attach some value and importance."

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1. *Martindale* v. *Smith*, (1841) 113 ER 1181 : 55 RR 285; *Mersey Steel & Iron Co.* v. *Naylor*, (1884) 9 AC 434 (Payment for prior instalments not a condition for future delivery); *Payzu* v. *Saunders*, (1919) 2 KB 581; *Maples Flock Co.* v. *Universal Furniture Products*, (1934) 1 KB 148.
2. *Bishop* v. *Shillito*, (1829) 106 ER 387 (Note); *Thames Sack Co.* v. *Knowles*, (1918) 88 LJKB 585; *Ebbw Vale Steel & Iron Co.* v. *Blaina Iron and Tin-plate Co.*, (1901) 6 Com. Cas. 33; *Burn* v. *Luckhdriji*, (1925) 30 CWN 145 : 90 IC 52 : (1925) PC 188.
3. *Orissa Textiles Ltd.* v. *Ganesh Das Ramkishan*, AIR 1961 Pat. 107. (Cf.) *Amarnath* v. *Mohan Singh*, AIR 1954 MB 134 (Fixation of time of performance by itself insufficient to show time to be of essence).
4. *National Co-operative Sugar Mills Ltd.* v. *M/s. Albert and Company*, AIR 1981 Mad. 172 : (1981) 2 MLJ 343 ; *American Pipe Co.* v. *State of U.P.*, AIR 1983 Cal. 186.
5. (1877) 2 AC 455; *Sri Krishna Khanna, In re.* (1934) Sind 29 : 148 IC 977; *Wasoo Enterpriser* v. *J.J. Oil Mills*, AIR 1968 Guj. 57; *British Prints* v. *Union of India*, AIR 1971 Cal. 393.

Moreover, a mercantile contract is not always an isolated transaction, but a link in chain of transactions and if A does not keep his contract with B, then B may not be able to keep his contract with C, so that punctual performance may go to the whole consideration for the sale.[1] Thus, in many cases, the time of delivery,[2] or of shipment of the goods may be treated as part of the essential description of the goods.[3] But a term in an auction catalogue for clearance of goods knocked down has been held to be not of the essence of the contract.[4] Similarly, a stipulation regarding the giving of specification in respect of iron to be purchased has been held not to be a condition.[5]

SALE OF LAND.—With regard to sale of land, time is generally, not of the essence of the contract.[6] The rule is the same in England.

Where time is not of the essence, the contract must be performed within a reasonable time and in case of delay, the other party may give notice that the contract will be treated as broken on failure of compliance.[7]

Effect of waiver.—It is open to a party to waive stipulations as to time inserted in his interest. After such waiver, he has no right to rescind the contract on the ground waives.[8]

12. Condition and warranty.—(1) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.

(2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

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1. Halsbury's Laws of England, Vol. 29 page 57, Note (n).
2. *Volkart Bros.* v. *Rutnavelu,* (1895) 18 Mad. 63; *Balaram* v. *Govinda,* (1925) 49 MLJ 200: 91 IC 257 : (1925) Mad. 1232; *Bhudar Chandra* v. *Betts,* (1915) 22 CLJ 566 : 33 IC 347; *Baij Nath* v. *Johar Chand,* (1933) All. 404 : (1933) ALJ 1000 : 144 IC 82; *Sharp* v. *Christmas,* (1892) 8 TLR 687 (Sale of potatoes—Seller's failure to send in time).
3. *Bowes* v. *Shand,* (1877) 2 AC 455. **See also** *Reuter* v. *Sala,* (1879) 4 CPD 239 (Sale of 25 tons of pepper, name of vessel, marks and particulars to be declared within sixty days of date of bill of lading); *Sanday* v. *Keighley Maxted,* (1922) 91 LJKB 624 (Ship expected ready to load late September—Non-arrival till November—Contract avoided); *Aron* v. *Comptoir Wegimont,* (1921) 3 KB 435; *James Finlay* v. *Kwick Hoo Tong,* (1929) 1 KB 400 (Stipulation as to date of Bill of Lading); *Hartley* v. *Hymans,* (1920) 3 KB 475; *Wasoo Enterpriser* v. *J.J. Oil Mills,* AIR 1968 Guj. 57 : 9 Guj. LR 376.
4. *Woolfe* v. *Horne,* (1877) 2 QBD 355.
5. *Kidston* v. *Monceau Iron Works Co.,* (1902) 18 TLR 320.
6. *Jamshed* v. *Burjorji,* (1916) 40 Bom.289; *Pokharsingh* v. *Kishan Singh,*AIR 1974 Raj. 112.
7. *Stickney* v. *Keeble,* (1915) AC 386.
8. *Levey* v. *Goldberg,* (1922) 1 KB 688; *Muhammad Habibullah* v. *Bird & Co.,* (1921) 43 All. 257.

(3) A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

(4) Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition though called a warranty in the contract.

Analogous law.—Sec. 11(1) (b) of the English Act runs thus:

> "11 (1) (b). Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated, or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract."

Comparison with previous law.—The English Act did not define the term "condition". But since the passing of the Act, a number of decisions have cleared the matter and so the authors of the Indian enactment have laid down a definition of "condition" on the lines of the accepted English authoritative pronouncements.

The Indian decisions on the subject were conflicting owing to the indiscriminate use of the expression warranty.[1] With a view to set the matter at rest, the terms warranty and condition have been clearly differentiated in the present Act.

Sub-clause (1)—Stipulation.—There is no definition of the word in the Act. In Halsbury's Laws of England,[2] "stipulation" is said to include only promises and not collateral contingencies beyond the control of either party (*e.g.,*) in sales of goods "to arrive." The clause divides stipulations into conditions and warranties. It would appear to follow that a bare 'representation' will not amount to a stipulation. The stipulations in a contract of sale relate to goods; is stipulations with regard to time are outside the purview of Sec. 12.[3]

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1. (Cf.) *Buch & Co.* v. *Govardhan Das,* (1922) 24 Bom. LR 991 : (1923) Bom. 92 : 70 IC 877; *Nagardas* v. *Velmahomed,* (1930) 32 Bom. LR 454 : (1930) Bom. 249 : 126 IC 312; *Empire Engineering Co.* v. *Municipal Board of Bareilly,* (1929) All. 806 : (1929) ALJ 674.
2. Vol. 29, 4th Edn., p. 53, Note (s).
3. *C.V. George & Co.* v. *Marshall Sons (Manufacturing) Ltd.,* 1983 (II) MLJ 525.

Sub-clause (2)—Condition.—In the commentary on Sec. 4(2), the different kinds of conditions have been adverted to.[1] Of these, the Sale of Goods Act deals only with conditions precedent. The concurrent conditions spoken of and what are known as reciprocal conditions are dealt with in Secs. 51 to 58 of the Contract Act. The report of the Special Committee suggests also another cross division of conditions into promissory and contingent conditions. The contingent conditions are dealt with in Secs. 31 to 36 of the Contract Act under the heading of "Contingent Contracts."

The material portion of the definition of the term "condition" is the word "essential" and this has been taken from the judgment of Williams, J., in *Behn* v. *Burness*.[2] The distinction between condition and warranty has been well brought out in the judgment of Fletcher Moulton, L.J., in *Wallis* v. *Pratt*,[3] **[980]**

Sub-clause (3)—Warranty.—The definition of warranty in the English Act is taken from the notes to *Cutter* v. *Powell*.[4] Lord Abinger in *Chanter* v. *Hopkins*,[5] gave the following definition :

> An express or implied statement of something which the party undertakes shall be part of the contract, and though a part of the contract, yet collateral to the express object of it."

It is only when a representation is made a term of the contract that it ranks as a condition or a warranty.[6] So a representation in the nature of a mere expression of opinion will not be a warranty or a condition.[7] But if the parties intend to make any statement a warranty, they may do so. The question whether the parties so intended or not, is one of evidence.[8]

Sub-clause (4)—Construction.—This clause lays down that it is a question of construction of the contract, whether a stipulation therein is a condition or warranty. The real effect has to be considered and the nomenclature used by the parties is not conclusive of the character of the stipulation.[9]

13. When condition to be treated as warranty.—(1) Where a contract of sale is subject to any condition to be fulfilled by

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1. See pp. 261 *ante*.
2. (1863) 122 ER 281 : 124 RR 787.
3. (1910) 2 KB 1003.
4. (1795) 101 ER 573 : 3 RR 185.
5. (1838) 150 ER 1484 : 51 RR 650.
6. *Bentsen* v. *Taylor*, (1893) 2 QB 280.
7. *Muthukaruppa* v. *Kathappudayan*, (1914) 27 MLJ 249 : (1914) MWN 706 : 25 IC 726.
8. **See** *Hebut* v. *Buckleton*, (1913) AC 30.
9. *Barker* v. *Agius*, (1927) 43 TLR 751.

the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

(2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, [1][xxx] the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

Analogous law.—Sections 11 (a) (c) and (3) of the English Act are the same as Sec. 13 Clauses (1), (2) and (3) of the Indian Act.

Cannot reject goods after acceptance.—The Select Committee report says, that having regard to the conflict which had arisen over the right of a buyer after he has accepted the goods, the law has been definitely laid down that once a buyers has accepted the goods, he cannot reject them even if inspection shows that there has been a breach of a conditions. In such cases, the buyer must treat it only as a breach of warranty.

When once on a breach of condition by the seller the buyer rejects the goods, he cannot later on by any unilateral act divest the seller of his title to the goods as if in performance of the original contract.[2]

Where the contract was for specific goods and as soon as the manufactures made the machinery according to the specification, the property in the goods had passed to the buyer. In such a case the breach of any condition under Section 13(2) will be treated as a warranty.[3]

Clause (1)—Waiver—Voluntary.—It is always open to a party to voluntarily waive a stipulation, which is for his benefit.[4] It has however, been held that if a stipulation operates for the benefit of both parties, it may be

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1. Omitted by Act 33 of 1963.
2. *Sha Trilokchand Poosaji* v. *Crystal & Co.*, AIR 1950 Mad. 481.
3. *Behere* v. *Nanagram etc., Rice Mills Firm*, AIR 1966 Assam 95.
4. *Hartley* v. *Hymans*, (1920) 3 KB 475; *Robinson* v. *Bebar*, (1927) 1 KB 513; *Mondel* v. *Steel*, (1841) 151 ER 1288 : 58 RR 890; *Buch* v. *Gordhandas*, (1923) 24 Bom. LR 991 : 70 IC 877 : (1923) Bom. 92.

waived only by mutual consent.[1] In a case where a horse was sold with a warranty of soundness; it was held that the mere fact of the purchaser getting a veterinary doctor's certificate as to the soundness of the horse, will not amount to a waiver of the warranty.[2] A condition may be waived temporarily (*e.g.,*) in cases of performance in instalments; in such cases, notice should be given to the other side before insisting on performance of the condition.[3]

Waiver or abandonment may be express or implied. Thus, if parties do not enforce the obligations under a contract even after the lapse of considerable time, an intention to waive may be inferred.[4]

Clause (2)—Waiver—Compulsory.—Clause (2) deals with two cases where the law presumes a waiver. It enacts that where there are no indications to the contrary in the contract the seller's breach of conditions shall have effect as if it was only breach of a warranty in cases where (i) the buyer has accepted the goods in part under a contract not severable [See under heading *'Accepted the goods' infra*] (ii) the contract is for specific goods, property in which has passed to the buyer. Thus where a buyer after having paid the price, takes delivery, and finds that the goods do not answer the description, his remedy will be not to repudiate the contract but to ask for damages as for breach of a warranty.[5] As to when a contract is severable see commentary on Sec. 38 *infra* and the cases noted. It will suffice here to say that:

> "A contract of sale of goods is said to be severable when its terms are such that the goods may be delivered in parcels, and the buyer is bound to take delivery of each parcel as it comes along provided it is in accordance with the contract."[6]

Other cases of compulsory waiver.—In *Wallis* v. *Pratt,*[7] Fletcher Moulton, L.J., was of option that there may be other cases of waiver, but did not pursue the matter further. **[982]** It would appear that where one party prevents the performance of a condition by the other. (*Cf.*, Sec. 53 of the Contract Act) a case of compulsory waiver will arise.[8] Again, where the performance of

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1. *Maine Spinning Co.* v. *Sutcliffe,* (1917) 34 TLR 154.
2. *O'Grady* v. *Herbert Winn,* (1912) 9 ALJ 285 : 14 IC 135.
3. *Panoutsos* v. *Raymond Hadley Corporation,* (1917) 2 KB 473.
4. *Pearl Mill Co.* v. *Ivy Tannery Co.,* (1919) 1 KB 78.
5. *Ishar Das* v. *Khannumal,* (1927) 8 Lah. 276 : 9 LLJ 180 : 100 IC 548 : (1927) Lah. 443. **See also** *Nagardas* v. *Velmohamed,* (1930) 32 Bom. LR 454 : (1930) Bom. 249; *Harnor* v. *Groves,* (1855) 139 ER 587.
6. **See** *Andrew Yule & Co., In re.* (1932) 59 Cal. 928 : (1932) Cal. 879; *Jackson* v. *Rotax Motor Cycle Co.,* (1910) 2 KB 937; *Simpson* v. *Crippin,* (1872) 8 QB 14; *Brandt* v. *Lawrence,* (1876) 1 QBD 344.
7. (1910) 2 KB 1003 (1012).
8. **See** *Mackay* v. *Dick,* (1881) 6 AC 251.

a condition precedent is waived by the wrongful repudiation of the contract by the other party, it may also be a case of compulsory waiver.[1]

In a case arising under Sec. 117 of the Contract Act (corresponding to Sec. 13(2) of the present Act) the Calcutta High Court ruled that a buyer to whom the property in the goods had been transferred and part delivery made, could avoid the sale only on the ground of fraud or misrepresentation which precluded him from discovering the inferiority of the goods with ordinary diligence.[2]

In a Calcutta case, it has been observed that Sec. 13(2) is limited in its operation to case of "bargain and sale" according to the English Common Law, as distinct from a claim for "goods sold and delivered".[3]

Clause (3)—Impossibility or otherwise.—The words "excused by law .....or otherwise" in Section 13(3) would include provisions of other statues and notifications as well as the conduct of the buyer.[4] It includes legal impossibility.[5] (See commentary on Sec. 56, Contract Act). Where the performance of the contract has become impossible, the agreement is void, and so no question can arise of fulfilling conditions or warranties. Thus, in *Chapman* v. *Withers,*[6] where the contract provided that the horse should be return within two days, if the warranty given in respect of it failed, it was held the omission to return it within two days, because of an accident to the horse, did not disentitle the buyer from claiming damages as on a breach of warranty.

"Accepted the goods."—As to what amounts to acceptance, see Sec. 41 and 42 *infra.* Mere receipt of goods for inspection does not amount to acceptance. But if the goods are not rejected within a reasonable time, it may amount to acceptance.[7] So too, the resale of part of the goods without examination may amount in law to an acceptance.[8]

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1. **See** *Baithwaite* v. *Foreign Hardwood Co.,* (1905) 2 KB 543; *Cort* v. *Ambergate Ry. Co.,* (1851) 117 ER 1229 : 85 RR 369; *Bradley* v. *Newson,* (1919) AC 16 (Case of anticipatory breach); *Michael* v. *Hart & Co.,* (1902) 1 KB 482.
2. *Shoshi Mohan* v. *Nobo Kristo,* (1878) 4 Cal. 801. **See also** *Gan Kim Swee* v. *Ralli Brothers,* (1886) 13 Cal. 237 (Presumption of due performance arising from acceptance of goods after examination—Rebuttal of).
3. *Lal Chand* v. *Baij Nath,* (1936) 63 Cal. 736 : 169 IC 128 : (!937) Cal. 140.
4. *United States* v. *Pelly,* (1899) 15 TLR 166.
5. *Esposito* v. *Bowden,* (1857) 119 ER 1430 : 110 RR 822.
6. (1888) 20 QBD 824.
7. *Ramudu Ayyar* v. *Ramayyar,* (1925) Mad. 221 : 78 IC 1051; *Empire Engineering Co.* v. *Municipal Board, Bareilly,* (1929) ALJ 674 : 119 IC 853 : (1929) All. 806; *Banwari Lal* v. *Dina Nath,* (1922) Lah. 127 : 65 IC 464; *Haridas* v. *Kalumall,* (1903) 30 Cal. 649 : 7 CWN 562 (Exercising dominion over grounds amounts to acceptance).
8. *Pranlal* v. *Maneckji Petit,* (1932) 34 Bom. LR 1252 : 140 IC 610 : (1933) Bom. 46; *Hardy* v. *Hillerns,* (1923) 2 KB 490.

Legal results of waiving condition.—In case of waiver of a condition, voluntary or compulsory, the buyer is relegated to the remedies provided for breach of warranty. And the mere fact that the contract expressly excludes a warranty will not prejudice the right to sue for breach of a condition, which has sunk to the level of a warranty.[1]

14. Implied undertaking as to title etc.—In a contract of sale, unless the circumstances of the contract are such as to show a different intention there is—

(a) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;

(b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;

(c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

Analogous law.—Sec. 12 of the English Act—Same as Sec. 14 of the Indian Act.

Principle underlying Secs. 14 to 17.—The general principle of a contract of sale is *caveat emptor,* purchaser beware.[2] Where parties deal on an equal footing, the rule is unexceptionable. But with the increasing complexity of modern commercial transactions, it is found that a buyer has in many cases to trust to the judgment or honesty of his vendor; for it would be obviously impossible that the buyer could go through a long questionnaire to the seller as to the quality, fitness etc, of the goods about to be bought. Modern law therefore has stepped in to protect the buyer by declaring that the vendor shall be presumed to have certain representations as to some matters relating to the goods sold. These are what are called implied conditions and warranties in contracts of sale, and Sec. 14 to 17 deals with them. [986]

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1. *Baldry* v. *Marshall,* (1925) 1 KB 260; *Wallis* v. *Pratt,* (1911) AC 394.
2. *Jewson & Sons* v. *Arcos,* (1934) 39 Com. Cas. 59 (Contract for sale of goods not a contract *uberrimae fidei*—Maxim *caveat emptor* applies—Seller under no duty to disclose to buyer another contract previously entered into by him with third party rendering bargain unprofitable to buyer).

Old and new sections compared.—Sec. 109 of the Contract Act seems to imply that a stipulation regarding title is merely a *warranty* and breach of it entitles the buyer and persons claiming under him, to recover loss sustained. Besides, the section did not contain any warranty as to quit possession, and freedom from encumbrances. The present section follows the English enactment, and therefore gives larger rights to the buyer than he had under Sec. 109 **[986-987]**

Clause (a)—Title.—In *Rowland* v. *Divall,*[1] the plaintiff who purchased a motor car and used the same for some months but was forced to surrender the same to the true owner, owing to the seller's (defendant's) defect of title, was held entitled to recover the full price paid as on a total failure of consideration. Under the repealed Sec. 109, he would have been entitled only to damages. Similarly in *Niblett* v. *Confectioners Materials Co.,*[2] the goods sold the plaintiff bore labels, which infringed the trademark of certain third parties, and plaintiff could take delivery of the goods only after destroying the labels. He had to sell the goods, at a loss because of the absence of a distinctive mark on the goods, and sued the sellers for breach of warranty. It was held that the defendants had broken as implied condition as to title to sell. Where there is a want of title in the seller who sold the car, the buyer is entitled to rescind the contract and recover the price. [3] **[986]** Where the plaintiff purchaser claimed damages for breach of condition as to the title of the car sold by the defendant alleged to be stolen and seized by the police, the claim for damages cannot be sustained in the absence of proof and pleading of loss of title by the plaintiff owing to seizure of car by police.[4]

Circumstances showing a different intention.—Where properties are sold *in invitum* under orders of court, what is sold is only the right, title and interest of the judgment-debtor. Therefore where a sheriff of court acting within his jurisdiction sells certain attached properties there is no room for invoking the implied warranty to title.[5] But where the sheriff acts *ultra vires,* and sells property without jurisdiction, he will be in the position of

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1. (1923) 2 KB 500. **See also** *Butterworth* v. *Kingsway Motors Ltd.,* (1954) 2 All. ER 644; *Eichholz* v. *Bannister,* (1864) 144 ER 284. Cf., *Venugopala Rao* v. *Someswara Rao,* 1976 An. LT 652 : (1977) 1 An.WR 440 : (1977) 1 APLJ 358; *Kinwa Singh* v. *Nani Singh,* 1966 Raj. LW 148.
2. (1921) 3 KB 387; *Mercantile Union Guarantee Corpn.* v. *Wheatley,* (1937) 4 AER 713 (Applicability to hire purchase agreements); *Eichholz* v. *Bannister,* (1864) 144 ER 284 : 142 RR 594. As to Indian cases under old S. 109, **see** *Radha Kishan* v. *Ganga,* (1925) Lah. 366 : 7 LLJ 148 : 86 IC 1020; *Framji* v. *Hormasji,* (1877) 2 Bom. 258.
3. *Barber* v. *NWS Bank Plc.,* (1996) 1 All. ER 906.
4. *Mathew Varkey* v. *T.C. Abraham,* AIR 2001 Ker 98, 110 (DB).
5. *Ex parte Villars,* (1874) 9 Ch. App. 432. **See also** *Chapman* v. *Speller,* (1850) 117 ER 240 : 80 RR 342 (Sale of what vendor purchased at Sheriff's sale).

an ordinary seller.[1] Where a pawn broker sold goods alleging they were unredeemed, it was held that he did not as owner, and so no implied condition as to title arose.[2]

Clause (b)—Quiet possession.—In *Howell* v. *Richards*,[3] Lord Ellenborough said:—

> "The distinction between the conditions as to title and the warranty of quiet possession is similar to that between a covenant for title and one for quiet enjoyment. The former is an assurance by the grantor that he has the very estate in quantity and quality which he purports to convey, the latter is an assurance to the grantee against the consequences of a defective title." **[1010]**

The warranty will extend, it would appear, to all acts of the vendor and all lawful acts of third persons.[4]

Clause (c)—Freedom from encumbrances.—This has been construed as a warranty that the buyer's possession shall not be disturbed by reason of the existence of encumbrances. The bare existence of the encumbrances does not constitute a breach. The warranty is deemed broken only when the buyer has to discharge any encumbrance.[5] **[1010]**

15. Sale by description.—Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Analogous law.—Sec. 13 of the English Act—Same as Sec. 15 of the Indian Act.

Previous law compared.—Sec. 113 of the Contract Act dealing with this matter, used the word 'warranty' in the sense of condition. Besides, the section was confined to goods having a commercial denomination. Moreover, the proposition laid down in the explanation to the section seemed to be in conflict with the decision of the House of Lords in *Willis* v. *Pratt*. For all these

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1. *Dorab Ally* v. *Executors of Khajah*, (1878) 3 Cal. 806. **See also** *Payne* v. *Elsden*, (1900) 17 TLR 161 (Auctioneer selling goods obtained by invalid distress).
2. *Morley* v. *Attenborough*, (1849) 154 ER 943 : 77 RR 709.
3. (1809) 103 ER 1150 : 11 RR 287.
4. *Nask* v. *Palmer*, (1816) 105 ER 1088 : 17 RR 364.
5. *Collinge* v. *Heywood*, (1839) 112 ER 1352 : 48 RR 616.

reasons, the Special Committee thought it advisable to substitute the present section, which is identical with Sec. 13 of the English Act.

Sale by description.—The term "sale of goods by description," must, in the words of Channell, J., in *Varley* v. *Whipp*[1] "apply to all cases where the purchaser has not seen the goods, but *is relying on the description alone.*" Falsity of description renders the goods substantially different amounting to failure of consideration.[2] Stipulation as to the time of shipment has been held to be a part of the description of the goods sold unless the parties intended otherwise.[3]

The test to determine whether the goods conform to the description or not is a strict one.[4] The expression 'description' usually means a particular class or kind of goods; but it also includes any statement which may be essential to the identity of the goods as contracted for (*e.g.,*) as to their quality or fitness, place of origin or shipment, time of despatch or delivery, mode of packing etc.[5] That the time of shipment of goods may be an essential part of the description is illustrated by the case of *Brower* v. *Shand.*[6] Even the place or origin may constitute part of the description of goods.[7] In *Barker* v. *Agius,*[8] the size of briquettes contracted to be sold was held to be part of the description. Thus the expression is applicable to all cases of goods, specific or unascertained, where there is no identification otherwise than by description.

A sale by description could be inferred from the circumstances of the case or the course of dealings between the parties.[9] A sale of goods over the counter may in particular cases be construed to be a sale by description.[10] A clause excluding liability for errors of description will go to show that the sale is not by description.[11]

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1. (1900) 1 QB 513; *Jones* v. *Just,* (1868) 3 QB 197; (Cf.) *Thornett* v. *Beers & Sons,* (1919) 1 KB 486.
2. *Sorabji H. Joshi & Co.* v. *Ismail,* AIR 1950 Mad. 570.
3. *Wasoo Enterprises* v. *J.J. Oil Mills,* AIR 1968 Guj. 57 : 9 Guj. LR 376.
4. *Kulsekarapatnam Hand Match Workers' Co-operative Cottage Industrial Society Ltd.* v. *Radhelal Lalloolal,* AIR 1971 MP 191 : (1971) MPLJ 552 : 1971 Jab. LJ 529.
5. See Halsbury's Laws of England, Vol. 25, p. 154, Note (p).
6. (1877) 2 AC 455. **See** Chap. XVI.
7. *Jones* v. *Clarke,* (1858) 157 ER 299 : 115 RR 769 (Pitch pine from Savannah).
8. (1927) 43 TLR 751.
9. *Wren* v. *Holt,* (1903) 1 KB 610; *Bostock* v. *Nicholson,* (1904) 1 KB 725 (Sale of Sulphuric acid commercially free from arsenic).
10. *Morelli* v. *Fitch,* (1928) 2 KB 636 ("Stone's Ginger wine"—Purchase of—Held to be a sale by description); *Kulsekarapatnam Hand Match Workers' Co-operative Cottage Industrial Society Ltd.* v. *Radhelal Lalloolal,* AIR 1971 MP 191; *Bengal Corporation (P) Ltd.* v. *Commr. for the Port of Calcutta,* AIR 1971 Cal. 357 ; *R.S. Thekar* v. *Hindustan G.E.C. Ltd.,* AIR 1971 Bom. 97.
11. *Taylor* v. *Bullen,* (1850) 155 ER 341 : 82 RR 875.

Illustrative cases.—The cases of *Varley* v. *Whipp*,[1] and *Moore & Co.* v. *Landauer & Co.*,[2] have already been examined. **[990-991]** In *White Sea Timber Trust* v. *North*,[3] a contract for the sale of timber containing a term that the goods were to be shipped "under deck", the buyer was held entitled to reject the whole shipment when it was found that a quarter of the whole quantity was shipped "on deck" and had suffered injury by being so carried. The term was treated as part of the description. In *Messrs Ltd.* v. *Morrison Export Co.*,[4] where the contract contained a similar condition "to be loaded, on deck one third," and in fact more than a third was shipped on deck, the buyers were held justified in rejecting the goods. In *Arcos* v. *Ronaasen & Son*,[5] the contract was to supply timber of $^1/_2$ inch thickness for being made into cement barrels. The timber supplied varied in thickness from $^1/_2$ to $^5/_8$ inch. The House of Lords held that the buyer was entitled to reject the timber on the ground of a breach of condition as to description though it was merchantable and commercially fit for the purpose for which it was ordered.

In *Makin* v. *London Rice Mill Co.*,[6] a shipment of Siam rice in single bags was held liable to rejection as the contract was for Siam rice packed in "double bags"—more easily saleable and essential for transit to a long distance. In the leading case *Willis* v. *Pratt*,[7] A sold to B seeds as "English sainfoin," and B resold them to C. It turned out that the seeds were "giant sainfoin." It was held that there was a breach of a condition, but since there has been delivery and resale, the buyer could only get damages as for breach of warranty. In *Andrews Bros.* v. *Singer & Co.*,[8] where the contract was for the purpose of "new Singer cars" and one of the terms excluded liability "for all warranties or conditions implied by common law, statute or otherwise" the court held that the supply of a used car amounted to a breach of contract the breach being of an express term amounting to a description and not of an implied term. In *Pinnock* v. *Lewis*,[9] on

1. (1900) 1 QB 513.
2. (1921) 2 KB 519. **See also** *Fisher Reeves & Co.* v. *Armour & Co.*, (1920) 3 KB 614 (Contract for tinned meat 'ex store' Rotterdam—Goods actually stored in lighters—Contract liable to be repudiated).
3. (1934) 148 LT 263.
4. (1939) 1 AER 92; **see also** *Wilson* v. *Wright*, (1927) 4 AER 371 (Agreement to load by Saturdays' steamer—Steamer heavily laden and so loaded later—Right to reject).
5. (1933) AC 470.
6. (1869) 20 LJ 705; (Cf.) *In re. Russ & Brown's Contract*, (1934) 1 Ch. 34 (Sale of underlease misdescribed as lease—Contract held unenforceable). As to stocks and shares etc., **see** *Gompertz* v. *Bartlett*, (1853) 118 ER 985 : 95 RR 851 (Unstamped bill purported to be drawn in foreign country but really drawn in London—Sale of—Implied warranty of being foreign bill); *Westropp* v. *Solomon*, (1849) 137 ER 542 : 79 RR 530.
7. (1911) AC 394; *Wieler* v. *Schilizzi*, (1856) 139 ER 1219 : 104 RR 815. (Cf.), *Govindji Jevat & Co.* v. *Cannore Spinning & Weaving Mills Ltd.*, AIR 1968 Ker. 310.
8. (1934) 1 KB 17.
9. (1923) 1 KB 690.

a sale of copra cake, which was so adulterated that it could not be described as copra cake, the buyers who had accepted the goods were held entitled to damages for breach of the condition that the goods should correspond with the description.

In *Ballantine* v. *Cramp,*[1] it was held that in the case of an instalment contract, each instalment must conform to the description, namely that it should be of a certain weight. In one Calcutta case, *In re: Andrew Yule and Co.,*[2] in a sale of hessian described in the contract as of "Standard Mills Make", the words were held to constitute part of the description within the meaning of the present section. In an earlier case of the same court, a clause in a contact for sale of Paris garters to be shipped 'F.O.B. New York' was held to be an essential part of the order, the place of shipment being held to be part of the description.[3] In *Bombay United Merchants Co.* v. *Doolubram,*[4] where there was a contract for sale of goods to be ordered out from Europe, the contract was held not to be fulfilled by offer of goods of the same description bought by vendors in Bombay. But in *Sazuki and Co.* v. *Uttamchand,*[5] where the contract was for sugar to be shipped to Bombay by steamers," tender of sugar of the contract description imported already by a third party was held sufficient. **[985-986]**

It has been held that the fact that the buyer has examined the goods does not prevent the sale being one by description, if there is a latent defect in the goods.[6] **[988]** In *Mitchell Reid* v. *Buldeo Doss,*[7] the Calcutta High Court pointed out that a purchaser's right to reject goods by reason of their not answering to the description in the contract may be independent of the question whether the property in the goods has passed or not. Where the contract of sale is to supply the goods of a certain description, the goods must not only answer the specific description but also must be serviceable and merchantable. The title in the goods though passes under F.O.R. as per the terms of the contract, it is subject to inspection and rejection at destination, if the goods are not conformable to the description.[8]

The plaintiff having received the goods, which are patently not those, contracted for, could not use them at the risk of the seller. It is not as if the

1. (1923) 129 LT 502.
2. (1932) 59 Cal. 928 : 140 IC 877 : (1932) Cal. 879.
3. *Dayton Price & Co.* v. *Rohomotollah & Co.,* (1925) 29 CWN 422 : 86 IC 571 : (1925) Cal. 609.
4. (1888) 12 Bom. 50.
5. (1926) 50 Bom. 318 : 28 Bom. LR 572 : 96 IC 313 : (1926) Bom. 431. Compare *Marwari Ramjiwan* v. *Bhikaji,* (1924) 48 Bom. 519 : 26 Bom. LR 442 : (1924) MWN 430 : 80 IC 381 : (1924) PC 143 : 46 MLJ 655 (Contract for cloth bearing certain numbers—Finding of fact that numbers not an essential part of the description).
6. *Josling* v. *Kingsford,* (1863) 143 ER 177 : 134 RR 596.
7. (1887) 15 Cal. 1.
8. *Geekay Industries (India)* v. *Republic Forge Co. Ltd.,* 1988 (1) ALT 68.

plaintiff could not discover these defects and used them and suffered loss. Once the goods are used by the plaintiff deliberately having come to know the defects any consequential loss of profits cannot be recovered by the plaintiff from the defendant.[1]

Sale by sample as well as description.—The section enacts also that the fact that the sale is also by sample does not exclude the condition that goods bought under a certain description must correspond to it. Thus in *Gardiner* v. *Gray,*[2] the contract was for sale of 12 bales of "waste silk," imported from the Continent, and samples were shown, though the bargain was made without reference to the sample. It turned out that the goods were not saleable as 'waste silk'. It was held that there had been a breach of a condition. So too where a contract was for "foreign refined rape oil warranted only equal to sample," and both sample and oil were adulterated, it was held that the seller must prove that the goods corresponded to the description.[3]

However, it has been held that where the nature of the goods is discoverable, a sale by sample will negative the requirement that the supplied goods must answer to the description.[4]

Evidence of trade usage.—In case of a contract in writing, evidence of trade usage not inconsistent with the terms may be admitted to explain or supplement.[5]

16. Implied conditions as to quality or fitness.—Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or

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1. *Shantilal Muthia & Co.* v. *Chiralal Co-op. Spinning Mills Ltd.,* (1986) (2) APLJ 291.
2. (1815) 171 ER 46 : 16 RR 764. **See also** *Tye* v. *Fynmore,* (1813) 170 ER 1446 : 14 RR 809 (Contract for merchantable Sassafras wood—Sample shown—Finding that it did not answer to description).
3. *Nichol* v. *Godts,* (1854) 156 ER 410 : 102 RR 523; **see also** *Wieler* v. *Schilizzi,* (1856) 139 ER 1219 : 104 RR 815.
4. *Prosser* v. *Hooper,* (1817) 19 RR 530 : 1 Moo. CP 106.
5. *Produce Brokers* v. *Olympia Oil Cake Co.,* (1916) 1 AC 314.

producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Analogous law.—Sec. 14 of the English Act runs thus:

> "14. Subject to the provision of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows ":
>
> Clauses (1), (2), (3) and (4) same as in Indian Act except for the absence of the word s *"or producer"* in clauses (1) and (2) in the English Act.

Principle of the section.—As observed already, the general rule with regard to a contract of sale is *caveat emptor,* and that rule is enunciated in the first para of the section.[1] The rule of *caveat emptor* means that the buyer must take care, and in the absence of fraud, buys at his own risk. The rule was well adapted to ancient times when men bought their goods in the open market place. But with the increasing complexity of trade relation's exceptions had to

1. See note u/s. 14.

be made to the rule. The modern scope of the maxim was well described by *Fitz Gibbon, J., in Wallis* v. *Russel*[1]:

> "[The, maxim] applies to the purchase of specific things, (*e.g.*), to a horse or a picture on which the buyer can and usually does exercise his own judgment. It applies also whenever the buyer voluntarily chooses what he buys. It applies also where by usage or otherwise, it is a term of the contract express or implied, that the buyer shall not rely on the skill or judgment of the seller. But it has no application to any case in which the seller has undertaken and the buyer has left it to the seller, to supply goods to be used for a purpose known to both parties at the time of the sale."

Thus the exceptions to the rule are (a) fitness of goods for a particular purpose—dealt with in sub-section (i) and (iii), and (b) merchantability—dealt with in sub-section (ii). But the general rules as well as the exception are subject to express agreements,[2] and the provisions of any other law in force.

The words "by implication" occurring in exception,[2] indicate that the communication of purpose to the seller need not be expressed but may be inferred from the description of the goods given by the buyer to the seller or from the circumstances of the case.[3] Where a layman purchases a watch of a particular make from a reputed firm exclusively dealing in such watches the sale would be within the purview of exception.[4]

"Subject to the provisions...etc."—Any condition or warranty that may arise under any other provisions of this Act is saved by this proviso. Other special enactments are the Merchandise Marks Act, Sale of Poisonous Drugs Act, and Adulteration of Foodstuffs Act etc. The provisions of these Acts are not affected by the rule embodied in the present section.

Sub-section (1)—Relying on seller's judgment—ESSENTIALS.—

(1) The buyer must require the goods for a *particular* purpose.

(2) The buyer must expressly or impliedly *make known* to the seller the particular purpose.

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1. (1902) 2 Ir. Rep. 585.
2. *Khoyee & Co.* v. *Gordon Woodrofle & Co.*, ILR (1937) Mad. 479 : 44 LW 676 : 166 IC 313 : (1936) MWN 970 : (1937) Mad. 40 : (1937) 2 MLJ 131 (Stipulation in contract that articles were to be of fair average quality of description and to be passed by the buyers as such—Held the superadding of the condition as to inspection did not reduce the importance of the undertaking as to quality).
3. *Ranbirsingh* v. *Hindusthan General Electric Corporation Ltd.*, AIR 1971 Bom. 97.
4. *Raghava Menon* v. *Kuttappan Nair*, AIR 1962 Ker. 118 : ILR (1962) 2 Ker. 449.

(3) The buyer must *rely* on the seller's skill and judgment.

(4) The seller's usual *course of business must be to sell* such goods, whether he is the actual producer or not.

The English Common Law rules on the subject of implied condition or warranty of quality or fitness were stated in the case of *Jones* v. *Just,*[1] and the following statement from Benjamin's treatise on Sale concisely summarises the law on the point:

> "A condition or warranty as to fitness or quality is implied only so far as a buyer does not buy on his own judgment. The buyer buys on his own judgment if he selects or defines the specific chattel or class of goods he requires, though he may state the purpose for which he is buying. He buys on the seller's judgment if the seller agrees to 'supply' goods and there is no opportunity of inspecting them. If the buyer's purpose be communicated to the seller, the seller's obligation is to supply goods fit for that purpose; if the goods are bought under a commercial description his duty is to supply merchantable goods. Where the goods are bought by sample, the buyer trusts to his own judgment (having inspected them or been able to inspect the sample) as regards any merchantable or other quality of the bulk which the sample would reveal on a reasonable examination but on the seller's judgment as regards the correspondence of the bulk with the sample."[2]

1. Section 16 clause (i) would apply in case the goods fall within the general description of the goods supplied by the vendor though in particular instance they assume a special form or are designed for a special use.[3] A particular purpose is, in fact, the purpose, expressly or impliedly communicated to the seller, for which the buyer purchases the goods. Where an article is capable of being applied to a variety of purpose, the buyer must particularise the special purpose.[4] The purpose must be notified to the seller in such a manner that he may know that his skill and judgment are being relied on to supply an article fit for that purpose.[5] The purpose need not necessarily be apparent from the written contract; evidence *aliunde* may be given, if it does not contradict the written contract.

Where the buyer has asked the seller for the sale of Everest asbestos sheets known for the quality and also disclosed the purpose for which they

1. (1868) 3 QB 197.
2. Benjamin on Sale (7th Edn. 1931) p. 653.
3. *National Traders* v. *Hindustan Soap Works,* AIR 1959 Mad. 112 : 71 LW 797.
4. *Drummond* v. *Van Ingen,* (1887) 12 AC 284; *Priest* v. *Last,* (1903) 2 KB 148; *Jones* v. *Padgett,* (1890) 24 QBD 650; *Manchester Liners Ltd.* v. *Rea Ltd.,* (1922) 2 AC 74.
5. *Joseph Mayr* v. *Phani Bhusan,* ILR (1938) 2 Cal. 88.

are to be bought, sub-section (1) of Sec.16 as to implied condition would be attracted since the corrugated asbestos sheets can be put to use for protecting the buildings from sun and rain but not for multi purposes.[1]

2. The seller must have been informed of the special purpose. Thus, in *Bombay Burmah Trading Corporation* v. *Aga Mohomed,*[2] where timber was purchased and the fact was made known to the seller that the timber was to be used for railway sleepers, it was held that the buyer could reject the timber as it was not fit for the purpose. So in *Preist* v. *Last,*[3] where a hot water bottle was purchased and it burst when boiling water was poured into it, it was held that the very description of the article showed that it was bought for the purpose of holding hot water and that there was a breach of warranty. **[993]**

In re: Andrew Yule & Co.,[4] there was a contract for sale of 150 bales of hessain cloth. The goods were resold by the buyers to sub-buyers who rejected the major portion of the goods, because of an unusual smell that rendered them unfit for packing provisions (which was one of their principal purposes). In as much as the goods could be used for other purposes than packing of foodstuffs, and as the buyers had not disclosed the particular purpose, it was held that there was no implied condition of fitness for that purpose and that the buyers could not reject the goods. In an English case *Griffiths* v. *Peter Conway,*[5] the plaintiff bought of the defendants a tweed coat. Soon after wearing it, she developed dermatitis and sued for damages. The court found that no normal skin would have been affected. On this finding, the Court of Appeal held that there was no breach of any implied condition as to fitness:

Provided the purpose is expressly disclosed to the seller, the buyer's knowledge that it may be possible that his exact requirements may not be satisfied, because of the seller's want of stock etc., will not exclude the operation of the rule enunciated in the section.[6] The communication of the purpose need

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1. *Eternit Everest Ltd.* v. *C.G.Abraham,* AIR 2003 Ker 273, 277 : (2003) 10 ILD 148 (Ker).
2. (1911) 34 Mad. 453 : 15 CWN 981 : (1911) 2 MWN 111 : 13 Bom. LR 813 : 8 ALJ 1208 : 21 MLJ 1110 (PC). **See also** *Jones* v. *Bright,* (1829) 130 ER 1167 : 30 RR 728 (Copper for sheathing a vessel); *Randall* v. *Newson,* (1877) 2 QBD 102 (Carriage pole for use in a carriage).
3. (1903) 2 KB 148. **See also** *Wallis* v. *Russell,* (1902) 2 IR 585 ("To nice fresh crabs for tea"); *Jackson* v. *Watson,* (1909) 2 KB 193 (Tinned salmon); *Gray* v. *Cox,* (1825) 107 ER 999 : 28 RR 769; *Robertson* v. *Amazon Tug & Lighterage Co.,* (1881) 7 QBD 598.
4. (1932) 59 Cal. 928 : 140 IC 877 : (1932) Cal. 879.
5. (1939) 1 AER 685. **See also** *Exportles Ltd.* v. *Allen & Sons,* (1938) 3 AER 375 (Operation of clause restricting right of rejection); *Wilensko* v. *Fenwick,* (1938) 3 AER 429.
6. *Manchester Liners* v. *Rea,* (1922) 2 AC 74 (Order for coal for particular steamer with natural draught furnaces—Buyer's knowledge of limited supplies—Coal actually supplied unsuited—Buyer held entitled to damages).

not be in words.[1] Where the seller knows of a general purpose but not of the special purpose contemplated by the buyer the seller may fulfil his contract by supplying goods fit for the general purpose.[2]

3. The buyer must rely on the seller's and judgment. In *Wallis* v. *Russell,* where 'two fresh crabs for tea' were required and the plaintiff saw the goods, it was yet held that the plaintiff relied on the defendant to select crabs, which would be nice and fresh for tea, and so the defendant was liable. The fact that the defects are latent is no excuse where the seller's judgment is relied on. The case of *Frost* v. *Aylesbury Dairy Co.,*[3] illustrates this. It is not necessary for the application of this rule that the buyer must have *exclusively* relied on the seller's judgment alone.[4]

The above three points are illustrated in a Calcutta case in which the plaintiff had, on the advice of the defendant, a manufacturer's representative, after acquainting him with all the facts, ordered a boiler for his carbon paper plant, and the boiler turned out to be useless for the plaintiff's purpose because the authorised declined to licence the boiler on account of its not conforming to the rules under the Indian Boilers Act. The court held that the defendant was liable for breach of an implied condition of fitness within the meaning of Sec. 16 (1) of the Act.[5]

4. It must be in seller's course of business to sell such goods. Otherwise, the buyer will be deemed to buy on his own judgment.[6] For this purpose it is immaterial whether the seller him self manufactures or produces the article. In *Camell Laird and Co.* v. *Manganese Bronze and Brass Co.,*[7] *where* an order was placed for the manufacture of a propeller for a ship according to plans and dimensions supplied by the purchaser, and the propeller when fitted in, made a great noise, it was held that the warranty of fitness was broken and that the buyer was entitled to reject the same. In *Myers* v. *Brent Cross Service Co.,*[8] the warranty was held applicable in cases of contracts for work and labour.

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1. *Gillespie* v. *Cheney,* (1896) 2 QB 59.
2. *Jones* v. *Padgett,* (1890) 24 QBD 650 (Order for "indigo blue cloth" by a wool merchant who was also a tailor—Cloth wanted for liveries—Goods unfit for that purpose, but otherwise merchantable).
3. (1905) 1 KB 608. **See also** *Mac Farlane* v. *Taylor,* (1868) 1 Sc. Ap. 245; *Mackillop* v. *Noorbhoy,* (1929) Sind 161 : 116 IC 588.
4. *Medway Oil & Storage Co.* v. *Silica Gel Corporation,* (1928) 33 Com. Cas. 195. **See** *Nagubai Ammal* v. *B. Shama Rao,* AIR 1956 SC 593 : 1956 SCJ 655 : 1956 SCR 451.
5. *Joseph Mayr* v. *Phani Bhusan,* ILR (1938) 2 Cal. 88.
6. **See** *Turner* v. *Mucklow,* (1862) 6 LT 690 : 131 RR 800; *Jackson* v. *Harrison,* (1862) 175 ER 1283; *Ipswich Gas Co.* v. *King & Co.,* (1886) 3 TLR 100; *Burnby* v. *Bollett,* (1847) 153 ER 1348 : 73 RR 667 (Sale of carcass of pig by farmer—Subsequent discovery that it was unfit for human consumption—No implied condition as it was not the line of the farmer's business).
7. (1933) 2 KB 141.
8. (1934) 1 KB 46; *Mayne* v. *Silvermere Cleaners,* (1939) 1 AER 693.

The section makes clear the doubt raised in *Parkinson* v. *Lee.*[1] The word 'producer' is added in the Indian Act to include agricultural products also.

Proviso to sub-section (1).—This corresponds to old Sec. 115 of the Indian Contract Act. The principle of it was expressed thus in *Bristol Tramways* v. *Fiat Motors Ltd.,*[2] *by* Farwell, L.J.:

> "If a man orders in express terms an article known by a patent or trade name under that name, and gets it, he cannot complain that it will not answer some specific purpose for which he wanted it even although he told the vendor before he ordered it the purpose for which he required it."

Thus in *Chanter* v. *Hopkins,*[3] where the defendant ordered a patent furnace known as "Chanter's smoke consuming furnace" for being fitted up in his brewery and defendant returned it, as the article could not be used for the brewery, the court held that the purchase was of a defined and well-known article, and that defendant could not invoke any implied warranty of fitness for the purpose of his brewery. But, as decided in *Baldrey* v. *Marshall,*[4] if the buyer while asking to be supplied with an article of a named make, indicates to the seller that he relies on the seller's skill and judgment for its being fit for a particular named purpose, he does not buy it under its trade name. Where goods are sold under a known trade name, in the absence of any breach of warranty, the fact that the parties were unaware of the lack of particular quality of goods shall not render the sale a nullity on the ground of mutual mistake.[5]

Fitness for a particular purpose.—This phrase has been construed to mean *intrinsic* fitness for the particular object to which the goods are to be applied and not fitness having regard to some particular legislation or rules framed by the state; and so on a sale of machinery or plant, the mere fact that the licensing authority declines to issue a licence in respect of it may not *ipso facto* be a breach of the warranty of fitness, though it may raise a presumption that the goods are not fit.[6]

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1. (1802) 102 ER 389 : 6 RR 429; (Seller, not manufacturer—No liability for latent defect).
2. (1910) 2 KB 831; (Cf.) *Gillespie* v. *Cheney,* (1896) 2 QB 59 (Sale of coal under a particular known description—Not a case of sale of article under its patent or trade name).
3. (1838) 150 ER 1484 : 51 RR 650. **See also** *Prideaux* v. *Bunnett,* (1857) 140 ER 252 : 107 RR 668; *Ollivant* v. *Bayley,* (1843) 114 ER 1257 : 64 RR 501.
4. (1925) 1 KB 260 (Order for comfortable car for touring purposes—Supply of Bugatti Car which was uncomfortable—Rejection of car and recovery of price).
5. *Harrison & Jones Ltd.* v. *Bunten & Lancaster Ltd.,* (1953) 1 All. ER 903.
6. *Joseph Mayr* v. *Phani Bushan,* ILR (1938) 2 Cal. 88; *Board of Trustees of Port of Calcutta* v. *Bengal Corporation (P) Ltd.,* AIR 1979 Cal. 142.

Scope.—This sub-section extends the common law rule under which the implied condition as to merchantability would not be a available to a buyer who had the *opportunity* of examining the goods, to cases where the buyer has *in fact* not made an examination. Again, even where the buyer has examined the goods, the seller will be liable for latent defects not discoverable by ordinary inspection.[1]

A computer disk comes within the definition of goods under Sec. 61 of English Sale of Goods Act, 1979 and Sec. 18 of the Supply of Goods Act, 1982 but a computer programme is not. If a computer disk is not suitable for the purpose, it amounts to breach of condition as to quality or fitness implied under Sec. 14 of the Sale of Goods Act, 1979 (Sec. 15 of Indian Sale of Goods Act, 1930) and Sec. 9 of the Supply of Goods Act, 1982.[2]

It is obligatory on the part of the seller under the implied condition as to fitness for purpose to ensure that the goods are fit for the purpose for which they would ordinarily be used. But the seller cannot be held liable for breach of implied condition as to fitness where the goods are not fit for such normal purpose because of abnormal feature or idiosyncrasy unless the seller is made known of the same by the buyer.[3]

Where the defendant has refused to accept the consignment of ground nut oil cake on the ground that it is of inferior quality not suiting for the purpose of solvent extraction, there is no necessity of a written contract between the parties ensuring the quality or fitness for the purpose of enforcing the implied condition as to the quality or fitness.[4]

Sub-section (2)—Merchantable quality.—Goods are of merchantable quality when they are of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept the goods in the circumstances of the case in performance of his offer to buy that article, whether he buys it for his own use or to sell again.[5] The condition as to merchantability requires the goods to be reasonably fits to be sold as goods of the particular description.[6] Or as observed in a recent Madras ruling, the term as to merchantability is fulfilled when the goods do not differ from the normal quality of the described goods, including under the term "quality,"

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1. *Thornett* v. *Beers & Sons,* (1919) 1 KB 486.
2. *St. Albans City and District Council* v. *International Computers Ltd.,* (1996) 4 All. ER 481 (CA).
3. *Slater* v. *Finning Ltd.,* (1996) 3 All. ER 398 (HL) ; *Forsythe Int. (UK) Ltd.*v. *Silver Shipping Co. Ltd.,* (1994) All. ER 851.
4. *Sri Lakshmi Narasimha Export Industries* v. *Zakaria Trading Co.,* (2003) 3 ILD 611 (AP).
5. Per Farwell, LJ in *Bristol Tramways* v. *Fiat Motors,* (1910) 2 KB 831; *G. McKenzie & Co. Ltd.* v. *Nagandranath Mahalanabish,* (1946) 50 CWN 213.
6. *Joseph Mayr* v. *Phani Bushan,* ILR (1938) 2 Cal. 88.

the state or condition as required by the contract.[1] The term 'merchantable' does not mean that the goods will fetch any price or even some price. It only means that the goods will fetch the price, which they would fetch if they had been sold as per the description.[2] It can only mean "commercially saleable".[3]

As regards this the rule in English law was laid down in *Gardiner* v. *Gray*,[4] and has been elaborately discussed in *Jones* v. *Just*.[5] There Manilla hemp, which had been sold, was delivered in a damaged state so as to be unmerchantable. It was held that the seller was liable.

Before the passing of the Indian Sale of Goods Act, it had been held by the Madras High Court following English cases that where goods were sold by description, there was an implied warranty that the goods should be of merchantable quality.[6] In *Board of Trustees of Port of Calcutta* v. *Bengal Corporation (P) Ltd.*,[7] the wire ropes supplied were held to be not of merchantable quality as the same were not suitable for the purpose for which the same were required.

The term quality of goods as defined in Sec. 2(12) *supra*, includes their state or condition. It has been held that labels on tins of condensed milk are part of the state of the goods, so that if the labels infringed a trademark the goods will not be in a merchantable state.[8]

'Merchantable quality' does not cover legal title to goods or the legal right to sell.[9] Again, goods are not to be deemed merchantable merely because they can be made so at a trifling cost.[10] **[1000]**

Proviso to Sub-section (2).—The exception applies only where the buyer has examined the goods and even then only as regards defects observable on examination. See *Thornett* v. *Beers & Son*,[11] where defendants who were offered every facility for examination of the glue sold where held to have

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1. *Khayee & Co.* v. *Gorden Woodroffe & Co.*, ILR (1937) Mad. 479 : 44 LW 676 : 166 IC 313 : (1936) MWN 970 : (1937) 2 MLJ 131.
2. *Sivalingappa* v. *Balakrishna*, AIR 1962 Mad. 426 : (1963) 2 MLJ 140.
3. *Board of Trustees of Port of Calcutta* v. *Bengal Corporation (P.) Ltd*, AIR 1979 Cal. 142.
4. (1815) 171 ER 46 : 16 RR 764.
5. (1868) 3 QB 197.
6. *Peer Mahomed* v. *Dalooram*, (1918) 35 MLJ 180 : 8 LW 192 : (1918) MWN 658 : 47 IC 555. **See also** *Wren* v. *Holt*, (1903) 1 KB 610; *Morelli* v. *Fitch*, (1928) 2 KB 636 (Purchase over counter of "Stone's Ginger Wine"—Held to be by description); *Malli* v. V. *A.A.R. Firm*, (1922) 43 MLJ 208 : (1923) Mad. 252 : 16 LW 145 : (1922) MWN 468 : 69 IC 396.
7. AIR 1979 Cal. 142.
8. *Niblett* v. *Confectioners' Materials Co.*, (1921) 3 KB 387.
9. *Summer* v. *Webb*, (1922) 1 KB 55.
10. *Jackson* v. *Rotax Motor & Cycle Co.*, (1910) 2 KB 937; *Grenfel* v. *Meyrowitz Ltd.*, (1936) 2 AER 1313.
11. (1919) 1 KB 486. **See also** *Drummond* v. *Van Ingen*, (1887) 12 AC 284.

bought the goods by description, and must be deemed to have examined them. But in case of latent defects, even an examination does not exclude the condition as to merchantability.[1] As observed in one case, the defects contemplated in Sec. 16 are those "apparent on reasonable examination" within the meaning of Sec, 17 *infra*.[2]

Where in a suit by the plaintiff for breach of implied condition as to merchantable quality of the fishing vessel sold by the defendant the contention of the defendant that it was not a Sale of Goods 'in the course of business' in terms of Sec. 14 (2) of Sale of Goods Act, 1979 is not tenable since the said Act aims to give wider protection to buyer and therefore the sale is in course of business.[3]

The combined effect of sub-section (2) and its proviso is that the implied condition extends to merchantability less patent defects.[4]

Condition as to wholesomeness.—Sec. 111 of the old Contract Act provided for an implied warranty of soundness on a sale of provisions. The present Sale of Goods Act contains no such provision, and such a case will fall only within the present sub-section. The cases of *Frost* v. *Aylesbury Dairy Co.*,[5] and *Wallis* v. *Russel*,[6] already cited are illustrations of this.

In this connection, mention may be made of the House of Lords decision in *Donoghue* v. *Stevenson*,[7] in which it was held that a producer of goods intended for immediate use by the customer in the condition and state in which the producer sends them out to the trade is under a duty to take care that the goods, when they leave him are free from defects which will render them unwholesome or noxious. In case of failure of such duty, the producer will be liable to the ultimate consumer, although between them, there may be no contractual relationship. The liability is grounded on tort, independent of breach of contract. **[1004]**

DANGEROUS GOODS.—Apart from condition or warranty, a seller of goods may be liable in tort to the buyer if he sells an article known to be dangerous, without sufficiently warning the buyer.[8] **[1005]**

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1. *Morelli* v. *Fitch*, (1928) 2 KB 636.
2. *Khoyee & Co.* v. *Gordon Woodroffe & Co.*, ILR (1937) Mad. 479 : 44 LW 676 : (1936) MWN 970 : 166 IC 313 : (1937) Mad. 40 : (1937) 2 MLJ 131.
3. *Stevenson* v. *Rogers*, [1999] 1 All. ER 613(C.A).
4. *Khoyee & Co.* v. *Gordon Woodroffe & Co.*, ILR (1937) Mad. 479 : 44 LW 676 : (1936) MWN 970 : 166 IC 313 : (1937) Mad. 40 : (1937) 2 MLJ 131.
5. (1905) 1 KB 608. **See also** *George* v. *Skivington*, (1869) 5 Ex. 1 (Injurious hair-wash).
6. (1902) 2 IR. R. 585; (1938) 4 AER 170.
7. (1932) AC 562; **see also** *Grant* v. *Australian Knitting Mills*, (1936) AC 85 : (1936) PC 34 : 159 IC 667 : 48 LW 132 : (1936) ALJ 120 : 70 MLJ 513; *Read* v. *Croydon Corpn.*, (1938) 4 AER 631; *Daniels* v. *White & Sons*, (1938) 4 AER 258. (Negligence will not be presumed); (Cf.) *Geddling* v. *Marsh*, (1920) 1 KB 668; *Kasler* v. *Slavouski*, (1928) 1 KB 78 (Quantum of damages).
8. *Clarke* v. *Army & Navy Co-operative Society*, (1903) 1 KB 155; *White* v. *Steadman*, (1913) 3 KB 340; *Burfit* v. *A&E Kille*, (1939) 2 AER 372. (Sale of pistol and blank ammunition to boy of 12 without warning).

Sub-section (3)—Condition or Warranty implied by usage.—This corresponds to old Sec. 110 of the Contract Act. It is based on the decision in *Jones* v. *Bowden*.[1] In this connection, attention may be drawn to Sec. 62, which says an implied condition may be negatived by the usage of a trade.

Where a particular quality of goods is contracted for, evidence of a custom whereby the buyer must accept goods of inferior quality cannot be let in.[2]

Sub-section (4).—This enacts that an implied condition or warranty is excluded only when it is inconsistent with an express warranty.[3] **[1006]**

17. Sale by sample.—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample there is an implied condition—

(a) that the bulk shall correspond with the sample in quality;

(b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

Analogous law.— Sec. 112 of the Indian Contract Act run thus—

"112. On the sale of goods by sample, there is an implied warranty that the bulk is equal in quality to the sample.

Sec. 15 of the English Act same as Sec. 17 of the Indian Act.

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1. (1813) 128 ER 565 : 14 RR 683. **See also** *Syers* v. *Jonas*, (1848) 154 ER 426 : 76 RR 515 (Usage as to sale by sample in tobacco trade).
2. *Rattonsay Rowji* v. *Bombay United Spinning & Weaving Co.*, (1917) 41 Bom. 518 : 18 Bom. LR 532 : 37 IC 271.
3. See *Bigge* v. *Parkinson*, (1862) 158 ER 758 : 126 RR 783; *Mody* v. *Gregson*, (1868) 4 Ex. 49.

Comparison with previous law.—The old Sec. 112 was narrower in scope as it referred only to the right to reject if the bulk did not correspond with the sample. The present clauses (b) and (c) were not found in the old section.

Clause (1)—Sale by sample.—In *Drummond* v. *Van Ingen*[1] Lord Macnaghten said that "the offer of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject- matter of the contract which owing to the imperfection of language, it may be difficult to express in words. The sample speaks for itself." **[1006]**

To constitute a sale by sample, it is necessary that there must be an express or implied term in the contract. That is, the offer must be made and accepted on the basis of the sample.[2] The mere fact that a sample is exhibited in the course of the negotiations will not make it a sale by sample.[3] In *Syers* v. *Jones,*[4] in a case of sale of tobacco, evidence was admitted of a trade usage that the sale should be by sample.

Clause (2)—Implied conditions.—SUB-CLAUSE (a)—As it is a condition that the bulk must correspond with the sample, the buyer can reject if the goods do not correspond to the sample.[5]

SUB-CLAUSE (b)—The buyer must have a reasonable opportunity to inspect the goods to see if the bulk corresponds to the sample.[6] In case of an improper refusal, the contract may be repudiated. The right to inspection may however be varied (*e.g.,*) in case of a provision for payment on arrival of goods and before delivery, the inspection can be made only after payment.[7] In such cases, the buyer need not accept the goods until after inspection. The general presumption is that the place of delivery is the place of inspection.[8]

Where there was a contract relating to the sale of 25,000 tons of gas oil subject to the condition of inspection as to the quantity and quality by a mutually agreed independent inspector and such inspection is to be made as

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1. (1887) 12 AC 284.
2. *Lal Chand* v. *Baij Nath,* (1936) 63 Cal. 736 : 169 IC 128 : (1937) Cal. 140. (In such a case, the sale remains a sale by sample notwithstanding the disappearance of the specimen or sample).
3. *Tye* v. *Fynmore,* (1813) 170 ER 1446 : 14 RR 809; *Meyer* v. *Everth,* (1814) 171 ER 8 : 15 RR 722; *Gardiner* v. *Gray,* (1815) 171 ER 46 : 16 RR 764.
4. (1848) 154 ER 426 : 76 P.R 515.
5. *Russel* v. *Nicolopulo,* (1860) 141 ER 1206 : 125 RR 683; *Wells* v. *Hopkins,* (1839) 15 ER 3; *Grimaldi* v. *White,* (1802) 170 ER 654.
6. *Lorymer* v. *Smith,* (1822) 107 ER 1.
7. *Polenghi* v. *Dried Milk Co.,* (1904) 21 TLR 118; (Cf.) *Pettitt* v. *Mitchell,* (1842) 134 ER 337.
8. *Perkins* v. *Bell,* (1893) 1 QB 193; *Nagardas* v. *Velmahomed,* (1930) 32 Bom. LR 454 : (1930) Bom. 249 : 126 IC 312; **but see** *Heilbutt* v. *Hickson,* (1872) 7 CP 438.

per the stipulated methods, the buyer cannot be made bound by the report and findings of the inspector who has not adhered to the stipulated methods.[1]

SUB-CLAUSE (c).—If there is any latent defect in the sample not discernible by ordinary examination of a prudent buyer, which, if present in the bulk would render the bulk unmerchantable, the sample is to be taken as if free from it.[2] **[1010]**

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1. *Veba Oil Supply & Trading GmbH* v. *Petrotrade Inc.*, (2002) 1 All. ER 703.
2. *Heilbutt* v. *Hickson*, (1872) 7 CP 438; **see also** *Mody* v. *Gregson*, (1868) 4 Ex. 49.

CHAPTER III

EFFECTS OF THE CONTRACTS

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER

18. Goods must be ascertained.—Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Analogous law.—English Sale of Goods Act, Sec. 16 same as Sec. 18 of the Indian Act.

Scope of the Chapter.—This chapter deals with the most important topic in sale of goods namely, the passing of property in the goods. As already said the Indian Act has adopted the governing principle of the English Act, namely, that the passing of the property depends upon the intention of the parties as evident from the terms of the contract and the circumstances of the case. But where the parties have formed no intention or failed to express their intention the law lays down certain rules for the determination of the question.[1] (See Sections 20 to 24, *infra*).

Under the Indian Contract Act, the language of the sections was such that they appeared to be rigid rules, which excluded evidence of contrary intention. The words "unless a different intention appears" found in Sec. 19, did not find a place in the Contract Act, **[1010]**

Sections 18 and 23 deal with the passing of property in contracts of sale of unascertained goods, while Secs. 19 to 22 and 24 deal with the case of ascertained goods.

Goods must be ascertained.—The section lays down the rule that property in unascertained goods does not pass till they are ascertained. Unless and until they are ascertained, the contract of sale is a mere agreement to sell. As was observed in *Badische Anilin Fabrik* v. *Hickson*[2]:

> "Where the goods are unascertained or do not exist when the contract is entered into property in goods does not pass to the purchaser."

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1. *Hoe Kin Seing* v. *Maung Ba Chit*, (1935) 14 Ran. 1 : 39 CWN 1217 : 157 IC 891 : (1935) ALJ 1119 : 37 Bom. LR 866 : (1935) MWN 1125 : 42 LW 469 : (1935) PC 182 : 69 MLJ 467.

2. (1906) AC 419. **See also** *Seath* v. *Moore*, (1886) 11 AC 350; *Thomes Sack* v. *Knowles*, (1918) 88 LJKB 585; *Maradugula Venkataratnam* v. *Kotla Ramanna*, (1911) 21 MLJ 413; *Mohanlal* v. *Gyaniram*, (1935) Nag. 111 : 31 NLR 250 : 155 IC 778; *Nippon Yusen Kaisha* v. *Ramjibhan*, ILR (1938) 2 Cal. 381 : (1938) 1 MLJ 834 : 42 CWN 677 : 67 CLJ 299 : (1938) MWN 487 : 40 Bom. LR 799 : 174 IC 564 : (1938) PC 152; *P.S. N.S.A. & Co.* v. *Express Newpapers*, AIR 1968 SC 741.

Unascertained goods may be an unascertained portion of ascertained goods. Thus in case of sale of goods from a larger bulk even though specific, the goods remain unascertained till a selection is made, (e.g.,) in a case of sale of twenty tons of oil out of the seller's stock in his cisterns, the contract will be only an agreement to sell.[1] Where the goods though is existence are mixed up with other goods it has been held there is no ascertainment till they are, so to say, earmarked.[2] So long as the goods are unascertained, merely entering a delivery order or making a transfer in the books of the warehouseman will not pass the property in the goods.[3] A State Forest Corporation cannot said to have held out a promise by issuing a sanction order in connection with the supply of timber, to supply timber at the price prevalent on the date of passing the sanction order when timber was unascertained and not in deliverable state and as such the question of promissory estoppel does not arise.[4] The reason in all these cases is that there is no individuality in the property sold till it is divided off from the rest of the property. Where the individuality of the goods depends on their being weighed or separated, the doing of such an act is a condition precedent to the passing of the property.

Where the seller agrees with buyer to sell manganese and iron ore to be excavated for delivery expit mouth, the metal so excavated can be treated as ascertained goods the moment it is excavated.[5]

It has however to be remembered that the mere ascertainment of goods will not pass the property unless the parties agree to that effect. Thus the contract may provide that, on the occurrence of an event sufficient to identify the goods, the property in the goods should pass.[6] In *Maneckji* v. *Wadilal,*[7] it was held that in cases of contracts for the sale of shares, as soon as the seller hands over the certificates and blank transfers and the buyer accepts them and gives the seller the cheque, the goods become ascertained goods, the sale is complete and the property passes.

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1. *White* v. *Wilks,* (1813) 128 ER 654 : 14 RR 735. **See also** *Shepley* v. *Davis,* (1814) 128 ER 832 : 15 RR 548 (Ten tons of hemp out of thirty); *Austen* v. *Craven,* (1812) 128 ER 483 : 13 RR 714 (Contract for 50 hogsheads of sugar out of a larger stock); *Gillett* v. *Hill,* (1834) 149 ER 871 : 39 RR 833; *Pletts.* v. *Campbell,* (1895) 2 QB 229 (One jar of beer in a cart containing others jars).
2. *Domingo* v. *De Souza,* (1928) 50 All. 665 : 26 ALJ 627 : (1928) All. 481.
3. *Busk* v. *Davis,* (1814) 105 ER 429 : 15 RR 288. **See also** *Laurie* v. *Dudin,* (1926) 1 KB 223; *Re Wait,* (1927) 1 Ch. 606.
4. *Ghulam Mohammed Wani* v. *State of J&K,* AIR 1999 J&K 74, 76.
5. *Vijaya Minerals Pvt. Ltd.* v. *Bikash Chandra Deb,* AIR 1996 Cal. 67, 77.
6. *Reeves* v. *Barlow,* (1884) 12 QBD 436; *Banbury* v. *Daniel,* (1885) 54 LJ CH. 265; *Gabarron* v. *Kreeft,* (1875) 10 Ex. 274. (The event must identify the goods).
7. (1926) 50 Bom. 360 : 28 Bom. LR 777 : 24 ALJ 657 : (1926) MWN 499 : 30 CWN 890 : (1926) PC 38 : 51 MLJ 1 (PC); *Shanker Lal* v. *Jamna Das,* (1937) 39 PLR 778 (Provision for postponement of delivery till payment will not *per se* stay passing of property).

Passing of property and risk.—It may be observed that the passing of the property, and the passing of the risk in regard to the goods need not necessarily be coeval. It is quite possible that the risk may pass independently of the passing of the property.[1]

19. Property passes when intended to pass.—(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in Sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Analogous law.—English Sale of Goods Act, Sec. 17, Clauses (1) and (2) Sec. 18, Clause (1) same as Sec. 19, Clauses 1, 2 and 3 of the Indian Act.

Passing of Property.—The expression 'sale of goods' is a composite expression consisting of a bargain or contract of sale, payment or promise of payment of price, delivery of goods and actual passing of title. Each one of these is a *sine qua non* for a sale though the sale is not concluded until the purchaser becomes the owner of the property.[2] The hall-mark of sale is the transfer of goods for the price paid or to be paid.[3]

Principle of the Section.—The Contract Act contained no corresponding section. The present section is based on the principle of the English law that the property may pass by the contract itself, if such be the intention of the parties.

Old Sec. 78 of the Contract Act was felt to lay down a vague and indefinite rule. As to the passing of property under it, there was a conflict of opinion. Maclean, C.J., in *Brij Coomaree* v. *Salamander Fire Insurance Co.*,[4] *held* that the section laid down a rule, which the parties could not by their arrangement vary. And in *Scott & Hodgson* v. *Keshavlal*,[5] a Bench of the Bombay High Court held that an

1. *Sterns* v. *Vickers*, (1923) 1 KB 78; *Laurie* v. *Dudin*, (1926) 1 KB 223.
2. *State* v. *Sinha Govindji*, AIR 1967 Delhi 88.
3. *Gordon Woodroffe & Co.* v. *Sheik M.A. Majid & Co.*, AIR 1967 SC 181 : (1967) 2 SCJ 387.
4. (1905) 32 Cal. 816.
5. (1930) 54 Bom. 862 : (1930) Bom. 529 : 32 Bom. LR 1065.

agreement between the parties that the property in the goods should not pass till payment of the whole purchase money was not valid. In *Bhimji* v. *Bombay Trust Corporation,*[1] the same Court following the Calcutta case above, held that it was not open to the parties to postpone the passing of property, contrary to the terms of Sec. 78. The Allahabad High Court also was of the same view.[2] But in an early Calcutta case, *Buchanan* v. *Audall,*[3] it had been held that it depended on the intention of the parties. In *Hurbut John* v. *Jal,*[4] and *Abdul Aziz* v. *Jogendra,*[5] and *Baij Nath* v. *Nand Ram,*[6] the same view was taken. To set this conflict at rest, the framers of the Act decided to follow the clear and definite rule of the English law, that the intention of the parties is the deciding factor as to when the property in the goods sold passes. **[1010]**

Two things are clear from the section, namely, (1) property passes when it is intended to pass,[7] (2) the rules postulated by the section are presumptions which apply only in the absence of stipulation by the parties as to when and under what circumstances property is to pass.[8] This is really a question of construction of the agreement; the intention has to be gathered from the whole agreement and the conduct of the parties.[9] Where the sanction of an authority is a condition precedent to a valid contract of sale, a sale without such sanction would not pass to the buyer the ownership in the goods contracted to be sold.[10]

Intention of parties.—As Lord Blackburn said in *Seath.* v. *Moore,*[11] *it* is a question of the construction of the contract in each case at what stage the property shall pass, and a question of fact whether that stage has been reached. Where the seller delivered the goods to the buyer and drew a hundi on the buyer to be accepted by him, the property would not pass to the buyer until the hundi is accepted, since the property is intended by the seller to be passed only after the acceptance of the hundi. [12]

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1. (1930) 54 Bom. 381 : 124 IC 800 : (1930) Bom. 306. **See also** *Kuttayan Chetty* v. *Palaniappa,* (1904) 27 Mad. 540.
2. *Peare Lal* v. *Diwan Singh,* (1930) All. 661 : (1930) ALJ 777 : 125 IC 453; *Dwarka Das* v. *Ram Ratan,* (1922) All. 458 : 68 IC 239.
3. (1875) 15 Ben. LR 276.
4. (1924) 25 Bom. LR 778 : 77 IC 150 : (1924) Bom. 41.
5. (1917) 44 Cal. 98.
6. (1926) Pat. 353 : 95 IC 867; *Rane (Mad.) Ltd.* v. *State of Kerala,* AIR 1968 Ker. 74; *State of Thailand* v. *Bombay Metal Depot,* (1978) 41 STC 140; *Hindustan Malleables and Forgings Ltd.* v. *Indian Furnace Co. Ltd.,* AIR 1979 Pat. 146.
7. *Rane (Madras) Ltd.* v. *State of Kerala,* AIR 1968 Ker. 74 (AB).
8. *Re. Anchor Line* v. *Henderson Bros. Ltd.,* (1937) Ch. 1.
9. *Ibrahim* v. *Union of India,* AIR 1966 Guj. 6 : ILR (1964) Guj. 928 ; *State of Madras* v. *Ramalingam & Co.,* AIR 1956 Mad. 695.
10. *Badri Dass* v. *Union of India,* AIR 1963 All. 346.
11. (1886) 11 AC 350. **See also** *Reid* v. *Macbeth,* (1904) AC 223; *Laing* v. *Barclay,* (1908) AC 35.
12. *United India Insurance Co.* v. *Aman Singh Munshi Lal,* AIR 1994 P & H 206, 209.

In *Khan & Khan* v. *Premsukh* [1] it was remarked that, though the incidence of risk is a good test in determining in which of the two parties the property in the goods vests, it is not a conclusive test and the question always is one of the intention of the parties, as other circumstances may show that the property was retained by one party in spite of the fact that they were shipped or-booked at the risk of the other party.

In *Chidambaram Chettiar* v. *Steel Bros.*[2] there was a mixed contract for storage of paddy and its subsequent sale. The paddy was in the firm instance delivered to the defendant for storage, and the plaintiff had the option to name a day on which the defendant was to buy at his current buying rate for that day. In these circumstances, the property in the goods was held not to pass until the option had been exercised; and as to the price, it was held that if the defendant had made no purchases that day, the rate must be fixed having regard to the market price.

On the passing of ownership under Sec. 19 of Sale of Goods Act, 1930 an English decision reported in *Forsythe Int. (UK) Ltd.* v. *Silver Shipping Co. Ltd. & Ors,*[3] is worth studying. The facts of the case (in gist) are as follows:–

The plaintiff contracted with the charterer to supply bunkers for a vessel, which was on time charter from the owners. The charterparty provided by Cl. 53 that the Charterers would pay for certain quantities of bunkers on delivery and about the same quantities and same prices (would apply) on redelivery and by Cl. 15 that the owners shall on redelivery (where it occurs at the end of the charter period or on earlier termination) accept and pay for all bunkers on board. Before the expiry of the Charter the vessel was withdrawn by the owners from the charterers for non payment of hire. At the time of the withdrawal of the vessel it was carrying bunkers for which the plaintiffs had not been paid. The plaintiffs brought an action against the charterers claiming under a retention of title clause in the contract for the supply of bunkers, the price of bunkers supplied to the charterers, and also against the ship owners, who had assumed possession of the bunkers when the charterparty was terminated, claiming that they had converted the bunkers when they had consumed them after termination of the charter party. It was accepted that property in the bunkers had not passed to the charterers as they had not paid for them and that therefore any assumption of ownership by the owners would be conversion. However, the owners contended that any conversion occurred at the date of termination of the charterparty, at which time they acquired good title to the bunkers by virtue of Sec. 25 (1) of

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1. (1931) Lah. 260 : 134 IC 1110.
2. (1936) Ran. 419 : 165 IC 308.
3. (1994) All. ER 851.

the Sale of Goods Act, 1979 which provided that a buyer in possession of goods with the consent of the seller could confer good title by delivery or transfer to any person receiving them in good faith without notice of any lien or other right of an original seller, since (i) the charterer had agreed to buy the bunkers from and obtained possession with the consent of the plaintiffs (ii) termination of the charterparty resulted in delivery or transfer of the bunkers by the charterers to the owners and (iii) the owners had received the bunkers by the charterers to the owners and (iv) the owners has received the bunkers in good faith without notice of any lien or other right of the plaintiff in respect of the bunkers. The plaintiffs contended that conversion occurred when the bunkers were consumed by the owners and not on termination of the charterparty, because by Cl. 53 of the charterparty, property in bunkers had not passed to the owners on termination as they were unascertained goods and were never appropriated to the charter party, or because Cl. 15 and 52, did not apply where a charter party was terminated before the end of its term. The Court held: (Per Clarke J.)

> "Property in the bunkers on board, the vessel passed from the owners to the charterers on delivery under the charterparty and (So far as they owned them) from the charterers to the owners on termination, even though the termination occurred during the carrying of Charterparty, since the termination amounted to redelivery for the purposes of Cl. 15 of the Charterparty. Accordingly subject to the effect of Sec. 25 (1) of the Act, 1979, the owners had converted the bunkers, on termination of the charterparty and again later when they had consumed them."

Ascertained goods.—The distinction between specific and ascertained goods would appear to be that the former are identified and agreed upon at the time of the contract of sale, while the latter are goods "identified in accordance with the agreement after the time a contract of sale is made."[1]

20. Specific goods in a deliverable state.—Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed.

Analogous law.—Sec. 18, Rule (1) English Act—Same as the section.

Passing of property.—The normal principle is that if the contract is unconditional and the goods sold are specific and

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1. *In re. Wait,* (1927) 1 Ch. 606.

in a deliverable state the property in the goods passes at the time the contract is made.[1] In the case of an *unconditional* contract for the sale of *specific goods* in a *deliverable state,* the property passes by the contract itself, without reference to payment of the price or delivery. It is immaterial whether the time of payment of the price or the delivery of the goods is postponed.[2] In *Dixon* v. *Yates,*[3] Parke, B. said:

> "I take it to be clear that by the law of England, the sale of a specific chattel passes the property in it to the vendee without delivery.....The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price, is equivalent to his accepting possession."

Thus by the making of an unconditional contract, the property passes, so as to throw on the purchaser all future risk, though, in virtue of the vendor's lien, the buyer may not remove the goods without payment of the price. In *Dwarka Das* v. *Ram Ratan,*[4] where specific goods in a deliverable state were sold but the buyer requested the seller to postpone delivery till a convenient time, it was held that the property had passed. In *Tarling* v. *Baxter,*[5] *a* stack of hay was agreed to be bought, and the hay was to remain uncut in the seller's premises till paid for. It was held that property had passed. In *Shankar Das* v. *Bhana Ram,*[6] where the vendors who had not actual possession, but had only the railway receipt in their hands, made a sale by endorsing the railway receipt in favour of the buyer, it was held that property passed on the making of the contract. When ascertained petroleum goods are loaded into tank lorries at Jullundhar and the buyer had paid the price, the property in goods passed on to the buyer at Jullundhur completing the sale at Jullundhur.[7]

Where the goods which being subject matter of sale transaction are ascertained, identified and put in a deliverable state, it cannot be said that the

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1. *Badriprasad* v. *State of Madhya Pradesh,* AIR 1966 SC 58 : (1967) 1 SCJ 313.
2. *Natonal Co-operative Sugar Mills Ltd.* v. *M/s. Albert and Company,* AIR 1981 Mad. 172 : (1981) 2 MLJ 343.
3. (1833) 110 ER 806 : 39 RR 489. **See also** *Gilmour* v. *Supple,* (1858) 14 ER 803 : 117 RR 97; *Sweeting* v. *Turner,* (1871) 7 QB 310; *Seath* v. *Moore,* (1886) 11 AC 350; *Badische Anilin Fabrik* v. *Hickson,* (1906) AC 419; *Collector of Customs* v. *Pednekar & Co. Ltd.* (in Liquidation) AIR 1976 SC 1408 : 1976 (3) SCR 971 : (1976) 3 SCC 790 : 1976 UJ 444.
4. (1922) 20 ALJ 579 : 68 IC 239 : (1922) All. 458.
5. (1827) 108 ER 484 : 30 RR 355; *Swanwick* v. *Southern,* (1839) 112 ER 1453; (Cf.) *Acraman* v. *Morrice,* (1849) 137 ER 584 : 70 RR 568; *Kursell* v. *Timber Operators,* (1927) 1 KB 298.
6. (1926) 7 Lah. 406 : (1926) Lah. 606.
7. *Indian Oil Corporation* v. *Municipal Corpn., Jullunder,* AIR 1990 P&H 99 : 1989 (2) Land LR 192.

property in goods has not passed to the buyer, merely because the buyer has not made full payment of price to the seller. [1]

When a transformer booked on F.O.R. basis is damaged during transit and the Insurance Co. as the assignee of the consignor sued railways for damages, neither the consignor nor his assignee Insurance Co. can sue for damages since the property had passed to the consignee in view of the fact that the consignment was booked on F.O.R. basis and the transformer was in deliverable state.[2]

Even in cases where the price has not been fixed by the contract, the rule will apply. [3]

Deliverable state.—See definition in Section 2, Clause (3):

> "Goods are said to be in a "deliverable state" when they are in such state that the buyer under the contract would be bound to take delivery of them."

Sale of movable and immovable property.—The section has no application to a contract for sale of specific goods along with an interest in land, where the contract is not severable,[4] (compare the repealed Sec. 85 of the old Contract Act). **[1015]**

21. Specific goods to be put into a deliverable state.—

Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

Analogous law.—Sec. 18, R. (2) of the English Act—Same as the section.

Scope of the section.—Where the seller has to do something to the goods before they are in a deliverable state, the property does not pass until that thing is done and the buyer has notice that it has been done.[5] Thus in *Acraman* v. *Morrice,*[6] where in respect of a contract for sale of certain oak trees,

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1. *Digamber Pershad Kirti Prasad* v. *State of UP,* AIR 1996 All. 1, 5.
2. *M/s. Oriental Fire and General Insurance Co. Ltd.* v. *Union of India,* AIR 1991 Kant. 385, 391.
3. *Seath* v. *Moore,* (1886) 11 AC 350; *Joyce* v. *Swann,* (1864) 144 ER 34 : 142 RR 258; (Cf.) *Valpy* v. *Gibson,* (1847) 136 ER 737 : 72 RR 740. see for rights under auction sales, *National Co-op. Sugar Mills* v. *Albert & Co.,* AIR 1981 Mad. 172; *Consolidated Coffee Ltd.* v. *Coffee Board, Bangalore,* AIR 1980 SC 1468 : 1980 (3) SCR 625 : 1980 (46) STC 164.
4. *Lanyon* v. *Toogood,* (1844) 153 ER 11; *Sleddon* v. *Cruickshank,* (1846) 153 ER 1103.
5. *Padamsi* v. *Shankar,* (1926) Nag. 410 : 95 IC 188.
6. (1849) 137 ER 584 : 70 RR 568.

it was the custom of the trade for the buyer to select and for the seller to sever the portions rejected, it was held that the goods-could not be said to be in a deliverable state unless the severing of the rejected portions had been done by the seller and that the buyer could not claim that property had passed merely by making the severance himself. So, in *Underwood* v. *Burgh Brick & Cement Syndicate,*[1] where the contract was for purchase of a horizontal condensing engine free on rail, and before delivery to the railway, the engine was damaged, it was held that property would not pass to the buyer until the engine was placed in safety on the rail. Similarly, in *Kursell* v. *Timber Operators,*[2] where the contract was for sale of timber of a certain description, growing in a forest, to be cut and removed in a period of fifteen years, after the trees had grown to a certain height, it was held that the timber could not be said to be in a deliverable state till severed, and so property did not pass with the making of the contract. **[1020]**

But where the act to be done is not for the purpose of putting the goods in a deliverable state, but for some other collateral purpose the passing of the property will not be delayed.[3] Thus in *Ramiah Asari* v. *Chidambar,*[4] where an author sold the right to publish and sell a literary production, it was held that the mere fact that the author had-undertaken to revise the work did not prevent the passing of property. **[1020]**

22. Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price.— Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

Analogous law.—Sec. 18, Rule (3), of the English Sale of Goods Act same as the present section except the words *"be one" is* found for "is done".

Scope of the section.—This section deals with cases where though the goods are ascertained and in a deliverable state, something has to be done *by the seller for* ascertaining the price *(e.g.,)* weighing or measuring the goods.

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1. (1922) 1 KB 343. **See also** *Rugg* v. *Minett,* (1809) 103 ER 985 : 10 RR 475; *Smith* v. *Surman,* (1829) 109 ER 209 : 33 RR 259; *Anderson* v. *Morice,* (1876) 1 AC 713.
2. (1927) 1 KB 298.
3. *Hammond* v. *Anderson,* (1804) 127 ER 384 : 8 RR 763 (Payment of warehouse rent); *Hinde* v. *Whitehouse,* (1806) 103 ER 216 : 8 RR 676 (Duties payable).
4. (1920) 39 MLJ 341.

Where the weighing or measuring is for some purpose other than ascertaining the price (*e.g.*,) for the satisfaction of the buyer, the property will pass.[1] Where the price is paid at the shop before the dealer's man goes to the godown to give delivery and the goods are not weighed, measured or tested at the godown, Section 22 has no application.[2]

The cases of *Simmons* v. *Swift* [3] and *Abdul Aziz* v. *Jogendra,*[4] *illustrate* the position from another point of view. In both these cases the sale was held not complete till examination and weighment by the buyer, as in the absence of such weighment, property did not pass. But in *Kanshiram* v. *Mulchand,*[5] where under the contract, it was the buyer who was to weigh the goods at the time of delivery and the seller had undertaken responsibility for any deficiency; it was held that the property had passed. Similarly, in *Dewa Singh* v. *Narain Singh,*[6] where in payment of a debt due to the buyer, the latter was to take at specified rates, all the bricks in the seller's kiln, the expenses of stacking etc, to be debited to the seller, it was held that as the seller had nothing more to do in connection with the sale, there was a completed sale and property passed to the buyer. So too, in *Hoe Kim Seing* v. *Maung Ba Chit,*[7] a contract for sale of specific goods, (*viz.*) paddy in baskets, in a deliverable state contained no express indication as to when property in the goods was intended to pass. The price was fixed in terms of baskets, but the total quantity of paddy had been declared. The notes exchanged between the parties contained a statement that the buyer was to measure the paddy. The Judicial Committee, reversing the decision of the High Court held that it required only a mere calculation to ascertain the total price, that on payment of such price, the property in the goods passed to the buyer, and that the measurement, was only for the satisfaction of the buyer, and had no bearing in the circumstances, on the passing of the property. **[1022]**

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1. *Shoshi Mohun* v. *Nobokristo,* (1879) 4 Cal. 801; *Turley* v. *Bates,* (1863) 159 ER 83 : 133 RR 639 (facts) *in pari materia* : *Gilmour* v. *Supple,* (1858) 14 ER 803 : 117 RR 97 (Measurement not necessary for ascertaining price); *Tansley* v. *Turner,* (1835) 132 ER 60 : 42 RR 564; *Nanka Bruce* v. *Commonwealth Trust,* (1926) AC 77; *Eldon (Lord))* v. *Hedley Bros.,* (1935) 2 KB 1.
2. *District Board* v. *Hira Singh,* AIR 1968 Punj. 289 : ILR (1967) 2 Punj. 772.
3. (1826) 108 ER 319 : 29 RR 438. **See also** *Hanson* v. *Meyer,* (1805) 102 ER 1425 : 8 RR 572 (Sale of starch—Weighing a condition precedent to passing of property); *Zagury* v. *Furnell,* (1809) 170 ER 1142 : 11 RR 704 (Sale of goat skin—Custom of trade that seller must count skins before delivery—Condition precedent); *Logan* v. *Le Mesurier,* (1847) 13 ER 628 : 79 RR 10.
4. (1917) 44 Cal. 98 : 20 CWN 1224 : 36 IC 119; *Ugarchand* v. *Motiram,* (1938) Sind 18 : 173 IC 535.
5. (1930) Lah. 469 : 127 IC 158.
6. (1927) Lah. 894 : 103 IC 222. **See also** *In re. David Sasoon & Co.,* (1926) Sind 246 : 95 IC 453.
7. (1935) PC 182 : 37 PLR 659 : 157 IC 891 : (1935) ALJ 1119 : (1035) OWN 980 : 37 Bom. LR 866 : 32 CWN 1217 : (1935) MWN 1125 : 42 LW 469 : 69 MLJ 467.

23. Sale of unascertained goods and appropriation.—(1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

Delivery to carrier.—(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Analogous Law.—Sec. 18 Rule 5 of the English Sale of Goods Act, same as Sec. 23 of the Indian Act except for the addition of the words *"or custodian"* after "or other bailee" in clause (2).

As to the principles formulated in the Section see *Hindustan Malleables & Forgings Ltd.* v. *Indian Finance Co. Ltd.*[1]

Clause (1) Appropriation.—ESSENTIALS.— 1. The goods should *conform* to the description in the contract. This is an important condition precedent. In *Vigers* v. *Sanderson,*[2] *there* was a contract for two parcels of seven lathes of specified lengths, and it was provided that property should pass on shipment, but as it happened that the goods supplied were not of the contract description, it was held that no question of the passing of property arose at all. **[892]**

In a contract represented by a pucca delivery order no property in the goods is transferred till the goods are ascertained by appropriation, which is a matter of evidence in the case.[3]

2. The goods must be in a *deliverable state.*

3. They must be *unconditionally appropriated* to the contract.[4] What is unconditional appropriation is defined in sub-section (2) of Sec. 23.

1. AIR 1979 Pat. 146.
2. (1901) 1 KB 608. **See also** *Buch & Co.* v. *Gordhandas,* (1923) Bom. 95 : 24 Bom. LR 991; (Cf.) *Cunliffe* v. *Harrison,* (1851) 155 ER 813 : 86 RR 543 (Order for ten hogsheads of claret—Fifteen sent—No specific appropriation).
3. *Jute and Gunny Brokers Ltd.* v. *Union of India,* AIR 1961 SC 1214 : (1961) 3 SCR 820.
4. *Carona Sahu Co. (P) Ltd.* v. *State of Maharashtra,* AIR 1966 SC 1153 : 1966 (2) SCR 845: 1966 (17) STC 348; *Karan Sohan Lal* v. *Firm John & Co.,* AIR 1967 All. 308; *Gambhirmull Mahabirprasad* v. *Indian Bank Ltd.,* AIR 1963 Cal. 163; *Indian Wood Products Ltd.* v. *Sales-tax Officer,* AIR 1968 Delhi 211.

Unconditional appropriation means that there is no reservation of the *jus disponendi.*[1] If, for instance, it is conditional on payment of the price, there is no appropriation within the meaning of the section. An executory agreement to sell unascertained goods will become a sale by a subsequent unconditional appropriation of them to the contract. Thus, in *Shanker Das* v. *Bhand Ram,*[2] where the sellers who had contracted to sell oil, and received the price therefor, subsequently received from their vendors a railway receipt for the goods, and endorsed them to the buyers, it was held that the property had passed to the buyers and the risk of destruction in transit lay with him.

4. The appropriation made by one party must be *assented* to by the other. The assent may be express or implied, and may be given either before or after the actual appropriation.[3] *Aldridge* v. *Johnson,*[4] *was* a case where the assent was given before the appropriation. The case of *Rohde* v. *Thwaites,*[5] is one where the assent was subsequent to the appropriation. In *Clive Jute Mills* v. *Ebrahim Arab,*[6] where goods answering the contract description were appropriated by the vendor and the buyer asked the vendor to make them and send them according to his instruction, the Court held that the directions given by the buyer constituted an implied assent to the appropriation already made by the seller. In *Gulabrai Rai* v. *Nirbhe Ram,*[7] where the seller forwarded the Bill of Lading with a Bill of Exchange attached, with directions for delivery of the former only on the acceptance or payment of the Bill of Exchange, it was held that the appropriation, which was conditional, became final when the draft was accepted. **[1031]**

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1. *Ford Automobiles* v. *Delhi Motor Engineering Co.,* (1923) 24 Bom. LR 1140 : (1923) Bom. 125; (Cf.) *Nripendra Kumar Bose, In re.,* (1930) 56 Cal. 1074 : 121 IC 745 : (1930) Cal. 171; *Campbell* v. *Mersey Docks and Harbour Board,* (1863) 143 ER 506 : 135 RR 752.
2. (1926) 7 Lah. 406 : 97 IC 765 : (1926) Lah. 606; (Cf.) *Maneckji* v. *Wadi Lal,* (1926) 53 IA 92 : 50 Bom. 360 : 24 ALJ 657 : 28 Bom. LR 777 : 43 CLJ 508 : 94 IC 824 : 51 MLJ 1 : (1926) MWN 499. (Sale of shares).
3. *Juggernath* v. *Smith,* (1906) 33 Cal. 547; *Scott Hodgson* v. *Keshavlal,* (1930) Bom. 529 : 32 Bom. LR 1065; *Hunt Huat and Company* v. *Sin Gee Moh & Co.,* (1921) 66 IC 510 (L. Burma); *Rangta Sons (P) Ltd.* v. *Owners Masters etc. in S.C. Edison,* 66 Cal. WN 1083.
4. (1857) 119 ER 1476 : 110 RR 875; **see also** *Raghnath Dass* v. *Ghamandi Lal,* (1925) Lah. 586 : 86 IC 794; *Produce Brokers* v. *Olympia Oil & Cakes Co.,* (1917) 1 KB 320; *Langton* v. *Higgins,* (1859) 157 ER 896 : 118 RR 515 (Purchase of crop of farm for oil of peppermint—Buyer to send bottles—Vendor filling bottles but selling to third parties—Held property passed to buyer); *Venkitaratnam* v. *Raman,* (1911) 21 MLJ 413 : 9 IC 225; *Finlay Muir* v. *Radhakissen,* (1909) 36 Cal. 736 : 3 IC 185.
5. (1827) 108 ER 495 : 30 RR 363; *Langton* v. *Higgins,* (1859) 157 ER 896. **See** *Wait* v. *Baker,* (1848) 154 ER 380 for several meanings of the term appropriation; *Alexander* v. *Gardner,* (1835) 131 ER 1276 : 41 RR 651.
6. (1897) 24 Cal. 177. **See also** *Juggernath* v. *Smith,* (1906) 33 Cal. 547.
7. (1923) 4 Lah. 423 : 79 IC 194 : (1924) Lah. 239.

Where the seller after unconditionally appropriating goods to the contract gives notice of the same to the buyer who does not reply, the court will have to infer whether there is any implied assent to the appropriation.[1]

Where the contract was that after the machinery ordered was manufactured it will be despatched to the plaintiff, in the absence of evidence to show that when it was despatched it was not in accordance with the specification, it could not be said that there was no implied assent to the appropriation of the machinery to the contract merely by reason of the plaintiff's refusal to take delivery.[2]

As an illustration of a case of a buyer appropriating under authority given under the contract itself, reference may be made to the case of *James Jones & Sons* v. *Tankerville.*[3]

It need hardly be added that if there is neither previous authority nor subsequent assent to appropriation, the property does not pass.[4] So too, if a mistake is made in the appropriation.[5] **[1041]**

Clause (2)—Delivery to carrier.—This clause must be compared with Sec. 25, which deals with the converse case of what is a conditional appropriation. Though in the repealed portion of the Contract Act, there was no specific section like this, the principle was yet recognised.[6] **[1035]**

Delivery of goods by the vendor to the carrier, as per the contract for transmission to the buyer is the commonest case of appropriation sufficient to pass the property in the goods to the buyer.[7] Delivery of the goods to the carrier would not pass the property in the goods to the buyer where the seller reserves the *jus disponendi.*[7] Delivery to the carrier may be absolutely for the buyer where no right or control is reserved by the seller.[8]

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1. *Pignatrao* v. *Gilroy,* (1919) 1 KB 459, **But see** *Nath Mal* v. *Jugal Kishore,*(1929) Lah. 268.
2. *Behera* v. *Nanagram etc. Rice Mills,* AIR 1966 Assam 95.
3. (1909) 2 Ch. 440.
4. *Jenner* v. *Smith,* (1869) 4 CP 270.
5. *Campbell* v. *Mersey Docks and Harbour Board,* (1863) 143 ER 506 : 135 RR 752. As to when appropriation becomes final. **See** *Reauter* v. *Sale,* (1879) 4 CPD 239; *Bailey, Son & Co.* v. *Smyth,* (1939) 1 AER 115 (Page 502 *ante*); *Aure* v. *Van Cauwenberghe & Fils,* (1938) 2 AER 300.
6. *Ford Automobiles* v. *Delhi Motor Co.,* (1923) 24 Bom. LR 1140 : 70 IC 138 : (1923) Bom. 125.
7. *Carona Sahu Co. (P) Ltd.* v. *State of Maharashtra,* AIR 1966 SC 1153 : 1966 (2) SCR 845 : 1966 (17) STC 348.
8. **See** *General Papers Ltd.* v. *Mohideen & Bros.,* AIR 1958 Mad. 408; *Rama Purchases & Sales Society Ltd.* v. *State of Madras,* (1958) 2 An.WR 458 : AIR 1959 AP 36; *Moidoo Bros.* v. *State of Madras,* AIR 1959 Ker. 29 (FB); *Union of India* v. *Laxmi Narain,* AIR 1963 Raj. 162; *Areen (P) Ltd.* v. *State of Madras,* AIR 1961 Mad. 216; *Mohideen Thumby & Co.* v. *State of Madras,* (1962) 2 MLJ 197; *Natarajan* v. *Parasram Perumal & Co.,* AIR 1963 Ker. 13; *Mutsadulal* v. *Union of India,* AIR 1964 Punj. 20; *Gumbhirmal* v. *Indian Bank,* AIR 1963 Cal. 163; *Firm Shah Chandamal* v. *Hazarilal,* AIR 1962 Raj. 122.

Where a seller delivers goods to a carrier under the orders of the buyer, delivery to the carrier is a delivery to the buyer, and property passes at once.[1] The carrier is presumed to be the buyer's agent not only to take delivery, but also to assent to the appropriation already made by the seller. It has been held by the Madras High Court that delivery to the railway company by taking a railway receipt in the risk note form is delivery to the buyer.[2] On the other hand, where the seller contracts to deliver at the destination, property will not pass till delivery at such destination.[3] Where the goods were consigned by railway, but the railway receipt was taken in the consignor's name, it was held that there was no appropriation.[4] **[1040]**

When goods are supplied by V.P.P. as directed by the buyer and the goods are delivered to the post office and remain with it, the seller no doubt has control over the goods up to the time they are delivered to the buyer against the payment of the price, but the seller has no right to dispose of them as he liked,[5] nor can the post office deliver the goods to the buyer without receiving the price.[6]

Futzure goods.—This term covers goods to be manufactured after making the contract of sale. In such cases, the property does not pass till the goods are made and appropriated. But parties may agree that property in the goods should pass even before they are completed, or at a certain stage. As said already, it is a question of construction as to when property was intended to pass and a question of fact whether that stage has been reached. A number of cases of this kind have arisen with regard to ship-building contracts,[7] in respect to which a special rule has been evolved through a series of cases, to

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1. *Cork Distilleries* v. *Great Southern Railway Co.*, (1874) 7 HL 269; (Cf.) *Sakarchand* v. *Premji*, (1930) Sind 130 : 120 IC 502; *Colonial Insurance Co.* v. *Adelaide Marine Insurance Co.*, (1886) 12 AC 128 (Delivery on board—Buyer's chartered ship—Delivery complete); *Studdy* v. *Sanders*, (1826) 108 ER 234 (Delivery to servant of buyer—Property passes); *Rungta Sons (P) Ltd.* v. *Owners and Masters etc.* Cf. *S.S. Edition*, 66 Cal. WN 1083.
2. *Alagappa* v. *Roopchand*, (1929) 57 MLJ 110 : (1929) Mad. 685 : (1929) MWN 613 : 30 LW 415 : 117 IC 136.
3. *Bryans* v. *Nix*, (1839) 150 ER 1634 : 51 RR 819; (Cf.) *Sadasook* v. *Chaitram*, (1925) 29 CWN 808 : (1926) Cal. 218 : 88 IC 910.
4. *Billimoria* v. *Gouri Mal*, (1928) Lah. 481 : 112 IC 457; *Sundar Singh* v. *Gulab Singh*, (1927) Lah. 269 : 100 IC 795.
5. *Commissioner of Income-tax* v. *Rathod & Co.*, AIR 1957 MB 54.
6. *Commissioner of Income-tax* v. *Rathod & Co.*, AIR 1959 SC 1394 : 1960 SCJ 153.
7. **See** *Laing* v. *Barclay*, (1908) AC 35; (Cf.) *Reid* v. *Macbeth*, (1904) AC 223. Interesting questions as to passing of property have arisen, (Cf.) *Mucklow* v. *Mangles*, (1808) 127 ER 856 : 9 ER 784; *Atkinson* v. *Bell*, (1828) 108 ER 1046 : 32 RR 382; *Bellamy* v. *Davey*, (1891) 3 Ch. 540; *Clarke* v. *Spence*, (1836) 111 ER 855 : 43 RR 395; *Wood* v. *Bell*, (1856) 119 ER 669 : 103 RR 735. **See also** *In re.. Blyth Shipbuilding and Dry Docks Co.*, (1926) Ch. 494.

the effect that, if the ship is to be paid for by instalments, property in the ship passes on payment of the first instalment and subsequent additions become the buyer's as and when they are worked into the ship. **[1028]** Where the goods to be delivered in future and seller becomes insolvent before any appropriation is made, the buyer acquires no interest in the goods.[1]

24. Goods sent on approval or "on sale or return".— When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—

(a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

Analogous law.—Sec. 18, Rule 4 of the English Sale of Goods Act same as Sec. 24 of the Indian Act except for the addition of the words at the end of clause (b) "What is a reasonable time is a question of fact."

Sale or return.—In *Amritlal* v. *Bhagwandas,*[2] Kania, J. observed: "The rule stated in Section 24 is to govern when there is no intention to the contrary .....Goods or jewellery may be delivered by the owner to the buyer with the intention that he may inspect the same and ultimately purchase it. The goods in such cases are stated to be delivered for approval *i.e., Jangad.* Section 24 covers that situation. In *Nirmalabai* v. *The State,*[3] certain ornaments were delivered to a lady "on approval" and the latter undertook to return them in the evening but she failed to do so. The Court held that "buyer" in Section 24 signifies a bailee in possession with option to purchase the goods; that under Clause (b) of Section 24 the lady's failure to signify approval or acceptance coupled with her retention of the ornaments without giving notice of rejection passed the property to her. When goods are sent on trial or on approval or on sale or return, generally the property remains in the seller till the transactions

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1. In *Re Gold Corp. Exchange Ltd.(in Receivership),* (1994) All. ER 806.
2. AIR 1939 Bom. 435 : ILR (1939) Bom. 454.
3. Anon.

is adopted by the buyer.[1] So in *Moore* v. *Evans*,[2] *a* case of sale or return, where the contract contained the words "Goods had on sale or return remain the property of [the seller till invoiced by them," it was held that the ownership in the goods did not pass. So, any right of suit in respect of the goods while on their way to the customer was held to lie only with the seller.[3] It is however open to the parties to contract that the property shall pass at the outset and revest in the seller if the intending buyer does not approve of the same.[4]

If during the time that the article is with the bailee on approval, the article gets damaged without the bailee's fault, the bailment is not changed into a sale.[5]

Sometimes, goods may be delivered on condition that the bailor may treat the transaction as a sale in case of non-return within a fixed period; in such cases this section is not applicable. The transaction must be viewed as a whole; for it may easily be a case of agency to sell.[6]

Clause (a)—Adoption of the transaction.—Any act, which indicates an election on the bailee's part to become owner of the goods, will be an act adopting the transaction, (*e.g.*), sale or pledge of the goods.[7] **[1024]**

Clause (b)—Retention beyond time.—Where the seller has specified a period within which the goods are to be returned in case of non-approval, the transaction will become a completed sale and property will pass to the bailee at the end of the period, if the bailee has not in the meanwhile given notice of rejection.[8]

TIME NOT FIXED.—Where the time is not fixed, the law implies that the parties intended a reasonable time.[9] What is a reasonable time is, under Sec. 63 *infra*, a question of fact.

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1. *Emperor* v. *Phirozeshah Manekji Gandhi*, (1934) 58 Bom. 646 : 36 Bom. LR 731 : (1934) 360 : 152 IC 706.
2. (1918) AC 185. **See also** *Edwards* v. *Vaughan*, (1910) 26 TLR 545.
3. *Swain* v. *Shepherd*, (1832) 174 ER 76 : 42 RR 782.
4. (Cf.) *Head* v. *Tattersall*, (1871) 7 Ex. 7.
5. *Elphick* v. *Barnes*, (1880) 5 CPD 321; *Chapman* v. *Withers*, (1888) 20 QBD 824.
6. **See** *Weiner* v. *Harris*, (1910) 1 KB 285.
7. *Kirkham* v. *Attenborough*, (1897) 1 QB 201; *London Jewellers* v. *Attenborough*, (1934) 2 KB 206. **See also** *Ex parte Wingfield*, (1879) 10 Ch.D. 591; *Weiner* v. *Gill*, (1906) 2 KB 574; *Genn* v. *Winkel*, (1912) 107 LT 434.
8. *Ellis* v. *Mortimer*, (1805) 127 ER 460; *Humphries* v. *Carvalho*, (1812) 104 ER 1006 : 14 RR 280 (Sale on trial).
9. *Moss* v. *Sweet*, (1851) 117 ER 968 : 83 RR 560 (Non-return within reasonable time—Sale absolute).

25. Reservation of right of disposal.—(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

[1][(2) Where goods are shipped or delivered to a railway administration for carriage by railway and by the bill of lading or railway receipt, as the case may be, the goods are deliverable to the order of the seller or his agent, the seller is *prima facie deemed* to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price and transmits to the buyer the bill of exchange together with the bill of lading or as the case may be, the railway receipt, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading or railway receipt if he does not honour the bill of exchange; and, if he wrongfully retains the bill of lading or the railway receipt, the property in the goods does not pass to him.

Explanation— In this section, the expressions "railway" and "railway administration" shall have the meanings respectively assigned to them under the Indian Railways Act, 1890 (9 of 1890).]

Analogous law.—Sec. 19 of the English Act, same as Sec. 25 of the Indian Act except for the addition of words *"or custodian"* in clause (1) after the words "or other bailee".

Scope of the section.—This section deals with conditional appropriation. There was no section corresponding to this in the old Contract Act, though the principle had been recognised.[2] Clauses (1) and (3) would appear to be based on *Mirabita* v. *Imperial Ottoman Bank.*[3] Clause (2) is an

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1. Sub-sections 2 and 3 has been amended by Amendment Act 33 of 1963.
2. *Ford Automobiles* v. *Delhi Motor Co.,* (1923) 24 Bom. LR 1140 : 70 IC 138 : (1923) Bom. 125.
3. (1878) 3 Ex. D. 164 (172) per Cotton, LJ. **See also** *The Parchim,* (1918) AC 157.

application of the general proposition enunciated in the first clause. It will be observed that Clauses (2) and (3) relate particularly to carriage by sea.

Principle of the section.—In *Ford Automobiles* v. *Delhi Motor Co.*,[1] *the* principles as to *jus disponendi* underlying the section have been elaborately discussed, and laid down by Mulla, J., in the shape of the following propositions:

(1) "In the case of such a contract, *i.e.*, a contract for the sale of unascertained goods, the delivery by the vendor to a common carrier, or, unless the effect of the shipment is restricted by the terms of the Bill of Lading, shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property. *(Mirabita's case.)* [2]

(2) "If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the Bill of Lading to his own order, and does so not as agent, or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently, there is no final appropriation and the property does not on shipment pass to the purchaser." (*Mirabita's case*).[2]

(3) "If the vendor deals with or claims to retain the Bill of Lading in order to secure the contract price, as when he sends forward the Bill of Lading with a Bill of Exchange attached, with directions that the Bill of Lading is not to be delivered to the purchaser till acceptance or payment of the Bill of Exchange, the appropriation is not absolute, but, until such acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser." *(Mirabita's case)* [2]

Rule 3 does not deal with Bills of Lading made out to the shipper's order, see *Annie Johnson (The).*[3]

(4) If the seller discounts a draft upon the buyer with a Bank, and authorises the Bank to hand to the buyer a Bill of Lading to the order of the seller and endorsed in blank by him upon his acceptance of the draft, the intention to be inferred, according to general mercantile understanding, is that the seller intends to

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1. (1923) 24 Bom. LR 1140 : 70 IC 138 : (1923) Bom. 125. **See also** *Balkishan* v. *Fazal Elahi*, (1927) 8 Lah. 173 : 102 IC 807 : (1927) Lah. 391; *Gulab Rai* v. *Nirbhe Ram*, (1923) 4 Lah. 423 : 79 IC 194 : (1924) Lah. 239.
2. (1878) 3 Ex. D. 164 (172) per Cotton, LJ. **See also** *The Parchim*, (1918) AC 157.
3. (1918) P. 154 (163).

transfer the ownership when the draft is accepted, but intends also to remain the owner until this has been done, *Prinz Adalbert (The).*[1]

Reserving right of disposal.—The question of reserving the right of disposal is material only where parties living at a distance contract by correspondence. In such cases, the seller is anxious to protect himself against the default or insolvency of the buyer, and the buyer would naturally like not to part with his money before he is sure of the goods being delivered. So, what is done is, that the seller ships the goods but takes the bill of lading in his own name or in the name of his agent at the buyer's place, and sends the bill to his agent with instructions to part with the bill of lading only on payment of the price.[2] Or he may draw a bill of exchange for the price on A, and send the bill to a banker, transferring to the banker the bill of lading. In both cases, there is no idea of passing the property in the goods to the buyer, though the goods have been ascertained and appropriated and in fact earmarked. It may be that the seller's act in taking the bill of lading in his own name may amount to a breach of contract in the circumstances of a particular case, but that will have no bearing on the question of ownership.[3] Yet another course is to draw on the buyer a bill of exchange for the price and send it to the buyer himself with the bill of lading. This is to be found in Clause (3) of the present section. But as observed by Jenkins, C.J. in *Re. Cargo ex S.S. Rappenfels,*[4] where the bill is drawn on the buyer himself, the question whether the *jus disponendi is* reserved is difficult to answer. **[1036]**

When a railway receipt is taken in the name of the consignee and the receipt, invoice and bill of exchange for the price are sent to the bank to be given to the buyer after he met the bill, it is a case of seller reserving the right of disposal. If in such a case the purchaser got the goods from the railway without producing the railway receipt by giving an indemnity, property will not pass to the buyer since his possession was secured by a tortious act.[5] Where the parties agree that payment allowed to be made in instalments was to be deemed as payment in full at the time of delivery of the goods sold there is no reserving of the right of disposal by the seller.[6]

The bill of lading is a symbol of property, and by taking it in his own name the seller keeps to himself the right of dealing with the property shipped

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1. (1917) AC 586.
2. *Ogg* v. *Shuter,* (1875) 1 CPD 47.
3. *Gabarron* v. *Kreeft,* (1875) 10 Ex. 274.
4. (1914) 42 Cal. 334 : 30 IC 174; (Cf.) *Walley* v. *Montgomery,* (1803) 102 ER 721 : 7 RR 526; *The Sorfareren,* (1915) 32 TLR 108; *Shepherd* v. *Harrison,* (1871) 5 HL 116.
5. *Mohammed Sheriff* v. *Official Liquidator,* AIR 1964 Ker. 135 : (1963) Ker. LT 641. Cf. *Metal Traders Ltd.* v. *Jeyporse Sugar Co. Ltd.,* (1970) 1 An.WR 107.
6. *Badriprasad* v. *State of M.P.,* AIR 1966 SC 58 : 1966 Mah. LJ 33.

and also the right of demanding possession from the captain and this is consistent even with a special term that the goods are shipped on account of and at the risk of the buyer.[1]

In a Privy Council case, where one clause of the contract of sale precluding the passing of property until payment of the price, was followed up by a clause providing for a lien of the seller as unpaid vendor on the mate's receipts or other documents and on the goods, the Judicial Committee held that reading the contract as a whole, the property in the goods passed when the goods were delivered to the ship owners.[2]

C.I.F. Contract—Essentials.—In modern transactions of sale and purchase, especially where the buyer and seller live in different countries, the common kind of contract of sale is the C.I.F. contract. The expression implies that the price of the goods is to cover not only the actual cost of the goods, but insurance and freight.

Vendor's duty under a C.I.F. Contract.—In *Johnson* v. *Taylor Bros.*,[3] Lord Atkinson describes the duties of a vendor under a C.I.F. contract as follows:

> "1. To make out an invoice of the goods sold. 2. To ship at the port of shipment goods of the description contained in the contract. 3. To procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. 4. To arrange for an insurance upon the terms current in the trade, which will be available for the benefit of the buyer. 5. To send to the buyer the shipping documents, *(viz.)* the invoice, bill of lading, and policy of insurance, delivery of which to the buyer is symbolical delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to payment of their price."

A C.I.F. contract is completed by tender of the relative documents. **[1042]**

Buyer's duty under a C.I.F. Contract.—As was said by McCardie, J., in *Manbre Sacharine Co.* v. *Corn Products Co.*[4]:

> "All that the buyer can call for is delivery of the customary documents. This represents the measure of the buyer's right and the

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1. *Carona Sahu Co. (P) Ltd.* v. *State of Maharashtra,* AIR 1966 SC 1153 : (1966) 17 STC 348 : 1966 (2) SCR 845 : 1966 (17) STC 348.
2. *Nippon Yusen Kaisha* v. *Ramjibhan Serogee,* ILR (1938) 2 Cal. 381 : (1938) 1 MLJ 384 : 67 CLJ 298 : 40 Bom. LR 799 : 42 CWN 677 : 174 IC 564 : (1938) MWN 487 : (1938) PC 152.
3. (1920) AC 144. **See also** *Biddell Bros.* v. *Clemens Horst Co.,* (1911) 1 KB 214; *Ireland* v. *Livingston,* (1872) 5 HL 395 (406).
4. (1919) 1 KB 198; *Durga Dutt* v. *Wood & Co.,* (1933) Lah. 453 : 142 IC 413 : 34 PLR 266; *Girdhari* v. *Scales,* (1937) Lah. 566.

extent of the vendor's duty. The buyer cannot refuse the documents and ask for the actual goods, nor can the vendor withhold the documents and tender the goods they represent."

The buyer is not entitled to refuse payment until he is given an opportunity for inspecting the goods.[1] Nor is he entitled to raise any question as to variation in the goods until the drafts or bills of exchange drawn against the goods have been retried.[2] The only justifiable reason for his refusing to accept will be that the documents tendered were not proper.

Is the C.I.F. contract then a mere sale of documents ? The correct view would appear to be that it is not a mere sale of documents; it is still a contract for the sale of goods, though it is to be performed by transfer of the relative documents, which must be proper and valid at the time when they are tendered.[3] Where the contract provides for payment by draft drawn on the buyer, the latter is bound to accept the draft drawn upon him, when the proper documents are tendered. This he must do even though the goods be lost or destroyed at the time of the presentation of the draft. The delivery he is entitled to as against payment is not of the goods but their symbol represented by the bill of lading etc.[4]

Passing of property in C.I.F. Contract.—The answer to the question as to when property passes in a C.I.F. Contract, depends on whether the seller has parted with the control over the disposal of the goods. Normally, the property does not pass to the buyer merely by shipment.[5] Endorsement of the bill of lading to the purchaser may indicate an intention to pass property. But if the endorsement is made in blank and the bill handed to the consignor's agent with instructions to deliver only on payment, there will be a manifest intention to retain the *jus disponendi*.[6] So where documents are sent to a bank to be delivered on acceptance of the draft, the property passes only on acceptance of the draft.[7] But the mere retention of the mate's receipt where the bill of

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1. *Mohanlal* v. *Krishna Premji,* (1928) 30 Bom. LR 415 : 109 IC 470 : (1928) Bom. 170; *Steel Bros.* v. *Dayal Khatan,* (1924) 47 Bom. 924 : (1924) Bom. 247 : 25 Bom. LR 1063 : 87 IC 67.
2. *Gopal Chand* v. *Jacob Behrens,* (1930) Lah. 640 : 123 IC 118.
3. *Kurberg & Co.* v. *Blythe Green & Co.,* (1916) 1 KB 495; *Johnson* v. *Taylor,* (1920) AC 144; *Durga Dutt* v. *Wood & Co.,* (1933) Lah. 453 : 142 IC 413 (Parties may vary usual conditions of C.I.F. Contract).
4. *Girdhari* v. *Scales,* (1937) Lah. 566; *Bubby Hurry* v. *Hertz,* (1923) 4 Lah. 215 : (1923) Lah. 541 : 73 IC 421; *Stirling Mason & Co.* v. *Jawalanath,* (1920) 1 Lah. 22 : 55 IC 975 : 62 PLR 1920.
5. *Mohanlal* v. *Krishna Premji,* (1928) 30 Bom. LR 415 : 109 IC 470 : (1928) Bom. 170.
6. *Bank of Morvi* v. *Baerlein Bros.,* (1924) 48 Bom. 374 : 26 Bom. LR 155 : 79 IC 1012 : (1924) Bom. 325; *Balkishan* v. *Fazal Elahi,* (1927) 8 Lah. 173 : 102 IC 807 : (1927) Lah. 391.
7. *Mehta & Co.* v. *Joseph Heureuz,* (1924) 48 Bom. 531 : 26 Bom. LR 382 : 80 IC 766 : (1924) Bom. 422.

lading has been made out in the buyer's name will not reserve the right of disposal.[1]

Consistently with the above, it would follow that repudiation by the buyer, which would absolve the seller from performance, must be before the date on which the documents ought to have been tendered.[2]

Where the goods consigned by an Indian seller to the foreign buyer under C.I.F. contract were lost during the transit before the foreign buyer had paid the price and documents of title were transferred to him, the insurance company is liable to compensate only to Indian currency but not in pounds and sterling's.[3]

Breach of C.I.F. Contract.—The contract is performed in fact and the date of its performance is the date, when the documents would come forward, the seller making every reasonable effort to forward them. In case of non-delivery the contract is broken at the time when the document ought to have been tendered and not when the goods arrive and damages must be estimated accordingly.[1]

Clause (2)—Bill of Lading.—In the definition of "document of title," the bill of lading is included. It is a symbol of the goods, though not a symbol of the right of property in all cases *(e.g.)* a bill of lading issued by the master of a ship without the seller's consent will not pass the property.[4] Where endorsed in blank, the bill is transferable by delivery. Bills of lading are generally drawn in sets of three, and the property passes to the *bona fide* transferee who is firsts in point of time.[5] Sometimes, the following words are added in the bill: "One of these bills of lading being accomplished, the others shall stand void."

It has been held that where the seller sends the goods to the buyer by rail, but takes the railway receipt in his own name, and despatches it to his banker with instructions to deliver it to the buyer only on receiving payment, the circumstances bring the case within this section and the mere fact of the buyer accepting a bill drawn on the seller has not the effect of passing the property in the goods.[6]

Clause (3).—Where delivery of documents or goods is against payment of the price, the right of disposal is reserved.[7] Where the bill of lading and the

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1. *Cowasji* v. *Thompson,* (1845) 3 MIA 422.
2. *Steel Bros.* v. *Dayal Khatan,* (1924) 47 Bom. 924 : 25 Bom. LR 1063 : 87 IC 67 : (1924) Bom. 247.
3. *National Insurance Co. Ltd.* v. *Sky Gems,* (2002) 2 SCC 273.
4. *Craven* v. *Ryder,* (1816) 128 ER 1103 : 16 RR 644.
5. *Barber* v. *Meyertein,* (1870) 4 HL 317.
6. *Ugarchand* v. *Motiram,* (1938) Sind 18.
7. *Barrow* v. *Coles,* (1811) 170 ER 1316 : 13 RR 763.

bill of exchange are sent together to the buyer, he cannot reject the one and retain the other.[1] The buyer who wrongfully deals with the documents is liable in trover to the seller.[2]

26. Risk *prima facie* passes with property.—Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not:

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party is fault as regards any loss which might not have occurred but for such fault:

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

Analogous law.—Sec. 20 of the English Act, same as the Indian Act except for the addition of the words *"or custodian"* after the words "as a bailee."

Previous law compared.—The Special Committee pointed out that old Sec. 86 seemed to lay down an inflexible rule that the risk follows the property. Under the English law, it is merely a *prima facie* rule subject to the agreement of parties to the contrary. And the present section has adopted that rule.

Passing of the risk.—It is always open to the parties to enter into any contract they please, such that the risk can be separated from ownership.[3] The risk generally follows the property in the absence of special contract. But ownership may, in particular cases, be separated from the risk.[4] In *Kanshiram* v. *Mulchand,*[5] a case under Sec. 86, Contract Act, where a consignment of lime was sold and the price paid in part, the balance to be paid after the lime was

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1. *Cahu* v. *Pockett's Bristol Channel Steam Pocket Co.,* (1899) 1 QB 643.
2. *Peruvian Guano Co.* v. *Dreyfus,* (1892) AC 166.
3. **See** *Multanmal Champalal* v. *C.P. Shah & Co.,* AIR 1970 Mys. 106 : (1969) 2 Mys.LJ 499.
4. *Martineau* v. *Kitching,* (1872) 7 QB 436; *The Parchim,* (1918) AC 167; (Cf.) *Anderson* v. *Morice,* (1875) 1 AC 713; *Sweeting* v. *Turner,* (1871) 7 QB 310; *Sterns* v. *Vickers,* (1923) 1 KB 78.
5. (1930) Lah. 469; (Cf.) *Billimoria* v. *Gouri Mal,* (1928) 10 LLJ 290 : 112 IC 457 : (1928) Lah. 481; *Shankardas* v. *Bhanaram,* (1926) 7 Lah. 406 : (1926) Lah. 606 : 97 IC 765.

weighed, and the goods were delivered in a damaged state, it was held that the property had passed and so the risk was with the buyer. Where goods are sent F.O.R. the property in goods passes immediately on the seller delivering the goods and loading the same in the railway wagons.[1] In *Ford Automobiles* v. *Delhi Motor Co.*,[2] where the sellers had taken the railway receipt in their own name, and had instructed their agents not to part with the receipt except on payment, it was held that the property was with the plaintiffs. But if parties agree that the seller should send the goods to the buyer at the owner's risk, then delivery to the carrier will be tantamount to delivery to the buyer, and in the absence of any indication, the risk will pass also.[3] **[1045]**

As Chalmers says, property and insurable interest may be separable. But, insurance by one party will be a circumstance showing that the incidence of the risk is with him.[4] Where the price is payable only on arrival of goods at their destination, the risk lies with the seller.[5] But, generally, if goods are shipped "F.O.B." the risk attaches to the buyer on shipment.[6] It is possible for even unascertained goods to be at the buyer's risk.[7]

The second proviso to Section 26 would cover a case where the party in possession of goods remains liable for them as bailee either under a contract of bailment or in circumstances giving rise to the relationship of bailor and bailee for negligence though not for accidental loss.[8]

TRANSFER OF TITLE

27. Sale by person not the owner.—Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller

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1. *M/s. Marwar Tent Factory* v. *Union of India,* AIR 1990 SC 1753 : (1989) 4 JT 307 : (1989) 3 Cur. CC 582.
2. (1923) 24 Bom. LR 1140 : 70 IC 138 : (1923) Bom. 125.
3. **See** *Alagappa* v. *Roopchand,* (1929) 57 MLJ 110 : (1929) MWN 613 : 30 LW 415 : (1929) Mad. 685.
4. *Fragano* v. *Long,* (1825) 107 ER 1040 : 28 RR 226; *The Annie Johnson,* (1918) p. 154.
5. *Calcutta & Co. Ltd* v. *De Mattos,* (1863) 139 RR 752 : 32 LJQB 322. **See** *Multanmal Champalal* v. *C.P. Shah & Co.,* AIR 1970 Mys. 106.
6. *Cowasji* v. *Thompson,* (1845) 13 ER 454 : 70 RR 27; *Wimble* v. *Rosenberg,* (1913) 3 KB 743.
7. *Inglis* v. *Stock,* (1885) 10 AC 263.
8. *Hanutmal Bhutoria* v. *Union of India,* AIR 1961 Cal. 54.

had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell:

Provided that, where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

Analogous law.—Sec. 21 of the English Sale of Goods Act runs thus.—

> "21. (1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.
>
> (2) Provided also that nothing in this Act shall effect.—
>
> (a) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof:
>
> (b) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a Court of competent jurisdiction."

Section 2, Cl. (1) of the Factors Act, 1989, same as the proviso to Sec. 27 of the Indian Sale of Goods Act except for the addition of the words *'pledge, or other disposition of the goods.'*

Transfer of title.—GENERAL SURVEY.—The batch of Sections from 27 to 30 have superseded and split up old Sec. 108 of the Contract Act. These sections set out the circumstances and limitations under which a person can transfer a good title to the buyer without himself having title or authority from the owners to pass title.[1] Section 27 applies only to contracts of sale but not to transactions intended to operate as mortgage, pledge, charge or the

1. *Pramatha Nath* v. *Probirendra,* AIR 1966 Cal. 405.

security.[1] Sec. 27 corresponds to the first para of Sec. 108 of the Contract Act and the first exception. Sec. 28 has been re-enacted as a separate section in place of the second exception to Sec. 108. Sec. 29 has taken the place of exception 3 to Sec. 108. Sec. 30 is a new addition not covered by the Contract Act.

While thus splitting up the section, the legislature has considerably altered its language, so that the scope of old Sec. 108 has been much narrowed from *'any person in possession of goods' to 'a mercantile agent in possession'*. But the law as laid down is in general conformity with the English law.

The modification of Sec. 108 necessitated an alteration in the companion Section 178 of the Contract Act. Accordingly, the Indian Contract (Amendment) Act IV of 1930 has modified old Sec. 178 and added another Sec. 178-A, so to make the sections correspond in principle to the newly enacted sections.

General rule.—The Latin maxim *nemo dat quod non habet* expresses the general rule that no man can pass a better title than he has. The mere fact of an innocent and *bona fide* purchaser from a person with no title is no answer to the claim of the true owner.[2] But the rule is not without exceptions and the present section deals with one of them in the proviso.

Exceptions.—The words "subject to the provisions of this Act, and of any other law for the time being in force" show that apart from the exceptions to be found in the Act itself (*e.g.*) Sec. 54 (3), there may be others provided by other enactments. Thus, Sec. 176 of the Contract Act gives the pawnee the power of sale under certain conditions, and the competency to pass a better title than he has. Again, under Or. 40 of the Civil Procedure Code, a receiver appointed by court has power to sell and pass all the property in the subject-matter sold. Similarly, executors in whom legal title vests, (as distinguished from beneficial interest), the Official Assignee in whom the property of an insolvent vests, liquidators of companies—are all persons who can pass a good title though they do not sell as owners or with the consent of the owners.[3] **[1050]**

Estoppel.—The basis of the first para is the principle of personal estoppel. Where the owner of goods so conducts himself, when another person deals as an owner with those goods, as to lead a third party to believe that the person dealing with the goods has authority to sell, then the true owner is estopped by his conduct from impeaching the disposition made.[4] In *Woodley* v.

1. *Purshottam Das Banersi Das* v. *Union of India,* AIR 1967 All. 549 : ILR (1967) 1 All. 398.
2. *Stone* v. *Marsh,* (1827) 108 ER 554 : 30 RR 420.
3. **See** Halsbury, IV Edn., Vol. 7, para 695 etc.
4. *Cole* v. *North Western Bank,* (1875) 10 CP 334; *Greggs* v. *Wells,* (1839) 113 ER 35 : 50 RR 347; *Simm* v. *Anglo-American Telegraph Co.,* (1880) 5 QBD 188.

Coventry [1] the defendants sold corn to a third party who, having got advances from the plaintiff on the security of the goods, gave plaintiff a delivery order on the defendants. The plaintiff lodged the delivery order with the defendants and sold the goods to different persons. After a part had been delivered, the third party absconded, and defendants refused further delivery to the plaintiff. In plaintiff's action of trover, the court held the defendants were estopped from denying that property had passed to the third party.

This rule of estoppel is on the principle of *Lickbarrow* v. *Mason,* that as between two innocent persons, he who has enabled a wrong to be done must be the sufferer. This rule, though generally followed,[2] has latterly been qualified by limitations put on the word 'enabled,' so as to import some act of the owner which has *misled* the innocent purchaser,[3] (*i.e.*)"an act amounting to a disregard of his obligations towards the person who relies on the negligence as creating an estoppel".

In *Mercantile Bank of India* v. *Central Bank of India,*[3] the Central Bank, which used to advance moneys to a merchant on the pledge of railway receipts was accustomed in the usual course of business to hand back the receipt to the merchant for clearing the goods. The merchant, instead of doing so, repledged the receipts with the Mercantile Bank. On the merchant's failure, a question of priority arose between the two banks with regard to some railway receipts, which had been fraudulently pledged in succession with both banks. An estoppel by conduct or negligence was sought to be raised against the Central Bank, and the principle of *Lickbarrow* v. *Mason* as applied in *Commonwealth Trust Company* v. *Akotey* was invoked.

But their Lordships of the Judicial Committee negatived any such estoppel, observing that the Central Bank owed no duty to the Mercantile Bank in the matter, there being no relationship of contract or agency between them. In this connection, their Lordships observed that the well-known statement of the law by Ashurst, J., in *Lickbarrow* v. *Mason* was too wide, and that the *Commonwealth Trust case* was not safe to follow. To the further argument

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1. (1863) 159 ER 68 : 133 RR 633. **See also** *Knights* v. *Wiffen,* (1870) 5 QB 660; *Dixon* v. *Kennaway,* (1900) 1 Ch. 833; *Commonwealth Trust* v. *Akotey,* (1926) AC 72; *Baijnath* v. *Firm of Nand Ram,* (1926) Pat. 353 : 95 IC 867.
2. *Commonwealth Trust* v. *Akotey,* (1926) AC 72.
3. **See** *Mercantile Bank of India* v. *Central Bank of India,* ILR (1938) Mad. 360 : (1938) ALJ 273 : 40 Bom. LR 713 : 66 CLJ 510 : 42 CWN 321 : (1938) OWN 206 : 47 LW 329 : (1938) MWN 552 : (1938) PC 52 : (1938) 1 MLJ 268; *Farquharson* v. *King & Co.,* (1902) AC 325 (342); *Union Credit Bank* v. *Mersey Docks and Harbour Board,* (1899) 2 QB 205; *Rimmer* v. *Webster,* (1902) 2 Ch. 163.

that there was an estoppel against the Central Bank based on representation, their Lordships said that the special conditions of fact justifying a finding of estoppel by representation did not exist in the case, inasmuch as the railway receipt was in form merely an authority to take delivery of goods and possession of it contained no representation as to any authority in the holder.

On the same principle, a registered owner of shares by merely handing over the share certificates and blank transfers signed by him to another person has been held not to make a representation to the world that such person is entitled to deal with shares.[1] So too, the registered owner of a motor vehicle who allows the 'C' certificate standing in his name to remain in the possession of his agent plying the vehicle for hire, has been held not precluded from denying the agent's right to sell, where the agent fraudulently sells it to a third party. The principle is that the mere retention of the 'certificate' could not, without any further fraudulent dealing on the agent's part, confer any authority to sell.[2] **[1051]**

English law of market overt.—There is in English Law an important exception to the rule that a person cannot make a valid sale of goods that do not belong to him. Sec. 22 of the English Sale of Goods Act deals with this, and runs as follows—

> "22. (1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller."

Market overt in the country is held by charter or prescription on special days. But, in the city of London, every day except Sunday is market day; and every shop in London in which goods are exposed publicly for sale is a market overt for such goods as the owner openly professes to trade in. The goods must be openly sold in the presence and sight of any person entering the ship. The ship is not a market overt except for goods usually sold, *e.g.* a scrivener's shop is no market overt for plate, Smithfield no market overt for clothes, but only for horses and cattle.

It must be remembered that the privilege protects only the innocent buyer: the seller, however innocent, is not protected from liability.

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1. *Abdul* v. *Hasanali*, (1926) 50 Bom. 229 : 28 Bom. LR 562 : 96 IC 305 : (1926) Bom. 338.
2. *Mohambaram* v. *Ram Narayan*, (1935) Mad. 850 : 158 IC 535 : (1935) MWN 932 : 42 LW 431 : 69 MLJ 691.

But, the English rule as to sale in market overt has been held unsuited to Indian conditions and has not been adopted. **[1049]**

Proviso.—This confines the power of sale to mercantile agents only. Thus the Indian law is brought into line with the English law. The corresponding proviso (i) to Sec. 108 of the old Contract Act was wide in its scope, as it referred to 'any person' in possession of goods. But the interpretation placed by courts on the word 'possession' as meaning 'juridical possession,' (*i.e.*), unqualified possession, not to be restricted otherwise than by the owner giving instructions to the person who has it,[1] had in practice the effect of confining the proviso to persons whose employment corresponded to that of commercial agents like factors. **[1053]**

Mercantile Agent.—The term has been defined in Sec. 2 (9). The term does not include a servant or caretaker or one who has possession of the goods for a special purpose,[2] (*e.g.*) carriage, custody, etc. It includes only persons whose employment corresponds to that of some known kind of commercial agent. Thus, the clerk of a wine merchant, in possession of dock warrants in his capacity, as a clerk is not a mercantile agent.[3] In *Oppenheimer* v. *Attenborough*,[4] the plaintiff gave some diamonds to a diamond broker on the latter's representation that there were some likely purchasers for them. The broker pledged them with the defendants who acted *bona fide*. It was held that the broker was a mercantile agent and had, as such, authority to pledge—an authority which could not be cut down by any trade custom. But it is not necessary that the person must have a general occupation as agent.[5] **[1053]**

Consent of the owner.—It means consent in fact. In *Folkes* v. *King*,[6] a motor car agent entrusted with a car for sale not below a reserve price fixed, sold it for less. It was held that the buyer acquired a good title as the agent had possession only with the consent of the owner. **[1058]**

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1. *Greenwood* v. *Holquette*, (1873) 12 Ben. LR 42; *Shankar* v. *Mohanlal*, (1887) 11 Bom. 704; *Seager* v. *Hukma Kessa*, (1900) 24 Bom. 458 : 2 Bom. LR 403; *Shankar* v. *Lakshmibai*, (1928) 30 Bom. LR 470 : (1928) Bom. 225; *Roopchand* v. *National Bank*, (1919) 46 Cal. 342 : 22 CWN 1042 : 48 IC 975; *Katta Ramasami* v. *Kamalammal*, (1922) 45 Mad. 173 : (1922) Mad. 44 : 42 MLJ 32 : 14 LW 599 : (1921) MWN 801 : 70 IC 448; *Ahmed* v. *Singer Co.*, (1921) 3 LLJ 249. **But see** *Rahimbux* v. *Central Bank*, (1929) 56 Cal. 367 : (1929) Cal. 497 : 119 IC 23.
2. (Cf.) *Shankar* v. *Mohanlal*, (1887) 11 Bom. 704; *Katta Ramasami* v. *Kamalammal*, (1921) 45 Mad. 173 : 42 MLJ 32 : 14 LW 599 : (1921) MWN 801 : 70 IC 448.
3. *Lamb* v. *Attenborough*, (1862) 121 ER 922 : 124 RR 772. **See also** *City Bank* v. *Barrow*, (1880) 5 AC 664.
4. (1908) 1 KB 221.
5. *Lowther* v. *Harris*, (1927) 1 KB 393; *Weiner* v. *Harris*, (1910) 1 KB 285 (Manufacturing jeweller entrusting travelling agent with jewels).
6. (1923) 1 KB 282.

In some English cases, the exact import of the term 'consent of the owner' has been canvassed, some holding that there is no consent in cases of 'larceny by a trick'. But latterly, protests have been made against the importation into commercial transactions, of the artificial distinctions of criminal law. The present tendency would appear to be to confine consent to consent in fact or *de facto* consent.[1]

Subsequent revocation of consent.—In English law, the Factors Act, Sec. 2 (2) validated a sale by the mercantile agent even after revocation of the consent by the owner provided the buyer had no notice of the revocation. In India, the Sale of Goods Act contains no corresponding provision, but there is no reason why the English rule should not apply.[2] **[1060]**

It has been suggested that the goods must have come into the possession of the mercantile agent in his capacity as mercantile agent. Thus in Benjamin's treatise on Sale, it is said that a mercantile agent who in some other capacity is entrusted with goods, is not entrusted with them as a mercantile agent and could not in consequence pass a good title to a third person. In other words, it is as if the section ran," where a mercantile agent is, with the consent of the owner, in possession *as a mercantile agent* of goods. etc." It would therefore follow that the capacity in which the mercantile agent comes to possess the goods in question must be one which clothes him authority to (1) sell goods, (2) consign goods for sale, (3) buy goods, (4) raise money on the security of goods.

But such a construction is not quite free from difficulty. The section itself deals with an exception to the rule of *nemo dat quod non habet.* Ex hypothesis, therefore, the person who sells has no authority to sell. But if the above construction is to be adopted, it would follow that the mercantile agent, having received the article in his capacity as such, has authority to sell or pledge. Where then comes the question of an exception to the rule? It is only the case of a person having authority to sell or pledge selling it to a third party contrary to instructions. If this construction is to be adopted, then the result will be a considerable narrowing of the section to a case of the following kind: A mercantile agent, authorised *only* to pledge the goods sells them to a third party. In such a case, the third party will get a good title.[3] **[1056]**

It is submitted that, if this were the intendment of the section, it would have been much simpler to recast the proviso by saying that where a

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1. *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.,* (1899) 1 QB 643; *Heap* v. *Motorists' Agency,* (1923) 1 KB 577; *Folkes* v. *King,* (1923) 1 KB 282; *Butler & Co.* v. *Brooks,* (1932) 142 LT 576; *London Jewellers* v. *Sutton,* (1934) 50 TLR 193.
2. *Moody* v. *Pall Mall Deposit Co.,* (1917) 33 TLR 306.
3. See observations of Collins, LJ, in *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.,* (1899) 1 QB 643 (660).

mercantile agent authorised only to pledge sells the goods, the third party will get a good title if he acted *bona fide; the* expressions relating to consent of the owner and possession will be unnecessary, for both consent and possession must be presumed where authority is given to pledge goods. It is exceedingly doubtful whether this narrowing was intended by the legislature.

"Acting in the ordinary course of business" etc.—*In Oppenheimer* v. *Attenborough,*[1] these words were held to mean that

> "the person must act as if he were carrying out a transaction which he was authorised by his master to carry out .....so that there is nothing to lead the pledgee to suppose that anything wrong is being done or to give him notice that the disposition is one which the mercantile agent had no authority to make."

That is, in the particular transaction, he must act as a mercantile agent would. In *De Gorter* v. *Attenborough,*[2] where a mercantile agent, instead of dealing with the goods himself, pledged them through a friend, it was held he was not acting in the ordinary course of business.

Good faith.—It is incumbent on the buyer to prove that he acted in good faith and had no notice of any want of authority in his vendor.[3] The term 'good faith' has not been defined in the Sale of Goods Act, but Sec. 3(20) of the General Clauses Act, defines it on the same lines as in Sec. 62(2) of the English Sale of Goods Act. **[1062]**

Notice includes actual and constructive notice. It means knowledge or means of knowledge.[4] **[1063]**

28. Sale by one of joint owners.—If one of several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them of such joint owner in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

Scope of the section.—This section deals with another exception to the general rule laid down in the opening words of Sec. 27. It is designed to protect the *bona fide* purchaser who sees his seller in possession and has no reason to suppose that he is not entitled to sell. **[1063]**

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1. (1908) 1 KB 221.
2. (1904) 21 TLR 19.
3. *Heap* v. *Motorists Advisory Agency,* (1923) 1 KB 577.
4. *Jones* v. *Gordon,* (1877) 2 AC 616; *Whitehorn* v. *Davidson,* (1911) 1 KB 463.

29. Sale by person in possession under voidable contract.—When the seller of goods has obtained possession thereof under a contract voidable under Section 19 or Section 19A of the Indian Contract Act, 1872 (9 of 1872), but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Analogous law.—Section 23 of the English Act runs thus.—

> "23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."

Comparison with previous law.—Under the corresponding section of the Contract Act, a person buying in good faith from a person who has obtained possession of goods under a voidable contract could acquire no title to the goods if the circumstances rendering the contract voidable amounted to an offence under the Penal Code. The Select Committee thought it rather a hard case, and deleted the clause dealing to offences and recast the section on the lines of the English Act. **[1065]**

Essentials.—1. The seller must have got possession under a contract. The section presupposes a contract and does not apply unless there is a contract. Thus, where the seller has received the goods on 'sale or return' or other terms, and at the time of sale the property has not passed to him, there is no contract. Where the goods are obtained by theft or extortion, there can be no contract.[1] Where goods are obtained by fraud, the person who has obtained them has either no title or a voidable one according as the nature of the fraud was such as to negative the formation of a contract, [(*e.g.*), mistake induced by fraud,] or not.[2]

2. The contract must be one voidable for misrepresentation, fraud, coercion or undue influence.

3. The sale to the third party must have taken place before the rescission of the contract.

4. The buyer must have acted in good faith and without notice.

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1. *Kshitish Chandra* v. *Emperor,* (1924) 51 Cal. 796 : (1924) Cal. 816 : 82 IC 163.
2. (Cf.) *Cundy* v. *Lindsay,* (1878) 3 AC 459; *Phillips* v. *Brooks,* (1919) 2 KB 243; *Whitehorn Bros.* v. *Davison,* (1911) 1 KB 463.

30. Seller or buyer in possession after sale.—(1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist.

Analogous law.—Section 25, Clauses (1) and (2), of the English Sale of Goods Act—same as the present section.

Scope of the section.—The first clause of the section reproduces Sec. 25 (1) of the English Act, which is largely based on Sec. 8 of the Factors Act of 1889. Before that Act, it was held that if the buyer for his own convenience left the goods and documents in the hands of the seller who fraudulently resold or pledged them, the buyer could nevertheless recover the goods from the innocent purchaser or pledgee. Sec. 8 of the Factors Act was enacted to remove the hardship caused by the Common Law.

The second clause provides for the case of a sale by a buyer obtaining possession of goods with the consent of the seller, where the original sale was on credit. It reproduces Sec. 25 (2) of the English Act, which was based on Sec. 9 of the Factors Act. Before this section was enacted, it was held at common law, that a sale or pledge of goods or documents of title to goods by the buyer does not defeat the unpaid seller's rights. Sec. 9 was like Sec. 8, enacted to meet the hardship created by the Common Law rule.

Under Section 30 the possession of the seller must be *qua* seller and not as hirer or bailee.[1] The possession as seller need not be actual possession and may be possession by an agent; ware-houseman or mercantile agent. Possession includes possession held by another on behalf of the person whose possession is material. It is enough that he should have such control over the

1. **See** *Parbati Debi Bagla* v. *Lachminarayan,* AIR 1957 Cal. 551; Cf. however *Pacific Motor Auctions (P) Ltd.* v. *Motor Credits Hire Finance Ltd.,* (1965) AC 867.

goods as to transfer possession of the goods or documents of title with the consent of the buyer.[1]

Clause (1)—Disposition by seller.—The case of *Nicholson* v. *Harper,*[2] is an illustration in point. There, the plaintiff had purchased wine stored with a warehouseman, and after the sale, the vendor pledged the goods to the warehouseman himself. When the trustee in bankruptcy of the seller put up the goods for sale on behalf of the pledge, the plaintiff was held entitled to the goods as there had been no delivery of goods or transfer of documents of title to the pledge, after the sale to plaintiff. **[1066]**

Where the seller in possession of the goods acknowledged to the buyer that he is holding such possession of goods on behalf of the buyers, such continuing possession under the circumstances is that of bailee inferring a constructive delivery to the buyer followed by redelivery to the seller as bailee.[3]

Clause (2) —Disposition by buyer in possession.—This clause assumes that the owner can pledge the goods by transfer of the relevant documents of title.[4] In *Cann* v. *Pockett's Bristol Channel Steam Packet Co.,*[5] where the seller sent a bill of lading endorsed in blank and a draft for acceptances and the buyer without accepting the draft, endorsed the bill of lading to the plaintiff, who acted in good faith and without knowledge that the goods had not been paid for, it was held that the seller could not stop the goods in transit. **[1068]**

Where a buyer in whose favour a contract of sale has been made obtains possession by fraud, he can pass a good title to a *bona fide* purchaser for value.[6]

"Obtains with the consent of the seller possession."—As the section speaks only of obtaining possession, it would appear that subsequent withdrawal of the consent is immaterial. the Supreme Court has held that 'consent' in sub section (2) means "agreeing on the same thing in the same sense" and not free consent.[7]

"Agreed to buy goods."—Where a hire-purchase agreement gives only an option to buy, the hirer will not come within the section.[8]

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1. *Pramatha Nath* v. *Prabirendra,* AIR 1966 Cal. 405.
2. (1895) 2 Ch. 415.
3. *Michael Gerson (Leasing) Ltd.* v. *Wilkinson,* (2001) 1 All. ER 148.
4. *Morvi Mercantile Bank* v. *Union of India,* AIR 1965 SC 1954 : (1966) 2 SCJ 6.
5. (1899) 1 QB 643; (Cf.) *Inglis* v. *Robertson,* (1898) AC 616; *Common-wealth Trust Co. Ltd.* v. *Akotey,* (1926) AC 72; *Martin* v. *Whale,* (1917) 2 KB 480.
6. *Mohammed Sheriff* v. *Official Liquidator,* AIR 1964 Ker. 135 : ILR (1963) 2 Ker. 723.
7. *Central National Bank Ltd.* v. *United Industrial Bank Ltd.,* AIR 1954 SC 181 : (1954) SCR 391.
8. *Belsize Motor Supply Co.* v. *Cox,* (1914) 1 KB 244. **But see** *Lee* v. *Butler,* (1893) 2 QB 318 (Court's finding as to agreement to buy); *A.G.* v. *Pritchard,* (1928) 97 LJKB 561; *Helby* v. *Mathews,* (1895) AC 471 (No agreement to buy); *Balmukund* v. *Mahesh Narayan,* (1934) Oudh 133 : 148 IC 793; *Suraj & Sons* v. *J. O'Brien,* (1931) All. 759 : 133 IC 159; *Puranchand* v. *Mahomed Ismail,* (1931) Lah. 653 : 132 IC 496; *Navnitdas* v. *Manchursa,* (1934) Nag. 78 : 30 NLR 213 : 148 IC 822.

CHAPTER IV

PERFORMANCE OF THE CONTRACT

31. Duties of seller and buyer.—It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Analogous law.—Section 27 of the English Sale of Goods Act—same as the section.

Principle of the section.—As was observed in *Buddle* v. *Green,* [1] "In every contract of sale there is involved a contract on the one side to accept and on the other to deliver." But the contract of sale may modify the terms. In a sale on credit, the title and the right to immediate possession are transferred[2] though payment is postponed. Where the buyer has put an end to the agreement and has repudiated his obligation, the seller is under no duty to deliver.[3] Similarly if the seller does not give facilities to the purchaser in taking delivery, he cannot maintain an action for the price of goods sold.[4] **[1072]**

The obligation arising under the section may be modified by agreement between the parties whether as to delivery of goods or as to payment of prices.[5] In the absence of a contract to the contrary the obligations are to be performed simultaneously and each party should be ready and willing to perform his promise before he can call upon the other to perform his.[6]

32. Payment and delivery are concurrent conditions.—Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

Analogous law.—English Sale of Goods Act, Section 28—same as the Section.

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1. (1857) 27 LJ Ex. 33 : 114 RR 991.
2. *Bloxam* v. *Sanders,* (1825) 107 ER 1309 : 28 RR 519; *Staunton* v. *Wood,* (1851) 117 ER 1025 : 83 RR 641.
3. *Chunnamal* v. *Moolchand,* (1928) 9 Lah. 510 : 32 CWN 738 : (1928) PC 99 : 30 Bom. LR 837.
4. *Smith* v. *Chance,* (1819) 106 ER 540 : 21 RR 485.
5. *Herman & Mohata (India) Ltd.* v. *Pran Ballav,* AIR 1960 Cal. 524 : 64 Cal. WN 798.
6. *Sujanmal* v. *Radhe Shyam,* AIR 1976 Raj. 98; *Firm Birdhi Chand* v. *Ramdeo,* ILR (1969) 19 Raj. 481 : 1970 Raj. LW 148.

Principle.—The section gives effect to the principle recognised in modern commercial transactions that payment and delivery are concurrent conditions.[1] Of course, it is open to parties to make an agreement to the contrary. In C.I.F. contracts, generally payment and delivery of goods are not concurrent conditions. **[1078-1079]**

Readiness and willingness imply capacity also.[2] They are sufficiently shown if it is proved that there was control over the requisite money or goods. Actual physical possession is not necessary.[3] Thus in *Mulchand Chandolia* v. *Kundanmull*,[4] in a contract of sale of ready goods, it was held that it is enough if between the contract date and the date of delivery, the seller is in a position to deliver. In *Satyanarayanamurti* v. *Erikalappa*,[5] it was ruled that in case of repudiation by the buyer, the seller's suit for damages could not be defeated by proof of inability to implement the contract after such repudiation. On the other hand, the buyer need not carry the purchase money in his pockets. It is enough if he has made the necessary arrangements for securing payment.[6] Therefore actual tender of delivery or of the purchase money is not necessary in an action for the price or for non-delivery respectively.[7]

In a suit for damages for non-delivery the plaintiff must prove readiness and willingness and capacity to pay and a demand for delivery.[8] It has been held that such proof need not be given unless the defendant puts plaintiff to proof of it.[9]

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1. *Chengaravelu* v. *Venkanna*, (1925) 49 MLJ 300 : (1925) Mad. 571 : 86 IC 299; (Cf.) *Morton* v. *Lamb*, (1797) 101 ER 890 : 4 RR 395; *Dixon* v. *Fletcher*, (1837) 150 ER 1092: 49 RR 543; *Bloxam* v. *Sanders*, (1825) 107 ER 130 : 28 RR 519; *Firm Birdhi Chand* v. *Ramdeo*, ILR (1969) 19 Raj. 481; *Sujanmal* v. *Radhe Shyam*, AIR 1976 Raj. 98.
2. *De Medina* v. *Norman*, (1842) 152 ER 347 : 60 RR 912.
3. *Shriram* v. *Madangopal*, (1903) 30 Cal. 865 : 5 Bom. LR 483 : 8 CWN 25; *Nalam Lakshmi Kantam* v. *Narayanaswamier*, (1926) Mad. 1109 : (1926) MWN 710 : 97 IC 986; *Kedar Nath* v. *Shimbu Nath*, (1927) 8 Lah. 198 : (1927) Lah. 176 : 99 IC 812 : 28 PLR 351; *Kanwar Bhan Sukha* v. *Ganpat Rai*, (1926) 7 Lah. 442 : (1926) Lah. 318 : 94 IC 304.
4. (1919) 47 Cal. 458 : 57 IC 140.
5. (1926) 50 MLJ 150 : (1926) Mad. 410 : 25 LW 396; **see also** *British & Bennington Ltd.* v. *N.W. Cachar Tea Co.*, (1923) AC 48 (Seller not bound to prove readiness and willingness to deliver in suit for damages).
6. *Kedar Nath* v. *Shimbu Nath*, (1926) 8 Lah. 198 : 99 IC 812 : (1927) Lah. 176.
7. *Levey* v. *Goldberg*, (1922) 1 KB 688; *Boyd* v. *Lett*, (1845) 135 ER 524 (Cases of seller's suit); *Shriram* v. *Madangopal*, (1903) 30 Cal. 865 : 5 Bom. LR 483 : 8 CWN 25; *Peare Lal* v. *Diwan Singh*, (1930) All. 661 : 82 ALJ 777 : 125 IC 453; *Zippel* v. *Kapur & Co.*, (1932) Sind 9 : 139 IC 114.
8. *Ganesh Das* v. *Ram Nath*, (1928) 9 Lah. 148 : (1928) Lah. 20; *Rattan Lal* v. *Bishan Sahai*, (1928) 10 Lah. 143 : 110 IC 241 : (1928) Lah. 834 (Chain of buyers).
9. *Bansari Lal* v. *Haji Abdulla*, (1930) Lah. 553 : 121 IC 723; (Cf.) *Abdulla Bey* v. *Tenenbaum*, (1933) ALJ 570.

Concurrent conditions.—A concurrent condition may depend on a condition precedent, (*e.g.*,) delivery at the directions of buyer.[1] In case of instalmental deliveries, the same conditions apply to each instalment. But in case of a single and entire contract, delivery being in instalments, complete delivery may be a condition precedent to payment.[2]

Unless otherwise agreed.—The section applies only in the absence of a contract to the contrary. A sale on credit, an agreement to pay the price on a fixed date, irrespective of delivery, and perhaps the usual C.I.F. contract, will be instances of contract to the contrary.[3]

33. Delivery.—Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf.

Delivery.—[See Sec. 2, C1. (2), pp. 858-9 *ante*]. The parties may agree that a particular act shall be treated as delivery to the buyer,[4] (*e.g.*,) delivery to a carrier. As said already, delivery effectual for one purpose may not be effectual for another. For instance, delivery to a carrier may in particular circumstances transfer the property to the buyer, but such delivery will not defeat the right of stoppage in transit. Delivery may be actual, symbolical,[5] or constructive. The first kind presents no difficulty. The last may be of three varieties: (1) A seller of goods may, after sale, hold the goods as buyer's bailee,[6] (2) the buyer may already be in possession, but after sale, he will hold the goods on his own account. Here the completing of the sale operates as delivery,[7] (3) The goods may be in a third party's hands and such third party may attorn to the buyer.[8] In this case, all three parties must assent; otherwise there will

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1. *Great Northern Railway Co.* v. *Harrison,* (1852) 138 ER 1032 : 92 RR 786.
2. *Oxendale* v. *Wetherell,* (1829) 109 ER 143 : 33 RR 207.
3. *E. Clement Horst* v. *Biddall Bros.,* (1912) AC 18. **See also** *Narayanaswamy* v. *Soundararajan & Co.,* AIR 1958 Mad. 43 : ILR (1957) Mad. 1108.
4. **See** *Haji Peer Mahomed* v. *Sakavath,* (1923) 43 MLJ 199 : (1923) Mad. 103; *Hurry* v. *Mangles,* (1808) 170 ER 1018 : 10 RR 727.
5. *Commissioner of Income-Tax* v. *Ram Chandra,* AIR 1968 Cal. 385 : 72 Cal. WN 274.
6. *Elmore* v. *Stone,* (1809) 127 ER 912 : 10 RR 578; *Castle* v. *Sworder,* (1861) 158 ER 341 : 123 RR 860. But mere payment of warehouse rent by buyer may not be conclusive, (Cf.) *Miles* v. *Gorton,* (1834) 149 ER 860 : 39 RR 820, disapproving Lord Ellenborough's observations in *Hurry* v. *Mangles,* (1808) 170 ER 1018 : 10 RR 727.
7. *Cain* v. *Moon,* (1896) 2 QB 283; *Kilpin* v. *Ratley,* (1892) 1 QB 582; *Blundell-Leigh* v. *Attenborough,* (1921) 3 KB 235.
8. *Farina* v. *Home,* (1846) 153 ER 1124 : 73 RR 433; *Dublin City Distillery* v. *Doherty,* (1914) AC 823.

be no delivery.[1] But once such assent is obtained, complete delivery is effected as between seller and buyer, and thereafter the seller will not be liable for any wrongful delivery by the warehouseman.[2] **[1072]**

As to the oft-quoted instance of symbolic delivery, namely, delivery of the key of a warehouse, it has been pointed out that the key is not the symbol of the goods, but its delivery has the effect of transferring the possession of the goods, because its possession gives the actual control of the place where the goods are, and thereby of the goods themselves.[3] It may also be mentioned that delivery, which does not give access to the goods, is no delivery (*e.g.*,) giving an inner key, but keeping the outer.[4]

Delivery of goods in transit may be made by handing over the documents of title such as bill of lading, railway receipt or delivery order.[5] In the case of goods sent by railway, the goods must be held to be in railway custody till they are unloaded. Delivery could not be held to have taken place merely by the consignee signing the delivery book and surrendering the railway receipt.[6]

Delivery should have the effect of putting the buyer in possession. And so, where the wood of fallen trees is sold the mere fact of the buyer cutting them up will not amount to taking possession of them until he carts them away.[7]

34. Effect of part delivery.—A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole does not operate as a delivery of the remainder.

Scope and principle of the section.—The section refers to part delivery in relation to the passing of property. The English Act contains no

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1. *Godts* v. *Rose,* (1855) 139 ER 1058 : 104 RR 688 (Case where buyer had not assented to the wharfinger holding for him); *Poulton* v. *Anglo-American Oil Co.,* (1911) 27 TLR 216 (Case where seller did not assent); *McEwan* v. *Smith,* (1849) 9 ER 1109 : 81 RR 166 (Mere handing of delivery order to buyer is insufficient); *A.T.K.P.L. Chetty Firm* v. *S.K.R.S.S.T. Chetty,* (1914) 22 IC 952 (L. Burma).
2. *Wood* v. *Tassell,* (1844) 115 ER 90 : 64 RR 374.
3. Pollock & Wright on Possession p. 61; (Cf.) *Wrightson* v. *McArthur,* (1921) 2 KB 807.
4. *Milgate* v. *Kebble,* (1841) 133 ER 1073 : 60 RR 475.
5. *J.V. Gokal & Co. Ltd.* v. *Asst. Collector,* AIR 1960 SC 595 : (1960) 2 SCR 852.
6. *Union of India* v. *West Punjab Factories Ltd.,* AIR 1966 SC 395 : (1966) 1 SCJ 350 : (1966) 2 An. LT 269.
7. *Chotku* v. *Ram Nath Sahu,* (1936) All. 880 : (1936) ALJ 1270.

such section; for it has provided other tests than delivery as to the passing of property and there was no necessity to treat of part delivery in relation to the passing of property. Considering that the Indian Act has in most respects adopted the English Act, this section is rather a superfluity. If the words relating to the passing of property are not to be considered, then virtually this section is an adjunct to Sec. 33.

Part-delivery.—The section is simply an affirmation of the Common Law rule that delivery of a part may be delivery of the whole *if so intended by the parties.*[1] The buyer in taking delivery of the part must accept it as constructive delivery of the whole.[2]

In *Mitchell Reid* v. *Buldeo Dass,*[3] the defendants agreed to buy from the plaintiffs five bales of chrome orange twist, each bale containing 500 lbs., at so much per lb. to-be paid for on or before delivery. The buyer paid for one bale, took delivery of it and rejected the rest. It was held that it was not a case of delivery of part in progress of the delivery of the whole, and that therefore the buyer could not be sued for the price of the goods. But, in *Pranlal* v. *Maneckji Petit,*[4] where the buyer took delivery of a part without making any inspection, and sold that portion to third parties, the circumstance were held to point to delivery of part in progress of the delivery of the whole.

Burden of proof.—The party-who affirms that part delivery is to operate as delivery of the whole has to prove it.

35. Buyer to apply for delivery.—Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery.

Buyer to apply for delivery.—In the absence of express contract, the seller is under no duty to deliver unless the buyer applies for delivery. The buyer will have no cause of action against the seller if he has not applied for delivery.[5] If under the contract the seller has to requisition containers from the buyer for supplying the goods, the buyer's duty to apply for delivery is postponed to a reasonable time to enable the seller to apply for the containers and fill them up.[6] Under English law where there is no provision corresponding to this section, the only duty of the seller is to place the goods at the disposal of

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1. *Kemp* v. *Falk,* (1882) 7 AC 573. **See also** *Behrend & Co.* v. *Produce Brokers,* (1920) 3 KB 530.
2. *Bolton* v. *L& Y.R. Co.,* (1866) 1 CP 431; *Ex parte Cooper,* (1879) 11 Ch.D. 68.
3. (1887) 15 Cal. 1; *Dixon* v. *Yates,* (1833) 110 ER 806 : 39 RR 489; *Bunny* v. *Poyntz,* (1833) 110 ER 569 : 38 RR 309.
4. (1932) 34 Bom. LR 1252 : 140 IC 610 : (1923) Bom. 46.
5. *Ramamoorthy* v. *Satyanarayana,* AIR 1958 AP 550.
6. *Mercantile Corporation Ltd.* v. *Venkateswarlu & Co.,* AIR 1959 AP 543.

the buyer at the place of delivery and afford him reasonable facilities for removing the goods.[1] In *Ganesh Das* v. *Ram Nath,*[2] where the contract provided that on the arrival of the railway receipt and the invoice the buyer should receive them on payment of the price, it was held that the fact of the seller giving notice of the arrival of the goods does not dispense with the duty of the buyer to apply for delivery. In the case of *Mulji* v. *Nathubhai,*[3] where a buyer assigned his contract and got a subsequent reassignment, and sought to adopt the assignee's demand for delivery, it was held that the section was not complied with as there was no demand on the buyer's own account. **[1081]**

In *Sivayya* v. *Ranganayakulu,*[4] *a* case which arose under old Sec. 93 of the Contract Act, the Judicial Committee observed that the corresponding words "special promise" ("express promise" in the section) indicate an expresses stipulation as to delivery which relieves the buyer from the obligation to apply for delivery or the necessary implication of such a stipulation from the nature of the contract as expressed, and that it may arise also out of usage or custom of trade. The Judicial Committee proceeded to observe that in the absence of proof of such custom or usage or any express or implied term in the contract, there is no special promise such as to absolve the buyer from his obligation under the section.

Section 35 will be applicable to both ready and forward goods.[5] The section has no application in regard to anticipatory breach where the buyer has elected to treat the contract as rescinded.[6]

C.I.F and F.O.B. contracts will come within the scope of the words apart from any such contract occurring in the section.[7]

36. Rules as to delivery.—(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, goods

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1. *Smith* v. *Chance,* (1819) 106 ER 540 : 21 RR 485.
2. (1928) 9 Lah. 148 : 111 IC 498 : (1928) Lah. 20; **see also** *Ishwardas* v. *Dhanpatrai,* (1927) 8 Lah. 514 : (1927) Lah. 687; *Kanwar Bhan Sukha* v. *Ganpat Rai,*(1926) 7 Lah. 442 : 94 IC 304: (1926) Lah. 318; *Mohanlal* v. *Gyaniram,* (1935) Nag. 111 : 155 IC 778 (Buyer bound to send some one to take delivery); *Wood* v. *Tassell,* (1844) 115 ER 90 : 66 RR 374.
3. (1891) 15 Bom. 1. **See also** *Jaggernath* v. *Maclachlan,* (1881) 6 Cal. 681.
4. (1935) 58 Mad. 670 : 39 CWN 632 : 37 Bom. LR 538 : (1935) PC 67 : (1935) OWN 496 : 154 IC 1097 : 68 MLJ 635 : (1935) MWN 390 : 41 LW 775. **See** *Ramayya* v. *Firm Gas Shaik Saib,* AIR 1958 AP 576.
5. *Dinkerrao* v. *Sukhdayal,* AIR 1947 Bom. 293.
6. *Devi Lal* v. *Govind Lal,* AIR 1961 Raj. 283.
7. *Herman & Mohota (India) Ltd.* v. *Pran Bhallav,* AIR 1960 Cal. 524 : 64 Cal. WN 798.

sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence, at the place at which they are manufactured or produced.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf:

Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller.

Analogous law.—Section 29 of the English Sale of Goods Act runs thus:

> "(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery."

Clauses 2, 3, 4 and 5—Same as in the Indian Act.

Comparison with the English Act.—The English Act says that apart from any contract, the place of delivery is the seller's place of business

or his residence except in the case of specific goods known to be in some other place, when that place will be the place of delivery. There is no provision as regards 'future goods'; it would therefore appear that the general rule will apply. Under the present section, the place of delivery in regard to future goods will be the place of manufacture.

Clause (1)—Place of delivery.—The place of delivery may be fixed by the agreement of parties. Where delivery is to be at the option of one party, the liability of the other party will not come into existence till the option is exercised.[1] In *Grenon* v. *Lachmi Narain*,[2] where the contract was to deliver goods at any place in Bengal to be mentioned subsequently, it was held that the matter did not fall within the ambit of Sec. 94 at all, but rather under Sec. 49 of the Contract Act. In one case under old Sec. 94, the Lahore High Court held that the buyer should ask to have the goods made over to him at the seller's place of business and not at his own.[3]

Where the contract provides that the goods should be taken delivery of from the premises of the vendor, there is an implied licence for the buyer to enter and remove the goods.[4]

Where a contract for a sale of goods provided for *'station delivery'* the buyer has to bear the customs duty in respect of the goods in transit up to the railway station; the seller's liability is only to bear the expenses of taking his goods from his business place to the railway station in carts.[5]

Where in a contract for supply of coal there was no express or implied provision as to place of delivery, the goods would be deemed to have been delivered at the place where they were at the time of the sale.[6]

Goods in sea transit.—This clause does not touch cases of symbolic delivery of goods, which are in course of transit by sea, by dealing with the bill of lading.[7]

F.O.B. CONTRACTS.—In the case of contracts F.O.B. [(*i.e.*) free on board] the seller must put the goods on board the ship at his own expense, and delivery is effected from the time the goods are so put on board.[8] The

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1. *Armitage* v. *Insole*, (1850) 117 ER 280 : 80 RR 388.
2. (1897) 23 IA 119 : 24 Cal. 8.
3. *Phul Chand* v. *Jugal Kishore*, (1927) 8 Lah. 501 : 106 IC 10 : (1927) Lah. 693.
4. *Jones* v. *Tankerville*, (1909) 2 Ch. 440; *Wood* v. *Manley*, (1839) 113 ER 325; 52 RR 271.
5. *Shreechand Aggarwala* v. *Bhagwan Das*, AIR 1952 Orissa 85.
6. *Bibhuti Bhusan Bose* v. *National Coal Trading Co.*, AIR 1966 Pat. 346.
7. *Clemens Horst* v. *Biddell Bros.* (1912) AC 18.
8. *Brandt* v. *Morris*, (1917) 2 KB 784; *Colley* v. *Overseas Exporters*, (1921) 3 KB 302.

expression F.O.B. when used in connection with the place of delivery means that the delivery *prima facie* takes place when the goods are put on rail and when the expression is used in connection with the price it means that the rate is inclusive of all charges of putting the goods on rail.[1]

EX-SHIP CONTRACTS.—In *Yangtsze Insurance Assn.* v. *Lukmanjee,*[2] Lord Sumner said:

> "In the case of a sale ex-ship, the seller has to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery, and has reached a place therein which is usual for delivery of goods of the kind in question. The seller, therefore, has to pay the freight or otherwise release the ship owner's lien and to furnish the buyer with an effectual direction to the ship to deliver."

Clause (2)—Reasonable time.—As provided by Sec. 63, what is a reasonable time is a question of fact and may be affected by trade usage.[3] A contract by a manufacturer to supply some specified goods "as soon as possible", means within a reasonable time.[4] If delivery depends on some concurrent act of seller and buyer, the seller must use reasonable diligence in performing his part.[5]

In a dispute where the delivery of goods on a particular date is in question, the seller who sues for the recovery of price of goods so delivered shall have the burden of adducing evidence in support thereof.[6]

Where under a contract of sale the buyer has agreed to extend time by six months for the delivery of goods without specifying the fixed date, the delivery has to be made within a reasonable time.[7]

Even though the contract for sale and purchase of rice did not mentioned the delivery time and the defendant seller has expressed his inability to despatch the consignment owing to non-availability of wagons, the defendant

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1. *Bengal Timber Trading Co. Ltd.* v. *Commissioner of Sales-Tax,* AIR 1967 SC 1348 : (1967) 2 SCJ 698.
2. (1918) AC 585.
3. *Sujanmal* v. *Radhe-Shyam,* AIR 1976 Raj. 98.
4. *Attwood* v. *Emery,* (1856) 140 ER 45 : 107 RR 595; (Cf.) *Alagirisamy* v. *Runa Cheena,* (1924) 19 LW 654 : 78 IC 326.
5. *Ford* v. *Coteswarth,* (1868) 4 QB 127; *Pearl Mill Co.* v. *Ivy. Tannery Co.,* (1919) 1 KB 78.
6. *Gujarat Agro Oil Enterprises Ltd.* v. *Arvind H. Pathak,* AIR 1993 Guj. 47 : 1992 (2) Cur. CC 1.
7. *Food Corporation of India* v. *Arosan Enterprises,* AIR 1996 Del. 126, 142.

seller for having failed to deliver the consignment in a reasonable time is liable to pay damages to the plaintiff purchaser.[1]

DELIVERY 'ON DEMAND'.—This sub-clause assumes that nothing remains to be done by the seller. But when something has to be done (*e.g.*) in the case of goods to be supplied "as required" or "on demand" the seller is entitled to a reasonable time after demand to comply with his promise.[2]

DELIVERY ON REQUEST.—In such a case, a request personal or by post, by the buyer is a condition precedent to delivery. Where the contract does not limit the time for the buyer's request, the buyer may ask for the goods at any time and the seller is not discharged by the buyer's omission to make a request within a reasonable time, unless he gives notice to the buyer asking him to notify his requirements.[3]

But, inordinate delay in making the request may be evidence of abandonment of the contract.[4]

Clause (3)—Attornment.—The acknowledgement must be given with the consent of both seller and buyer.[5] If the third party refuses to acknowledge the buyer's title, the buyer may repudiate the contract.[6] If the buyer is in fault, the seller may treat the delivery as having been properly made.[7] Where the third party, though not in actual possession, attorns to the buyer, the attornment will create only a personal estoppel against the person making it, but will not amount to delivery the by seller.[8]

The proviso has the effect of putting documents of title outside the scope of the sub-section. The transfer of documents of title operates as delivery of the goods irrespective of attornment.

Clause (4)—Reasonable hour.—This would ordinarily mean during office hours.

Clause (5)—Expenses.—The clause does not deal with the expenses incidental to delivery, but only with expenses of putting the goods in a

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1. *Nagnath Kaulwar and Sons* v. *M/s. Govindram Shyamsunder,* AIR 2004 Bom 271.
2. *Moore* v. *Shelley,* (1883) 8 AC 285.
3. *Jones* v. *Gibbons,* (1853) 155 ER 1626 : 91 RR 41.
4. *Pearl Mill Co.* v. *Ivy Tannery Co.,* (1919) 1 KB 78; *Sahu & Co.* v. *Sriram Vijay Kumar,* 1971 (2) CWR 86 (Failure to supply within reasonable time amounts to breach of contract.
5. *Godts* v. *Rose,* (1855) 139 ER 1058 : 104 RR 668; *London Founder's Assn.* v. *Clarke,* (1888) 20 QBD 576.
6. *Pattison* v. *Robinson,* (1816) 105 ER 990.
7. *Bartlett* v. *Holmes,* (1853) 138 ER 1347 : 93 RR 658.
8. *M' Ewan* v. *Smith,* (1849) 9 ER 1109 : 81 RR 166; *Shaw* v. *Bill,* (1885) 8 Mad. 38.

deliverable state. Unless otherwise agreed, the expenses of and incidental to making delivery of the goods must be borne by the seller; the expenses of and incidental to receiving delivery must be borne by the buyer.[1] Where goods are sold F.O.B., the seller must bear the expenses of, and upto, shipment.[2] Where the contract is for delivery 'ex ship", the seller must do all that is necessary to release the ship owner's lien.[3] In case of C.I.F. contracts, the seller is, as between himself and the buyer, chargeable with the amount of the freight and the insurance charges, and the buyer, if he pays any of such charges, can claim credit for them.[4]

37. Delivery of wrong quantity.—(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods, so delivered, he shall pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

Analogous law.—Sec. 30 of the English Sale of Goods Act—same as the section.

Clause (1)—Short delivery.—Generally "every contract for a certain quantity of goods is *prima facie* and entire contract for that quantity and so

1. *White* v. *Williams,* (1912) AC 814; *Neill* v. *Whitworth,* (1865) 144 ER 513 : 148 RR 752.
2. *Cowasji* v. *Thompson,* (1845) 13 ER 454 : 70 RR 27; *Re Cock,* (1879) 11 Ch. D. 560; *Stock* v. *Inglis,* (1884) 12 QBD 564.
3. *Yangtsze Insurance Assn.* v. *Luckmanjiee,* (1918) AC 585.
4. *Ireland* v. *Livingston,* (1872) 5 HL 395; *Public Works Commissioner* v. *Houlder Brothers,* (1908) AC 276.

delivery of anything falling short of the specified quantity will not constitute sufficient delivery."[1] In a contract for a sale of goods in bulk some flexibility is unavoidable and a trivial shortfall in quantity must be overlooked.[2] The principle *de minimis non curat lex* will apply.[3] The buyer shall not have right to refuse to take delivery on the ground that seller delivered 5.22 tons short of agreed quantity of 1600 tons, as the shortage being a slight deficiency comes within the rule of *de minimis non curat lex.*[4] If however the difference was substantial the buyer may reject the quantity delivered, and treat the contract as at an end. The buyer may not call for a small portion of the goods contracted for, without being prepared to accept the whole quantity.[5] To invoke Section 37, Cl. (1) the buyer must show that the term relating to quantity was condition or warranty and not an innocuous representation.[6] In the case of an entire contract for a specified quantity to be delivered in distinct parcels, the buyer may return the part delivered, if the vendor fails to complete the contract by delivery of the remaining parcels.[7] **[1089]**

Clause (4) provides that the rule in clause (1) is subject to any usage trade, special agreement or course of dealing between the parties. For instance, the contract may fix the maximum to be supplied, in which case the buyer cannot refuse if the proffered quantity is less.[8]

It is however open to the buyer to waive his right of rejection and accept the goods. In such case, he is liable for the value of the goods, measured at the contract rate (which is deemed to be on index of the reasonable value).[9] But by accepting the lesser quantity, the buyer is not precluded from suing on the ground of short delivery,[10] or claiming a proportionate refund where he has paid as for the whole of the quantity contracted for.[11]

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1. *Mersey Steel Co.* v. *Naylor,* (1884) 9 AC 434; *Harland* v. *Burstall,* (1901) 84 LT 324; (Cf.) *Cunliffe* v. *Harrison,* (1851) 155 ER 813 : 86 RR 543; *Harnarayan* v. *Firm Radhakrishan Narayandas,* AIR 1949 Nag. 178.
2. *Dudhia Forest etc., Co. Ltd.* v. *Mohamed Saied and Abdul Rahman Co.,* (1980) 21 Guj. LR 272.
3. *Ibid;* **see also** *Jackson* v. *Rotax Motor & Cycle Co.,* (1910) 2 KB 937.
4. *Suresh Kumar Rajendra Kumar* v. *K. Assan Koya & Sons,* AIR 1990 Ker. 20 : 1989 (2) Ker. LT 337.
5. *Kingdom* v. *Cox,* (1848) 136 ER 982.
6. *Dudhia Forest etc. Co. Ltd.* v. *Mohamed Saied etc. Co.,* (1980) 21 Guj. LR 272.
7. *Oxendale* v. *Wetherell,* (1829) 109 ER 143 : 35 RR 207.
8. *Morgan* v. *Gath,* (1865) 159 ER 726 : 140 RR 714; *Graham* v. *Jackson,* (1811) 104 ER 693; (Cf.) *Re. Thornett & Fehr.,* (1921) 1 KB 219 ("5 percent more or less").
9. *Bragg* v. *Cole,* (1821) 6 Moore C.P. 114; *Shipton* v. *Casson,* (1826) 108 ER 141.
10. *Beck* v. *Szymanowski,* (1924) AC 43.
11. *Behrend* v. *Produce Brokers,* (1920) 3 KB 530.

Where goods have been rejected for short delivery or excess delivery, it is open to the seller to make, within the time limited, another delivery in conformity with the contract.[1]

Clause (2)—Over-delivery:—In the case of excess delivery, the buyer has the option of rejecting the whole or accepting the contracted quantity and rejecting the excess.[2] In *Cunliffe* v. *Harrison,*[3] where 10 hogsheads of claret were ordered and the seller sent 15, the buyer was held entitled to reject the whole. "The delivery of fifteen hogsheads under a contract to deliver ten is no performance of that contract, for the person to whom they are sent cannot tell which are the ten that are to be his." In *Doraisami* v. *Subbanna,*[4] a case under Sec. 119 of the Contract Act, the principle that rejection was proper, if there is risk or trouble in separating the goods ordered from the goods not ordered was applied. The rule of *de minimis* applies also to the case of a slight excess delivery.[5]

If the excess quantity supplied is not marginal or insignificant the defendant has a right to reject the entire goods under Section 37, Cl. (2).[6]

Clause (3)—Mixed delivery.—This clause gives a similar option to the purchaser in cases where contract goods are delivered mixed with goods not of the contract description. The word 'mixed' is not confined to cases of inseparable admixture. The term "mixed with" was interpreted in *More* v. *Landauer,*[7] as meaning "accompanied by." Where articles are added for purposes of packing, it is not a mixture.[8]

In the cases of instalment contracts, it may be open to the buyer to reject any instalment.[9]

"Different description."—This expression will not include inferiority in quality. Where therefore goods of the same description but of inferior quality are delivered, there is no mixture as contemplated and the buyer has no option of selection, though he may reject the whole.[10]

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1. *Borrowman* v. *Free,* (1878) 4 QBD 500.
2. *Jugal Keshwar* v. *Kishori Lal,* (1924) Pat. 159 : 74 IC 923.
3. (1851) 155 ER 813 : 86 RR 543. **See also** *Hart* v. *Mills,* (1846) 153 ER 771 : 71 RR 578; *Dixon* v. *Fletcher,* (1837) 150 ER 1092 : 49 RR 543.
4. (1927) MWN 549 : 105 IC 613 : (1927) Mad. 880. **See also** *Jugal Keshwar* v. *Kishorilal,* (1924) Pat. 159 : 74 IC 923.
5. *Shipton* v. *Weil,* (1912) 1 KB 574.
6. *Vilas Udyog Ltd.* v. *Prag Vanaspati Products,* AIR 1975 Guj. 112.
7. (1921) 2 KB 519.
8. *Levy* v. *Green,* (1859) 120 ER 1174 : 117 RR 552. **See also** *Nicholson* v. *Bradfield Union,* (1866) 1 QB 620 (Contract for supply of coal—Partly as per contract and partly not—Mixed delivery held ineffective).
9. *Andrew Yule & Co., In re.* (1932) 59 Cal. 928 : (1932) Cal. 879 : 140 IC 877.
10. *Aitken* v. *Boullen,* (1908) Sess. C. 490.

Clause (4)—Trade usage, special agreement etc.—By usage of trade a delivery order for 'about' the quantity of goods sold, from a warehouse may be valid.[1] Again, it may be open to the parties to show that in a particular trade or market, certain qualifying words have got particular special meanings.[2] Besides, the contract may itself provide certain limits of permissible variation, which must be strictly observed.[3] Again parties may agree that the quantity stated shall be only a maximum, in which event the buyer will be bound to accept than the quantity stated.[4]

SOME RULES AS TO QUANTITY.—The quantity contracted for under a contract of sale of goods may sometimes be determined by reference to a particular standard (*e.g.,*) a lot of goods lying at warehouse.[5] Or, a specified quantity may be mentioned, with some qualifying words like "about" or "say," or "more or less." Thus, where A agreed to sell B all the spars manufactured by him "say about 600," out of a particular lot, a tender of 496 was held to be a proper performance.[6] In a contract for sale of the remainder of a cargo "more or less" 5,400 quarters of wheat, the buyer was held bound to accept 5,979 quarters, which were found to remain.[7] Similarly, in a contract of sale of 200 tons 5 percent more or less, the buyer was held bound to accept 190 tons.[8] The quantity specified is taken, in such cases, as representing a mere anticipatory estimate. But if the term used is "not less than," it is taken as an absolute contract for delivery of the minimum.[9]

MEANING OF CARGO.—In *Barrowman* v. *Drayton,*[10] it has been held that the natural meaning of 'cargo' is the entire quantity of goods loaded on a vessel on the particular voyage. The Judicial Committee pointed out in *Colonial Insurance Co.* v. *Adelaide Marine Insurance Co.,*[11] that the word 'cargo' is susceptible of different meanings and must be interpreted with reference to the context.

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1. *Moore* v. *Campbell,* (1854) 156 ER 467 : 102 RR 604.
2. *Societie Anonyme & Co.* v. *Scholefield,* (1902) 7 Com. Cas. 114.
3. *Payne* v. *Lillico,* (1920) 36 TLR 569.
4. *Morgan* v. *Gath,* (1865) 159 ER 726 : 140 RR 714.
5. *Tancred* v. *Steel Co. of Scotland,* (1890) 15 AC 125.
6. *McConnell* v. *Murphy,* (1873) 5 PC 203. **See also** *Gwillim* v. *Daniell,* (1835) 150 ER 26: 41 RR 688; *Bealey* v. *Stuart,* (1862) 158 ER 672 : 126 RR 681; *Barrowman* v. *Drayton,* (1876) 2 Ex.D. 15; (Cf.) *Leeming* v. *Snaith,* (1851) 117 ER 884 : 83 RR 448 ("Not less than" are words of contract, not expectation).
7. *Harrison* v. *Lambert,* (1917) 1 KB 755.
8. *Re. Thornett & Fehr & Yuills Ltd.,* (1921) 1 KB 219.
9. *Leeming* v. *Snaith,* (1851) 117 ER 884 : 83 RR 448. **But see** *Kaliyanjee* v. *Shorreck,* (1910) 37 Cal. 334 : 6 IC 924.
10. (1876) 2 Ex. D. 15; *Bourne* v. *Seymour,* (1855) 139 ER 788 : 100 RR 744.
11. (1886) 12 AC 128. **See also** *Jardine* v. *Clyde Shipping Co.,* (1910) 1 KB 627; *Coffin* v. *Aldridge,* (1895) 2 QB 648; *Paul* v. *Pin & Co.,* (1922) 2 KB 360.

38. Instalment deliveries.—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

Analogous law.—Section 31 of the English Sale of Goods Act—same as Sec. 38 of the Indian Act, except that the words "*no* delivery or" appearing before the words "defective delivery" are not found in Clause (2).

Clause (1)—Instalment Delivery.—ENTIRE AND SEVERABLE CONTRACTS.—Clause (1) is a corollary to the proposition set out in Sec. 37 (1). It is a sequel to the principle that neither the seller nor the buyer can make or demand delivery of less than the full quantity nor insist that the delivery should be by instalments.[1] In the absence of a contract, express or implied, the buyer is not bound to accept by instalments.[1] Where there is an agreement express or implied for delivery by instalments, the contract is not by reason of that fact split up into as many separate contracts as there are instalments; the contract is one and entire, though divisible in performance.[2] The seller is therefore under a duty to deliver the whole, and cannot recover the price of one instalment or more, unless there is a provision therefore.[3]

Even where there is specific agreement for delivery by instalments, in the absence of any agreement to pay the price also in instalments the contract continues to be entire contract for the delivery of the whole goods.[4]

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1. *Sadasook* v. *Chaitram,* (1925) 29 CWN 808 : 88 IC 910 : (1926) Cal. 218.
2. *Ballantine* v. *Cramp,* AIR 1926 Cal. 218 : (1923) 129 LT 502.
3. *Burn & Co.* v. *Lukhdirji,* (1926) 30 CWN 145 : 90 IC 52 : (1925) PC 188; *Oxendale* v. *Wetherell,* (1829) 109 ER 143 : 33 RR 207.
4. *Devilal* v. *Govind Lal,* AIR 1961 Raj. 283.

An instalment contract may be implied from the terms of the contract or inferred from the circumstances.[1] Thus where goods are deliverable 'as required,' and in other similar cases, such a contract is implied. Where there is a contract for goods, some of which are *in esse*, while others have to be manufactured, the inference of delivery by instalments may be made.

In *Brandt* v. *Lawrence*[2] where there were two contracts for sale of Russian oats, 'shipment by steamer or steamers,' and payment for any shipment to be by cash on receipt of shipping documents, it was held that the shipment was intended to be in different parcels, and that the buyer was bound to accept them as they came, if they were in time. But in *Reuter* v. *Sala*,[3] the contract was, on the facts, held to be one and indivisible, and the buyer was held entitled to reject a portion of the goods which had been offered though it satisfied the terms of the contract. Where the contract does not specify the amount of the instalment, the deliveries are to be rateably distributed over the period fixed.[4] **[1089-1090]**

Clause (2)—Repudiation.—Clause (2) does not apply to entire contracts. Hence where price is payable as a single lump sum though delivery may be by instalments, the clause is not attracted and the partial breach will be treated as a total breach.[5] An instalment contract, though divisible by reason of the fact that instalments are to be separately paid for, resembles the ordinary contract in that it may be repudiated by one party on refusal of performance by the other. But the question that arises is what will be the degree of breach by one party, which will justify the other party in repudiating the unfulfilled portion of the contract. It is well settled that it is not every breach by one party, which gives the other the right to rescind. The breach must be such a kind as to amount to a refusal to perform the contract; it must relate to a matter going to the root of the contract. **[1090]** The question whether in case of a default of supply the entire contract for instalmental deliveries stands repudiated or not is one of fact depending on the circumstances of the case.[6]

On this matter, the rule in English law was originally very strict. In Withers v. *Reynolds*,[7] a case of instalmental delivery of straw, where the buyer

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1. *Colonial Insurance Co.* v. *Adelaide Insurance*, (1886) 12 AC 128.
2. (1876) 1 QBD 344.
3. (1879) 4 CPD 239. **See also** *Re Bailey Son & Co. and Smith & Co.*, (1939) 3 AER 175 **reversing** (1939) 1 AER 115.
4. *Calaminus* v. *Dowlais Iron Co. Ltd.*, (1878) 47 LJQB 575; *Coddington* v. *Paleologo*, (1867) 2 Ex. 193 (Delivery should be in reasonable instalments); *Barningham* v. *Smith*, (1874) 81 LT 540.
5. *Long Bottom & Co. Ltd.* v. *Bass Walker & Co.*, (1922) WN 245; *Motilal Srinivasa Sarda* v. *Netha Co-operative Spinning Mills Ltd.*, AIR 1975 AP 169.
6. *Union of India* v. *K.H. Rao*, AIR 1976 SC 626 : (1977) 1 SCC 583 : 1976 UJ 202.
7. (1831) 109 ER 1370 : 36 RR 782.

insisted on keeping one payment in arrears, it was held that is was a repudiation of the contract by the buyer, which entitled the seller to treat the contract as at an end. In *Hoare* v. *Rennie* [1] and *Honck* v. *Muller,*[2] it was held in similar circumstances that a failure to deliver or pay for, a particular instalment was a breach, which went to the root of the contract. But the rigidity of the above view was relaxed in other cases to this extent—that a mere failure to pay for, or deliver one instalment will not discharge the seller or buyer from his obligations, unless it reasonably leads to the inference that similar breaches will be committed in regard to subsequent deliveries.[3] As was said in *Mersey Steel Co.* v. *Naylor* [4]:

> "you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other, you must examine what that conduct is so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part."

Again, to quote Lord Blackburn in the same case:

> "The rule of law is that where there is a contract in which there are two parties, each having to do something, if you see that the failure to perform one part of it goes to the foundation of the whole, it is a good defence to say "I am not going on to perform my part of it, when that which is the root of the whole and the substantial consideration for may performance is defeated by your conduct."[5]

In *Maples Flock Co.* v. *Universal Furniture Products,*[6] the Court of Appeal in applying the sub-section laid down two test—(*viz.,*) (i) the quantitative ratio, which the breach bears to the contract as a whole, and (ii) the degree of probability that such a breach will be repeated. Therefore it is always a

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1. (1859) 157 ER 1083 : 120 RR 453.
2. (1881) 7 QBD 92.
3. *Millar's Karri Co.* v. *Weddell,* (1909) 100 LT 128; *Bloomer* v. *Bernstein,* (1874) 9 CP 588.
4. (1884) 9 AC 434. **See also** *Freeth* v. *Burr,* (1874) 9 CP 208; *Simpson* v. *Cripin,* (1872) 8 QB 14; *Cornwall* v. *Henson,* (1900) 2 Ch. 298; *Payzu* v. *Saunders,* (1919) 2 KB 581.
5. (Cf.) *Cort* v. *Ambergate Ry. Co.,* (1851) 117 ER 1229 : 85 RR 369 (When buyer repudiates, the seller need not make or offer the residue deliverable under the contract); *Ripley* v. *M'Cure,* (1850) 18 LJ Ex. 419.
6. (1934) 1 KB 148; *Aryavart Overseas Pvt. Ltd.* v. *Kay Aar Biscuits Pvt. Ltd.,* AIR 1983 NOC 14 (Del.)

question depending on the terms of the contract and the circumstances of the case whether the breach of contract is a virtual repudiation of the contract *in toto* or a severable breach of a part only such as to give rise to a claim for compensation.[1]

For Indian cases illustrating the above principles, see *Subbier* v. *Venkatachalapathy Iyer*,[2] *Sooltan Chand* v. *Sochilleri*[3] and *Rash Behary Saha* v. *Nrittya Gopal*[4] under Sec. 39 Indian Contract Act.

Failure of performance by one party may give the other party the right to treat an instalment contract as repudiated only if the breach goes to the root or essence of the contract.[5] In *Vishur Sugar Mills* v. *Rameshwar Jute Mills*,[6] it was held that where a breach is severable there can be a claim only for compensation and the whole contract cannot be repudiated.

Difference between the English and Indian Act.—The English Act provides only for cases of defective delivery. But the Indian Act applies also where the seller omits or refuses to make a delivery.

39. Delivery to carrier or wharfinger.—(1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorised by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case(s). If the seller omits so to do, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the

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1. *Taylor* v. *Oakes*, (1922) 127 LT 267; (Cf.) *Munro* v. *Meyer*, (1930) 2 KB 312 (Clause in contract that each delivery shall be a separate contract does not militate against right to rescind, if default leads to reasonable inference that similar breaches will be made).
2. (1925) Mad. 1290 : 91 IC 580 : (1925) MWN 592.
3. (1878) 4 Cal. 252.
4. (1906) 33 Cal. 477 : 3 CLJ 249. **See also** *Volkart Bros.* v. *Rutanvelu*, (1895) 18 Mad. 63; *Simson* v. *Virayya*, (1886) 9 Mad. 359; *Ratilal Kothari* v. *Lakmichand*, (1938) Ran. 364 : 178 IC 538.
5. *Union of India* v. *K.H. Rao*, AIR 1976 SC 626 : (1977) 1 SCC 583 : 1976 UJ 202; *Robert A Munco & Co. Ltd.* v. *Meyer*, (1930) 2 KB 312.
6. AIR 1979 Pat. 323.

delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit.

Analogous law.—Sec. 32 of the English Sale of Goods Act—same as the section except that the word "delivery to a wharfinger" in clause (1) and the words "whilst in the custody of the wharfinger" in clause (2) are omitted.

Principle of the section.—The Special Committee said with reference to this section:

> "This clause is a combination of Sec. 32 of the English Act and Sec. 91 of the Indian Act. In England, it has been well settled for more than a century that if a tradesman orders goods to be sent by a carrier, though he does not name any carrier, the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser."

Pollock and Mulla's Contract Act citing *Dutton* v. *Solomanson*[1]:

> "It is also well established that it is the seller's duty to do whatever was necessary to secure the responsibility of the carrier for the safe delivery of the goods, and to put them into such a course of conveyance as, that in case of a loss, the buyer might have his indemnity against the carriers.....As the rule as to wharfingers has been in existence since 1872 in India, we consider it desirable to include it in the present clause."

Clause (1)—Contract authorising delivery to carrier.—If there is no contract of sale at the time of delivery, (*e.g.*,) in a case of sale on approval or on sale or return, the section will have no application. It is only for purposes of delivery that the carrier or wharfinger is *prima facie* deemed to be the agent of the buyer,[2] he is not the buyer's agent for *accepting* the goods.[3]

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1. (1803) 127 ER 314 : 7 RR 883.
2. *Wait* v. *Baker,* (1848) 154 ER 380 : 76 RR 469. **See** *Dunlop* v. *Lambert,* (1838) 7 ER 824: 49 RR 143; *Amar Singh* v. *Sharaf-ud-din,* (1925) Lah. 555 : 89 IC 751.
3. *Hanson* v. *Armitage,* (1822) 106 ER 1295 : 24 RR 478; *Meredith* v. *Meigh,* (1853) 118 ER 803 : 95 RR 603 *Vide* judgment of Blackburn, J. in *Calcutta Co.* v. *De. Mattos,* (1863) 139 RR 752 : 32 LJQB 328; *Ram Saran* v. *Lala Ram,* AIR 1968 Del. 233.

But the rule enunciated is only in the nature of a presumption and is rebuttable. The section does not postulate that delivery of goods to the carrier constitutes actual delivery to the buyer.[1] Thus if the seller reserves the right to disposal, the carrier is not the buyer's agent for delivery.[2] Again, where the contract provides for delivery at a certain place, the property in the goods remains with the seller while they are in transit.[3] But if it is agreed that goods should be sent at owner's risk delivery to a carrier is as good as delivery to the buyer.[4]

It may be mentioned that this clause is controlled by, and subject to Section 50—52 of the Act.

Clause (2)—Duty to ensure safe carriage.—In *Clark* v. *Hutchins,*[5] the principle underlying this section was laid down. The Carriers Act and the Railway Act make provision for the several ways is which the seller may protect the interest of the buyer. As to the liability of common carriers under the Carriers' Act and the Railways Act see commentary on Sec. 151, Contract Act.

In a case under the corresponding Sec. 91 of the Contract Act,[6] it was held that where the contract provides that goods shall be sent at "owner's risk," the property passed to the buyer on delivery to the carrier.

The Lahore High Court has pointed out, with reference to this sub-section that the seller cannot claim the price unless he has placed the buyer in a position to claim delivery from the carrier, and that except where the carrier is the nominee of the purchaser, the mere delivery to the carrier without taking a receipt from him and sending it on to the purchaser will not satisfy the requirement of the section.[7]

Where property in the goods had passed to the buyer on delivery to the railway the latter is regarded as a bailee for the consignee buyer for loss of

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1. *S.K. Roy* v. *Additional Member Board of Revenue,* AIR 1967 Cal. 338; *Union of India* v. *National Coal Development Corporation,* 1972 MPLJ 32.
2. *Ford Automobiles* v. *Delhi Motor Co.,* (1923) 24 Bom. LR 1140 : 70 IC 138 : (1923) Bom. 125.
3. *Sadasook* v. *Chaitram,* AIR 1926 Cal. 218 : (1925) 29 CWN 808 : 88 IC 910.
4. *Alagappa* v. *Roopchand,* (1929) 57 MLJ 110 : (1929) MWN 613 : 30 LW 415 : 117 IC 136: (1929) Mad. 685; *M. & S.M. Ry.* v. *Rangaswamy,* (1924) Mad. 517 : 73 IC 537 (Consignee alone must sue Railway company); *Gogi Padamarajappa* v. *Maddur Venkatasubbiah,* (1914) MWN 803 : 24 IC 423.
5. (1811) 104 ER 683 : 13 RR 283.
6. *Alagappa* v. *Roopchand,* (1929) 57 MLJ 110 : 117 IC 136 : (1929) Mad. 685 : (1929) MWN 613.
7. *(Firm) Narain Singh* v. *(Firm) Tulsi Ram,* (1937) Lah. 785.

goods and he alone can sue.[1] Failure to declare to the railway by the seller about the goods, which come under the expected articles mentioned in Schedule II of the Railway Act when the value exceeds the particular specified minimum, will bring the case within the purview of sub-section (2). The seller will not be entitled to any damages from the railway; the liability of the buyer also is exempted under the sub-section (5).[2]

Clause (3)—Duty to notify buyer in the case of sea-transit.—As to the meaning of the word 'sent' there is some conflict of judicial opinion, and on the footing to this, the question has arisen whether the clause applies to F.O.B. contracts in which goods once delivered aboard a ship remain at the risk of the buyer.[3] **[1087]**

The rule in the clause does not apply to C.I.F. and "ex-ship" contracts.[4]

The right of suit against the carrier lies with the party in whom property in the goods remained.

40. Risk where goods are delivered at distant place.—Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer shall, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

Analogous law.—Section 33 of the English Sale of Goods Act—same as the present section.

Deterioration in transit.—As a rule the risk passes with the property. But this section deals with a case where property has passed to the buyer without delivery. The risk of any natural deterioration in the goods flowing out of, or caused during the transit is on the buyer, though for extra-ordinary deterioration the seller may have to bear the risk.[5] The rule applies also to perishable goods.[6] **[1106]**

The words "unless agreed" permit of the making of any special agreement which may oust the applicability of the general rule. Again, the course of dealing between the parties and usage of the trade may make the section inapplicable.

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1. *Yacob Rowther & Sons* v. *Union of India,* AIR 1965 Mad. 162 : 77 LW 530.
2. *Siddaiyah* v. *Muthayanna,* AIR 1957 Mad. 183.
3. See *Wimble* v. *Rosenberg,* (1913) 1 KB 279 : (1913) 3 KB 743; *Northern Steel Co.* v. *Butt & Co.,* (1917) 33 TLR 516.
4. *Wimble* v. *Rosenberg,* (1913) 1 KB 279 : (1913) 3 KB 743.
5. *Bull* v. *Robinson,* (1854) 156 ER 476 : 102 RR 620.
6. *Beer* v. *Walker,* (1877) 46 LJCP 677; *Ollet* v. *Jordan,* (1918) 2 KB 41.

41. Buyer's right of examining the goods.—(1) Where the goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Analogous law.—Section 34 of the English Act—same as the section.

Clause (1)—Opportunity to reject.—The section gives the buyer only a right to examine the goods and not to repudiate the contract.[1] This clause simply gives effect to the well-known principle that the buyer cannot possibly be said to have accepted the goods unless and until he has had an opportunity to satisfy himself whether the goods delivered are those ordered.[2]

Clause (2)—Opportunity to inspect.—The principle of the sub-section also underlies Sec. 38, clause (2) of the Contract Act. The principle was applied in the case of *Isherwood* v. *Whitmore,*[3] where the buyer applied for inspection but was only shown some closed receptacles said to contain the goods ordered. It was held that no proper tender had been made. In *Ruttonsey* v. *Jamnadas,*[4] it was ruled that reasonable opportunity is the limit of the right to inspect, and that in the circumstances of the case, period of 24 hours was quite reasonable for inspection purposes.

Ordinarily, the inspection will have to be at the time and place of delivery.[5] unless it is not possible to examine the goods at the place of delivery.[6]

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1. *Dharampal & Co.* v. *K.G. Ramachandra Rao,* AIR 1980 All. 316; *Behere* v. *Nanagram etc., Firm,* AIR 1966 Assam 95.
2. *Hardy* v. *Hillerns,* (1923) 1 KB 658; *Bog Lead Mining Co.* v. *Montague,* (1861) 142 ER 539 ("No acceptance can be properly said to take place before the purchaser has had an opportunity of rejection"—per Wills, J.)
3. (1843) 152 ER 837 : 63 RR 624; *Pettitt* v. *Mitchell,* (1842) 134 ER 337; (Cf.) *Startup* v. *Macdonald,* (1843) 134 ER 1029 : 64 RR 810.
4. (1882) 6 Bom. 692.
5. *In re. Andrew Yule & Co.,* (1932) 59 Cal. 928 : 140 IC 877 : (1932) Cal. 879; *Nagardas* v. *Vel Mahomed,* (1930) 32 Bom. LR 454 : 126 IC 312 : (1930) Bom. 249; *Perkins* v. *Bell,* (1893) 1 QB 193; *Grimoldby* v. *Wells,* (1875) 10 CP 391.
6. (Cf.) *Scaliaris* v. *Ofverberg,* (1921) 37 TLR 307; *Molling* v. *Dean,* (1901) 18 TLR 217; *Boks & Co.* v. *Rayner,* (1921) 37 TLR 800.

In case of latent defects, examination at the place of delivery does not bar the right to reject at a second examination.[1]

If the buyer fails to avail or avails himself in a perfunctory manner the opportunity to examine the goods the seller cannot be held liable.[2]

If the buyer does not ask for an opportunity to examine the goods he may be deemed to have waived it.[3]

Even if there was examination by the buyer, he can still reject the goods if they do not conform to the contract because of some defects not apparent on such examination.[4]

The section requires that there must be a request for inspection by the buyer. It is however open to the buyer to waive the right of inspection expressly; or the course of dealings or trade usage may create a waiver. In a contract on C.I.F. terms, an examination of the goods is deemed to be waived.[5] But the waiver of the right to examination does not deprive the buyer of any right to damages on account of substantial disconformity of the goods supplied with the contract description.[6]

42. Acceptance.— The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Analogous law.—Section 35 of the English Act—same as the section.

Acceptance.—Actual intimation of acceptance by the buyer is the most effective evidence of acceptance. Where the buyer has selected the goods himself, or has directed delivery to third parties, such conduct may amount to an intimation of acceptance.[7] Again, if the buyer after delivery deals with the goods as if the seller has ceased to be their owner, it will be an indication of acceptance.[8] Where goods are delivered at a place where the buyer has a reasonable opportunity to examine them but without doing so he sends them on to a sub-purchaser, he must be deemed to have accepted he goods and

1. *Heilbutt* v. *Hickson*, (1872) 7 CP 438.
2. *Muthukrishna* v. *Madhavji Dev Chand & Co.*, AIR 1953 Mad. 517 : (1952) 2 MLJ 385.
3. *S.H. Joshi & Co.* v. *Ismail*, AIR 1960 Mad. 520.
4. *Beharilal Baldeoprasad, In re.*, AIR 1955 Mad. 217.
5. *Clemens Horst* v. *Biddell Bros.*, (1912) AC 18.
6. *Khan* v. *Duche*, (1905) 10 Com. Cas. 87.
7. *Cusack* v. *Robinson*, (1861) 121 ER 726 : 124 RR 566.
8. *Khoyee & Co.* v. *Gordon Woodroffe & Co.*, ILR (1937) Mad. 479 : 44 LW 676 : (1936) MWN 970 : 166 IC 313 : (1937) Mad. 40 : (1937) 2 MLJ 131. (Delivery of skins—Buyer "putting them into work"—Held acceptance).

cannot afterwards reject them.[1] A resale by the buyer may be strong evidence of acceptance, though not conclusive.[2] Where, however, a resale is effected even before he has had an opportunity for inspection, it may amount to an acceptance.[3] Where the buyer complains that the articles do not correspond to description and returns them, there is no acceptance.[4]

Where the buyer retains the goods beyond a reasonable time without intimation of rejection, he is deemed to have accepted them.[5] What is reasonable time is a question of fact.[6] It may depend in some cases on the conduct of the seller in allowing long or further trials.

Acceptance may be conditional, and on the condition being complied with, the acceptance may become absolute.[7]

In the case of a divisible contract, acceptance of one instalment does not prevent rejection of others.[8]

43. Buyer not bound to return rejected goods.—Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

Analogous law.—Section 36 of the English Act—same as the section.

Need not return rejected goods.—The Indian Contract Act did not contain any corresponding provision though the principle was being applied.[9] In cases where the buyer rejects the goods he is under no obligation to redeliver the goods to the seller. It is enough if he gives notice intimating his rejection.[9]

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1. *Shah Mohanlal Manilal* v. *Dhirubhai Bhavajibhai,* AIR 1962 Guj. 56; *Nagardas* v. *Velmahomed,* 32 Bom. LR 454.
2. *Wallis* v. *Pratt,* (1911) AC 394; *Perkins* v. *Bell,* (1893) 1 QB 193 (Resale to sub-buyer after inspection); *Hardy* v. *Hillerns,* (1923) 1 KB 658; *Haridas* v. *Kalumull,* (1903) 30 Cal. 649 : 7 CWN 562.
3. *Morton* v. *Tibbett,* (1850) 117 ER 520 : 81 RR 666 ; followed in *Kibble* v. *Gough,* (1878) 38 LT 205; *Page* v. *Morgan,* (1885) 15 QBD 232.
4. *Varley* v. *Whipp,* (1900) 1 QB 513.
5. **See** *Heilbutt* v. *Hickson,* (1872) 7 CP 438; *Phaggu Mal* v. *Babu Mal,* (1913) 35 All. 325 : 11 ALJ 315 : 19 IC 254.
6. *Mithan Lal* v. *Suraj Parshad,* (1931) 32 PLR 734 : 135 IC 498 : (1932) Lah. 52; *Ishar Das* v. *Khannu Mal,* (1927) 8 Lah. 276 : 100 IC 548 : (1927) Lah. 443; *Empire Engineering Co.* v. *Municipal Board, Barielly,* (1929) 27 ALJ 674 : 119 IC 853 : (1929) All. 806; *Kissendoyal* v. *Askaran,* (1916) 23 CLJ 415 : 34 IC 290. **See also** *Fisher Reeves & Co.* v. *Armour & Co.,* (1920) 3 KB 614.
7. *Doraisami* v. *Subbanna,* (1927) Mad. 880 : 105 IC 613 : (1927) MWN 549.
8. *In re. Andrew Yule & Co.,* (1932) 59 Cal. 928 : 140 IC 877 : (1932) Cal. 879; *Pranlal* v. *Maneckji,* (1932) 34 Bom. LR 1252 : 140 IC 610 : (1932) Bom. 46. **See also** *Hardy* v. *Hillerns,* (1923) 1 KB 658.
9. *Sumerchand* v. *Ardeshir,* (1907) AWN 67 : 4 ALJ 245; *Buch* v. *Gordhandas,* (1922) 24 Bom. LR 991 : (1923) Bom. 92 : 70 IC 877; *Phaggu Mal* v. *Babu Lal,* (1913) 35 All. 325 : 11 ALJ 315 : 19 IC 254.

In a case of rightful rejection, the seller must bear the charges for return of the goods.[1] Rejected goods will remain with the buyer at the risk of the seller.[2] It is the duty of the buyer only to place the goods at the disposal of the seller without obstruction. For instance, he should not claim to keep them as security for purchase money paid in advance.[3] The buyer is however in the position of an involuntary bailee with respect to them.[4]

44. Liability of buyer for neglecting or refusing delivery of goods.—When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods:

Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

Analogous law.—Section 37 of the English Act same as the section.

Buyer's liability when delivery not taken.—The opening words of the section indicates that the seller must be ready and willing to deliver the contracted goods.[5] In *Greaves* v. *Ashlin,*[6] the rule was laid down in terms similar to the section. The reference to the charge for the custody shows that the section applies to cases in which the property has passed, and the buyer neglects to take possession. Where the seller retains the goods in exercise of his lien, he cannot charge the buyer for keeping the goods.[7] **[1107]**

The proviso saves all the rights of the seller, which he is entitled to enforce, in case of delay or neglect to take delivery amounting to a repudiation of the contract on the part of the buyer.

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1. *Mekhri* v. *Mohtal Trading Corporation,* (1968) 2 Mys. LJ 106 : 15 Law Rep. 369; *Trilokchand* v. *Crystal & Co.,* AIR 1955 Mad. 481.
2. *Grimoldby* v. *Wells,* (1875) 10 CP 391.
3. *Lyons* v. *May & Barker,* (1923) 1 KB 685.
4. *Okel* v. *Smith,* (1815) 170 ER 416 : 18 RR 752.
5. *E. Narasimham* v. *Mahadeoram Udimiram,* 1973 (2) CWR 1442 : 39 Cut. LT 3256.
6. (1813) 170 ER 1433 : 14 RR 771. **See also** *Bloxam* v. *Sanders,* (1825) 107 ER 1309 : 28 RR 519.
7. *Somes* v. *British Empire Shipping Co.,* (1860) 11 ER 459 : 125 RR 186.

CHAPTER V

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

45. "Unpaid seller" defined.—(1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act.—

(a) When the whole of the price has not been paid or tendered;

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for the price.

Analogous law—Section 38 of the English Act same as the section.

Clause (1)—Unpaid seller.—It is an essential condition of the definition that the seller should, besides being unpaid have an immediate right of action for the price.[1] The seller is deemed unpaid even if the buyer has a right of set-off.[2]

"WHOLE PRICE."—In case of an entire contract, the expression means the whole amount stipulated. Therefore, even where a portion of the price is unpaid,[3] the seller will be an "unpaid seller" for the purposes of this chapter. But, where the contract is severable, the term will mean the proportionate price of such part.[4] **[1117]**

The second clause of the sub-section gives effect to the general presumption of conditional payment in the case of negotiable instruments. The seller is 'unpaid', not only if the buyer fails to meet the bills at maturity

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1. *Raitt* v. *Mitchell,* (1818) 171 ER 47 : 16 RR 765; *Kuttayan Chetty* v. *Palaniappa,* (1904) 27 Mad. 540.
2. *Pinnock* v. *Harrison,* (1838) 150 ER 1256. **See also** *Chase* v. *Westmore,* (1816) 105 ER 1016 : 17 RR 301.
3. *Hodgson* v. *Loy,* (1797) 101 ER 1065 : 4 RR 483.
4. *Ex parte Chalmers,* (1873) 8 Ch. Ap. 289; (Cf.) *Wentworth* v. *Outhwaite,* (1842) 152 ER 541 : 62 RR 664.

but also if he becomes insolvent before they mature for payment.[1] In the latter case the vendor's lien, which was suspended during the currency of the bill, is revived.[2]

But it is quite possible that a negotiable instrument may in particular cases be taken in absolute discharge. In such a case, there is no right available against the goods to the seller, as an unpaid seller.[3] Whether the instrument operates as a conditional payment or absolute discharge is, of course, a question of fact, though as said already, the rebuttable presumption is against it's being an absolute discharge. [See discussion 452 on "Negotiable Instruments."]

Clause (2)—"Seller."—This clause effect to the accepted view that the rights of an unpaid vendor against the goods should be available to any one whose position can be shown to be substantially analogous to that of an ordinary seller, (*e.g.*,) seller's agent to whom a bill of lading is endorsed,[4] or a surety for the price of goods who has paid the price to the seller,[5] or a broker contracting as principal,[6] or a commission agent who is personally liable for the price.[7]

In *Jenkins* v. *Usborne*,[8] the Court went the length of holding that an unpaid vendor of an interest in a contract for delivery of goods may, on the insolvency of the purchaser, exercise the right available under Sec. 45 of the English Sale of Goods Act.

46. Unpaid seller's rights.—(1) Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, have by implication of law—

(a) a lien on the goods for the price while is in possession of them;

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1. *Feise* v. *Wray*, (1802) 102 ER 532 : 6 RR 551.
2. *Gunn* v. *Bolcklow*, (1875) 10 Ch. Ap. 491.
3. *Cowasji* v. *Thompson*, (1845) 18 ER 560 : 70 RR 27.
4. *Morrison* v. *Gray*, (1824) 130 ER 305 : 26 RR 624; *Cassoboglou* v. *Gibb*, (1883) 11 QBD 797. **See also** *Venkatachala* v. *Ponnuswami Ayyangar*, (1924) 47 MLJ 312 : 20 LW 195 : (1924) 47 MLJ 312 : 20 LW 195 : (1924) MWN 499 : (1925) Mad. 46 : 82 IC 536. **See also** *Girdhari Lal* v. *Jethmal*, AIR 1963 AP 185 : (1962) 2 An. WR 132.
5. *Imperial Bank* v. *London & St. Katherine Docks Co.*, (1877) 5 Ch.D. 195.
6. *Ramendra* v. *Brajendra*, (1919) 46 Cal. 831 : 53 IC 986. **See also** *Bombay Steam Navigation Co.* v. *Ram Dass*, (1912) 14 Bom. LR 532 : 16 IC 61.
7. *Harilal* v. *Pehladrai*, (1929) 31 Bom. LR 508 : 120 IC 337 : (1929) Bom. 260. **See** *Mewar Textiles Mills Ltd., Bhilwara* v. *Sita Ram Baisanti Lal Jain*, AIR 1982 Raj. 215.
8. (1844) 135 ER 273 : 66 RR 767.

(b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them;

(c) a right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.

Analogous law.—Section 39 of the English Act—same as the section.

Right of Unpaid Seller.—This section deals with three most important rights of the unpaid seller. In the Contract Act these were spread over different sections. Here they have been brought together thus clarifying some matters which were doubtful under the Contract Act.

Clause (1)—Where ownership has passed.—The rights of lien and stoppage in transit arise after the passing of the property in the goods to the buyer.

IMPLICATION OF LAW.—This implication may be negatived under Sec. 62. Or there may be circumstances creating a personal estopped against the seller.

Clause (2)—Where ownership has not passed.—Where property in the goods has not passed, (*e.g.*,) where the seller has reserved his right of disposal, there is no need to invoke these rights at all, for the seller is still the owner and has therefore the additional right of withholding delivery called "quasi-lien"[1] **[1113]** Where property has not passed, the unpaid seller has the right to withhold delivery, where the buyer becomes insolvent,[2] in addition to the other remedies provided by law, (*e.g.*,) right to sue for the price, or a suit for non-acceptance of goods. And for this purpose, the fact that the sale was on credit is immaterial. It is likewise immaterial whether the goods are specific or unascertained.[3] **[1112]**

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1. (Cf.) *Mordaunt* v. *Br. Oil & Cake Mills,* (1910) 2 KB 502; *Raju Naidu* v. *Kanakku Pillai,* (1928) 54 MLJ 116. **See also** *Ex parte Chalmers,* (1873) 8 Ch. Ap. 289.
2. *Haji Karim* v. *Doma,* (1924) Nag. 416 : 80 IC 639.
3. *Griffiths* v. *Perry,* (1859) 120 ER 1065 : 117 RR 397 (Seller guilty of breach of contract to deliver before the buyer's insolvency, yet held liable only for nominal damages); *Raju Naidu* v. *Kanakku Pillai,* (1928) 54 MLJ 116.

UNPAID SELLER'S LIEN

47. Seller's lien.—(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(a) where the goods have been sold without any stipulation as to credit;

(b) where the goods have been sold on credit, but the terms of credit has expired;

(c) where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Analogous law.—Sec. 41 of the English Act,—same as the section

Comparison with previous law.—Secs. 95 to 97 of the Contract Act dealt with this subject. But they were silent as to whether the seller in possession of the goods as bailee of the buyer could exercise the lien.[1] Before the English Sale of Goods Act was enacted, the rule at Common Law was that there would be no lien except on the buyer's insolvency.[2] But the rule was abrogated by Sec. 41 (2) of the English Act and the present section follows the same principle.

Clause (1)—Unpaid vendor's lien.—"SUBJECT TO THE PROVISIONS OF THE ACT."—In this connection, see Secs. 48, 49, 53 and 62 of this Act.

POSSESSION.—The lien is founded on possession and unless there is possession there is no lien.[3] The lien presupposes that the property in the goods had passed. A person cannot have a lien on his own goods.[4] The possession of a servant or bailee of the seller is sufficient for the purpose of the

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1. In *New* v. *Swain,* (1828) Dan. & L.I. 193, it was held he could.
2. *Townley* v. *Crump,* (1835) 111 ER 709 : 43 RR 300; *Cusack* v. *Robinson,* (1861) 121 ER 726 : 124 RR 566.
3. *Maneckji* v. *Wadilal,* (1926) 50 Bom. 360 : 28 Bom. LR 777 : 51 MLJ 1 : (1926) MWN 499 : 43 CLJ 508 : 24 ALJ 657 : 30 CWN 890 : (1926) PC 38 : 94 IC 824.
4. *Nippon Yusen Kasha* v. *Ramjibhan,* ILR (1938) 2 Cal. 381 : (1938) 1 MLJ 834 : 42 CWN 677 : 67 CLJ 299 : (1938) MWN 487 : 40 Bom. LR 799 : 174 IC 564 : (1938) PC 152.

section.[1] The fact that a delivery order has been does not divest the lien.[2] But where the seller is estopped by his own conduct from denying that he had received payment for the goods to which the delivery order relates he cannot exercise the lien under the section.[3]

Where the goods are ascertained by the buyer and are in a deliverable state property passes to the buyer under Section 20 when the contract is made. If however the seller has been allowed to continue in possession till payment of the price and no period of credit has been given, the seller's lien commences from the time of making the contract.[4]

PRICE.—As the lien is confined only to the price, other charges incurred by the seller (*e.g.,*) warehousing charges could not be added.[5]

LIEN AND LIMITATION.—The lien may subsist though the right to which it is attached may be barred by limitation.[6]

SUB-CLAUSE (a)—Delivery and payment are concurrent conditions if there is no stipulation as to credit. (See Sec. 32.)

SUB-CLAUSE (b)—A sale on credit will exclude the lien during the credit period.[7]

SUB-CLAUSE (c)—Where the buyer becomes insolvent, the seller is entitled to his lien, even in cases where credit has been given.[8] In case of a contract for delivery and payment in distinct instalments where the buyer becomes insolvent, the seller may refuse to deliver except on payment for goods delivered already and for future deliveries.[9]

It will be open to the assignee in insolvency of the buyer to elect to affirm the contract within a reasonable time and obtain the goods on payment.[10]

48. Part-delivery.—Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the

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1. *Owenson* v. *Morse,* (1796) 101 ER 856.
2. *Imperial Bank* v. *London & St. Katherine Docks Co.,* (1877) 5 Ch.D 195; *Let Geyt* v. *Harvey,* (1884) 8 Bom. 501.
3. *Anglo-India Jute Mills* v. *Omademull,* (1910) 38 Cal. 127.
4. *Kalka Prasad* v. *Harish Chandra,* AIR 1957 All. 25 : (1956) All. LJ 143.
5. *Somes* v. *British Empire Shipping Co.,* (1860) 11 ER 459 : 125 RR 186; *Parakh* v. *Mackenzie & Co,* (1934) Oudh 380 : 11 OWN 958 : 151 IC 117.
6. *Nursing* v. *Hurryhur,* (1880) 5 Cal. 898; (Cf.) *Nimchand* v. *Jagabandhu,* (1894) 22 Cal. 21.
7. *Spartali* v. *Benecke,* (1850) 138 ER 87 : 84 RR 532.
8. *Grice* v. *Richardson,* (1877) 3 AC 319; *Bloxam* v. *Sanders,* (1825) 107 ER 1309 : 28 RR 519.
9. *Ex parte Chalmers,* (1873) 8 Ch. App. 289.
10. *Gray* v. *Lamond,* (1913) 40 Cal. 523 : 18 IC 753.

remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien.

Analogous law.—Sec. 42, English Sale of Goods Act—Same as the section.

Part—delivery.—In *Kemp* v. *Falk*,[1] Lord Blackburn said:

> "In agreeing for the delivery of goods with a person you are not bound to take an actual corporeal delivery of the whole in order to constitute such a delivery and it may very well be that the delivery of a part of the goods is sufficient to afford strong evidence that it is intended as a delivery of the whole. If both parties intend it as a delivery of the whole then it is a delivery of the whole. and the onus is on those who say it was so intended." **[970]**

Therefore, where delivery of a part operates as delivery of the whole, the lien cannot be exercised. Where the delivery is of an essential part of a machine, it may be presumed that the lien is intended to be waived.[2] Or the character of the person taking delivery or the object for which it is taken may be such as to show a common intention to treat the part delivery as a delivery of all goods. But the fact that the goods are in the seller's own possession may be important to show that part delivery is not intended as a complete delivery.[3]

Instalment contracts.—In the case of an instalment contract where the price is not payable until complete delivery, there is no lien from the very start and the buyer can claim delivery of all the instalments. But the lien will come into existence in circumstances like the buyer's insolvency. In the case of a severable instalment contract, it is not open to withhold delivery of a subsequent instalment till the price of a previous instalment is paid, except where non-payment amounts to repudiation or the buyer is insolvent.[4] But under no circumstances will be buyer's insolvency justify refusal of delivery of an instalment, which has been paid for.[5]

49. Termination of lien.—(1) The unpaid seller of goods loses his lien thereon.—

(a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

1. (1882) 7 AC 573.
2. *Ex parte Cooper,* (1879) 11 Ch.D. 68.
3. (Cf.) *Miles* v. *Gorton,* (1834) 149 ER 860 : 39 RR 820.
4. *Ex parte Chalmers,* (1873) 8 Ch. Ap. 289.
5. *Merchant Banking Co.* v. *Phoenix Bessemer Steel Co.,* (1877) 5 Ch.D. 205.

(b) when the buyer or his agent lawfully obtains possession of the goods;

(c) by waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods.

Analogous law.—Sec. 43 English Act same as the section except for addition of the words *" or right of retention"* after the word "lien" occurring in both places.

When lien terminates—Clause (a)—On delivery.—Lien subsists only so long as the seller is in possession or control of the goods.[1] Where the goods are delivered to a carrier without reserving the power of disposal, the carrier is in the position of the agent of the buyer.

Clause (b)—On buyer obtaining possession.—The lien ceases to exist the moment the seller loses possession of the goods. And so, it follows that if the buyer or his agent lawfully gets possession of the goods, the lien will cease but not if possession is obtained wrongfully.[2] Where the seller's agent in possession of the goods attorns to the buyer, the lien will cease.[3] Similarly, if the buyer is in possession of the goods as the seller's bailee, the completion of the sale has the effect of terminating the lien because the buyer's possession ceases to be that of a bailee and becomes that of an owner.[4] But, attornment by the seller himself will not divest the lien. [See Sec. 47 (2)].

Clause (c)—By waiver.—The lien may be waived expressly or impliedly. Where the seller takes security for the price on terms inconsistent with the existence of the lien, an implication of waiver may arise.[5] As pointed out in *Morton* v. *Woodfall,*[6] the mere taking of a personal security is not tantamount to abandonment of the lien. Where he takes a negotiable instrument, the lien is suspended during the currency of the instrument, but may revive on its being dishonoured.[7] Again, where the buyer refuses to deliver

1. *Girdhari Lal* v. *Jethmal,* AIR 1963 AP 185 : (1962) 2 An. WR 132.
2. (Cf.) *Wallace* v. *Woodgate,* (1824) 171 ER 990; *Litt.* v. *Cowley,* (1816) 129 ER 68 : 17 RR 482.
3. *Grigg* v. *National Guardian Assurance Co.,* (1891) 3 Ch. 206; *M'Ewan* v. *Smith,* (1849) 9 ER 1109 : 81 RR 166.
4. *Cain* v. *Moon,* (1896) 2 QB 283.
5. (Cf.) *Re. Morris,* (1908) 1 KB 473 (Case of solicitor's lien); *Bank of Africa* v. *Salisbury Mining Co.,* (1892) AC 281; *Re Leith's Estate,* (1866) 1 PC 296 (Lien created by contract excludes statutory lien).
6. (1927) 8 Lah. 257 : 99 IC 770 : (1927) Lah. 103.
7. *Valpy* v. *Oakley,* (1851) 117 ER 1142 : 83 RR 786.

the goods without relying on his lien, the lien ceases to exist.[1] Assent to a resale by the buyer may imply waiver of the lien.[2] **[1114]**

Decree for the price.—Sub-section (2) gives effect to the well recognised rule of Common law. Thus though the debt is merged in a decree, the lien on the goods is not destroyed unless the seller attaches them in execution of the decree.[3]

STOPPAGE IN TRANSIT

50. Right of stoppage in transit.—Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods, has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price.

Analogous law.—Section 44, English Act,—Same as the section.

Distinction between lien and stoppage in transit.—(i) The right of stoppage comes into existence only after possession has been parted with, but a lien depends entirely on possession being with the seller. Possession is the test of a right of lien. Non-delivery to the vendee is the test of a right of stoppage in transit. (ii) The right of stoppage is narrower in scope than the right of lien, as it arises only in case of insolvency. The lien, on the other hand, is available in all cases where the seller is in possession of the goods and the price is payable. **[1121]**

Stoppage in transit.—This right is based on the plain reason of justice and equity that one man's goods shall not be applied to the payment of another man's debts.[4] It is founded on mercantile rules, and engrafted from the custom of merchants upon the English law. In *Gibson* v. *Carruthers,*[5] there is an interesting account of the history of stoppage in transit. In *Rash Behari* v. *Narain Das,*[6] the nature of the right is dealt with in detail.

SUBJECT TO THE PROVISIONS OF THIS ACT.—(Cf.) Secs. 51, 52, 53, and 62 of this Act.

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1. *Yungmann* v. *Briesemann,* (1893) 67 LT 642.
2. *Knights* v. *Wiffen,* (1870) 5 QB 660.
3. **See** *Houlditch* v. *Desanges,* (1818) 171 ER 666 : 20 RR 692; *Jacobs* v. *Latour,* (1828) 130 ER 1010.
4. *D'Aquila* v. *Lambert,* (1761) 28 ER 824. **See also** *Cassaboglou* v. *Gibb,* (1883) 11 QBD 797.
5. (1841) 151 ER 1061 : 58 RR 713. **See also** *Booth S.S. Co.* v. *Cargo Fleet Iron Co.,* (1916) 2 KB 570.
6. (1923) 50 Cal. 399 : 27 CWN 131 : 80 IC 485 : (1923) Cal. 182.

NATURE OF THE RIGHT.—As Lord Cairns said in *Schotsman* v. *Lancashire & Yorkshire Ry. Co.*,[1] the essence of stoppage in transit is that the goods should be in the possession of a middleman. It is therefore a right against the goods themselves. For instance, it cannot be availed of against the proceeds of an insurance policy effected by the buyer.[2] As between the right of stoppage in transit and the carrier's lien for a general balance of account, the former has precedence.[3] Similarly, the right of stoppage will prevail over a third party's attachment of the goods.[4]

LIMITS OF THE RIGHT.—In the first place, the right is available both in cases of carriage by land and carriage by sea. The right is available only so long as the goods are in transit. It stops just of actual delivery of the goods to the buyer. The only condition of the exercise of the right is the buyer's insolvency at some time before the end of the actual transit. It is not necessary that at the very moment of the stoppage the buyer must be insolvent. The right may be exercised in anticipation of the insolvency of the buyer,[5] but in such a case, the seller stops the goods at his peril. If it turns out that the buyer is solvent the seller is answerable in damages in additions to his liability tō deliver the goods.[6]

The bankruptcy of the buyer not being in law a rescission of the contract the delivery of the goods into the buyers warehouse after his bankruptcy or actual possession taken by his trustee will put an end to the transit and determine the right to stoppage.[7]

An insolvent buyer may rescind the contract in cases where it is only an agreement to sell with the consent of the seller and then the subsequent delivery of the goods into the buyer's possession cannot affect the seller's rights, since the property in the goods will not be in the buyer. Where the property has passed, the buyer may decline to take possession, thus leaving the seller free to exercise the right to stoppage. But in some circumstances, such an act of the buyer may amount to a fraudulent preference.

51. Duration of transit.—(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier

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1. (1867) 2 Ch. App. 338. **See also** *Bethell* v. *Clark*, (1888) 20 QBD 615.
2. *Berndtson* v. *Strang*, (1868) 3 Ch. App. 588.
3. *Oppenheim* v. *Russell*, (1802) 127 ER 24 : 6 RR 604.
4. *Smith* v. *Goss*, (1808) 170 ER 958 : 10 RR 684.
5. *The Tigress*, (1863) 167 ER 286; *The Constantia*, (1807) 165 ER 947.
6. *G.I.P. Ry.* v. *Hanmandas*, (1890) 14 Bom. 57; *Lilladhar* v. *George Wreford*, (1893) 17 Bom. 62.
7. *Ellis* v. *Hunt*, (1789) 100 ER 679 : 1 RR 743; *Scott* v. *Pettit*, (1803) 127 ER 255 : 7 RR 804.

or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.

Analogous law.—Section 45 of the English Sale of Goods Act—Same as the section except for the addition of the words, *"or custodian"* after the words 'bailee' and for the commission of Clause 7.

Duration of transit.—The section defines transit and its duration. The chief principle is that "the goods can be stopped only while they are passing through channels of communication for the purpose of reaching the hands of the vendee."[1]

Clause (1).—This clause assumes that the delivery to the carrier is as agent of the buyer for carriage. If the carrier is the agent of the seller, no question of stoppage can arise.

Goods are deemed to be in transit so long as they are in the possession of the carrier, *qua* carrier.[2] The right of the seller is not affected by the fact that the carrier has been appointed by the buyer.[3]

The transit does not cease merely by reaching destination, but continues till the goods come into the possession of the buyer.[4] The test is not whether the goods have arrived at their destination but whether, having arrived, there has been delivery to the buyer. Thus, where the endorsee of a railway receipt from the buyer, paid the freight and loaded the goods in his carts, but was prevented from leaving the station yard by the Railway authorities on receipt of a telegram directing stoppage, it was held that the right could not be exercised as there had been delivery to the buyer.[5] For the same reason, it has been held that the goods are deemed to be in transit, though in fact lying deposited with a forwarding agent,[6] as Cairns, L.J. observed in *Schotsman* v. *Lancashire Ry,*[7] the essence of stoppage in transit is that the goods should be in the possession of a middleman. **[1121]**

Where the goods entrusted to the carrier which are insured were destroyed by fire in mid way before reaching the destination while they were kept in the godown of the carrier, it cannot be said that the goods were not in transit and the insurance company cannot be absolved of its liability to indemnify the loss.[8]

Where the carrier enters into an agreement with the buyer to hold the goods as agent of the consignee, but not as a carrier, the transit will be put an end to.[9]

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1. *Kendell* v. *Marshall,* (1883) 11 QBD 356. **See also** *Bethell* v. *Clarke,* (1887) 19 QBD 553 (561) : on appeal, 20 QBD 615.
2. *Mills* v. *Ball,* (1801) 126 ER 1382 : 5 RR 653.
3. *Bethell* v. *Clark,* (1888) 20 QBD 615.
4. *Heinekey* v. *Earle,* (1857) 120 ER 153 : 112 RR 627.
5. *G.I.P., Ry. Co.* v. *Hanmandas,* (1890) 14 Bom. 57. **See also** *Naraindas* v. *Official Assignee,* (1936) Sind 106 : 163 IC 875.
6. *Ex parte Barrow,* (1877) 6 Ch. D. 783; *Smith* v. *Goss,* (1808) 170 ER 958 : 10 RR 684.
7. (1867) 2 Ch. Ap. 332.
8. *United India Insurance Co. Ltd.* v. *Aman Singh Munshi Lal,* AIR 1994 P & H 206 : 1994 (2) Cur. LJ 269 : (1994) 2 Pun. LR 293 : 1994 (2) RRR 385.
9. *Lyons* v. *Hoffnung,* (1890) 15 AC 391; *Whitehead* v. *Anderson,* (1842) 152 ER 219 : 60 RR 819; *Ex parte Cooper,* (1879) 11 Ch.D. 68.

It has sometimes been said that non-payment of freight raises a presumption that the transit is at an end. But this is not conclusive as a test.[1]

Once the goods are "at home," the tortious acts of the carrier will not interfere with the right of the purchaser.[2]

Clause (2)—Delivery to buyer before reaching destination.—Though the seller may have directed delivery by the carrier at a certain place, it is open to the carrier by arrangement with the buyer to deliver wherever the latter directs. In such a case, the transit is at an end.[3] The vendee may thus "anticipate the place of destination if he can succeed in getting the goods out of the hands of the carrier."[4]

Clause (3)—Attornment to buyer on reaching destination.—Where, after arrival at the appointed destination, the carrier attorns to the buyer, the transit is at an end. As Parke, B. observed in *Whitehead* v. *Anderson*,[5]:

> "A case of constructive possession is where the carrier enters expressly or by implication into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee or his agent, not for the purpose of expediting them to the place of original destination pursuant to the contract, but for the purpose of custody on his account and subject to some new or further order to be given to him."

Such attornment can only be with mutual consent.[6] As the section itself states, the mere fact that the buyer indicates a further destination for the goods for his own purposes, will not have the effect of prolonging the transit.[7]

It is open to the carrier to attorn to the buyer subject to his lien.[8] Therefore the mere fact of retaining the lien is not conclusive against the factum of attornment.[9]

Clause (4)—Rejected by buyer.—Where the buyer reject the goods, the carrier has possession of them *qua* carrier, and therefore the transit is deemed to continue.[10] But if the rejection is made after the buyer's agent has

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1. *Kemp* v. *Falk*, (1883) 7 AC 573; *Naraindas* v. *Official Assignee*, (1936) Sind 106 : 163 IC 875.
2. *Bird* v. *Brown*, (1850) 154 ER 1433 : 80 RR 775.
3. *Mills* v. *Ball*, (1801) 126 ER 1382 : 5 RR 653; *L & N. W. Ry.* v. *Bartlett*, (1861) 158 ER 529 : 126 RR 481.
4. *Kendell* v. *Marshall*, (1883) 11 QBD 356 (369).
5. (1842) 152 ER 219 : 60 RR 819. **See also** *Foster* v. *Framton*, (1826) 108 ER 392 : 30 RR 255.
6. *Ex parte Barrow*, (1877) 6 Ch.D. 783.
7. *Ex parte Cooper*, (1879) 11 Ch. D. 68.
8. *Allan* v. *Gripper*, (1832) 149 ER 94 : 37 RR 682.
9. *Kemp* v. *Falk*, (1882) 7 AC 573 (584).
10. *Bolton* v. *L & N.W. Ry. Co.*, (1866) 1 CP 431.

taken possession of them it will not prolong the transit.[1] Rejection by the buyer does not necessarily amount to a fraudulent preference.[2]

Clause (5) —Ship chartered by buyer.—As the section suggests, it is a question of construction of the charter party as to whether the master of the ship is a carrier or agent of the buyer. The test is whether he is a servant of the owner of the ship or the charterer. Where the circumstances suggest, so to speak, a temporary lease of the ship to the charterer so that master and crew are under the direction and control of the buyer (charterer) then the master will be in the position of servant or agent of the buyer, and so delivery aboard the ship amounts to delivery to the buyer and so the transit is at an end.[3]

Clause (6)—Wrongful refusal to deliver.—This sub-section is based on the case of *Bird* v. *Brown*.[4] This section would seem to suggest as Benjamin says, that if the carrier refuses delivery for just cause, the transit is not at an end.

Clause (7)—Part-delivery.—Compare Sec. 48, as to effect of part-delivery. See also *Ex parte Cooper*.[5]

52. How stoppage in transit is effected.—(1) The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, shall be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, he shall re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery shall be borne by the seller.

Analogous law.—Section 46, English Act, same as the section except for the addition of the words *"or custodian"* after the words "other bailee" in Clauses 1 and 2.

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1. *Jobson* v. *Oppenheim*, (1905) 21 TLR 468.
2. *Ex parte Cooper*, (1879) 11 Ch.D. 68.
3. **See** *Berndtson* v. *Strang*, (1867) 4 Ex. 481; *Schotsman* v. *Lancashire & Yorkshire Ry Co.*, (1867) 2 Ch. Ap. 332; on appeal (1868) 3 Ch. Ap. 588.
4. (1850) 154 ER 1433 : 80 RR 775.
5. (1879) 11 Ch.D. 68.

Clause (1)—How stoppage effected.—The section speaks of two modes of effecting stoppage, namely actual possession and notice,[1] but the word "may" would, as is suggested in the Law of England,[2] with reference to the English Act, make it appears as if the section is not exhaustive. A demand for the bill of lading has been held to be a good stoppage.[3] A request by telegram may also be sufficient.[4] Where the carrier delivers to the buyer after notice, but under a *bona fide* mistake, the buyer is liable for conversion if he refuses to return the goods.[5] **[1130]**

It appears doubtful whether a notice to the consignee is sufficient for the purposes of the section.[6]

Clause (2).—The carrier who delivers goods to the consignee after getting sufficient notice of stoppage is liable to the seller for conversion.[7] In case of genuine doubt, the carrier may interplead.[8]

TRANSFER BY BUYER AND SELLER

53. Effect of sub-sale or pledge by buyer.—(1) Subject to the provisions of this Act, the unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto:

Provided that where a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, and, if such last mentioned transfer was by way of pledge or other disposition for value, the

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1. See *Whitehead* v. *Anderson,* (1842) 152 ER 219 : 60 RR 819; *Kemp* v. *Falk,* (1882) 7 AC 573 (Notice to principal).
2. Vol. 29, p. 176, Note (g).
3. *Ex parte Watson,* (1877) 5 Ch.D. 35.
4. *Ex parte Falke,* (1880) 14 Ch.D. 446; *Rajhumal* v. *Michumal,* (1915) 26 IC 424 (Sind).
5. *Ex parte Cote,* (1873) 9 Ch. Ap. 27; *Litt* v. *Cowley,* (1816) 129 ER 68 : 17 RR 482.
6. (Cf.) *Phelps* v. *Comber,* (1885) 29 Ch.D. 813.
7. *Booth Steamship Co.* v. *Cargo Fleet Iron Co.,* (1916) 2 KB 570.
8. *Chhaganlal* v. *B.B.C.I Ry.,* (1915) 17 Bom. LR 339 : 28 IC 948 (2); *Amerchand* v. *Ramdas,* (1914) 38 Bom. 255 : 21 IC 343 : 13 Bom. LR 890; *The Tigress,* (1863) 167 ER 286.

unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee.

(2) Where the transfer is by way of pledge, the unpaid seller may require the pledgee to have the amount secured by the pledge satisfied in the first instance, as far as possible, out of any other goods or securities of the buyer in the hands of the pledgee and available against the buyer.

Analogous law.—Sec. 47 of the English Act runs thus.—

> "47. Subject to the provisions of this Act, the unpaid seller's lien (or retention) or stoppage in transit is not affected by any sale, or other disposition of the goods which the buyer may have made unless the seller has assented thereto:
>
> Provided that where document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien (or retention) or stoppage in transit is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value the unpaid seller's right of lien (or retention) or stoppage in transit can only be exercised subject to the rights of the transferee."

Previous Law compared.—Sections 102 and 103 of the old Contract Act dealt with the transfer of a document of title by the buyer. The words in Sec. 102 "having obtained" were unsatisfactory, as they would include cases where the document is got tortiously. So, the language of the English Act "lawfully transferred" was substituted. Again, to make the proviso applicable to warrants and delivery orders, the word "issued" was added:

The second clause has introduced the right of marshalling by an unpaid seller in cases of pledge of other securities along with documents of title by the buyer.

Clause (1).—Section 53 incorporates statutory exemptions to the principle that no one can confer on another a higher title than what he himself has.[1]

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1. *Morvi Mercantile Bank Ltd., by Official Liquidator* v. *Union of India*, AIR 1965 SC 1954.

Effect of sub-sale by buyer.—As a general rule, the buyer who resells the goods cannot give a better title than he himself has. The subsequent vendee who does not take possession gets only a title defeasible on non-payment of the price by the first vendee.[1] The mere assent by the seller to the buyer's subcontract does not deprive him of the rights of lien and stoppage in transit: for it is quite consistent with the seller thinking that neither the first nor the second buyer will be entitled to delivery unless the price is paid. In *Mordaunt* v. *British Oil Mills,*[2] Pickford, J., observed:

> "The assent which affects the unpaid vendor's right of lien must be such an assent as in the circumstances shows that the seller intends to renounce his right against the goods..... His assent to a sub-contract may simply mean that he acknowledged the right of the purchaser under the sub-contract to have the goods, subject to his own paramount right under the contract with his original purchaser to hold the goods until he is paid the purchase money....."

By his words or conduct, the original seller must have represented to the buyer's transferee that the goods will be delivered to him without obstruction.[3] **[1127]**

Proviso—ISSUED OR TRANSFERRED.—Thus a bill of lading made out in the name of the subsequent purchaser but not delivered to him will not come within the proviso,[4] as decided in *Bapuji* v. *Clan Line Steamers.*[5] *Defacto* consent, though got by fraud, will be sufficient for the purposes of the section.[6]

Good faith—BURDEN OF PROOF.—The onus of proving that the transfer was made in good faith and for consideration lies, as observed in *Rash Behari* v. *Narain Das,*[7] on the subsequent buyer. It has however been held that knowledge that the goods have not been paid for does not necessarily negative good faith.[8]

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1. *Dixon* v. *Yates,* (1833) 110 ER 806 : 39 RR 489. **See also** *Craven* v. *Ryder,* (1816) 128 ER 1103 : 16 RR 644.
2. (1910) 2 KB 502. **See also** *Stoveld* v. *Hughes,* (1811) 104 ER 619 : 12 RR 523.
3. **See** *Merchant Banking Co.* v. *Phoenix Bessemer Co.,* (1877) 5 Ch.D. 205; *Knights* v. *Wiffen,* (1870) 5 QB 660; *Pearson* v. *Dawson,* (1858) 120 ER 576 : 113 RR 724.
4. *Ex parte Golding,* (1880) 13 Ch.D. 628.
5. (1910) 34 Bom. 640 : 12 Bom. LR 553 : 7 IC 650; As to railway receipt under the old Act, (Cf.) *Arunachalam* v. *Ko Po,* (1923) Ran. 1 : 68 IC 694; *Ramdas* v. *Amerchand,* (1916) 40 Bom. 630 (Railway receipt—Pledge of—Stoppage in transit cannot defeat pledge).
6. *Cahn* v. *Pocketts Bristol, Steam Navigation Co.,* (1899) 1 QB 643.
7. (1923) 50 Cal. 399 : 27 CWN 231 : (1923) Cal. 182. **See also** *Lakshmi Kanta* v. *Emperor,* (1919) 46 Cal. 825 : 23 CWN 572 : 50 IC 669 : 29 CLJ 328.
8. *Cuming* v. *Brown,* (1808) 103 ER 66 : 9 RR 603; *Vertue* v. *Jewel,* (1814) 171 ER 10.

Consideration.—Under the old Contract Act Sec. 103, which was based on a decision of the Judicial Committee in *Rodger* v. *Comptoir d' Escompte de Paris,*[1] an antecedent debt of the buyer to the second buyer, was not sufficient consideration for the transfer of a document of title. But in *Leask* v. *Scott,*[2] this opinion was dissented from, and the present section being based on Sec. 47 of the English Act, makes no distinction between an 'antecedent debt' and an advance made specifically on the document transferred.

Clause (2).—The doctrine of marshalling has been recognised in the case of sale and mortgage of immovable property. That principle is here applied to sales of movables.[3]

54. Sale not generally rescinded by lien or stoppage in transit.—(1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage in transit.

(2) Where the goods are of a perishable nature, or where the unpaid seller who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell, the unpaid seller may, if the buyer does not within a reasonable time pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on the re-sale. If such notice is not given, the unpaid seller shall not be entitled to recover such damages and the buyer shall be entitled to the profit, if any, on the re-sale.

(3) Where an unpaid seller who has exercised his right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer, notwithstanding that no notice of the re-sale has been given to the original buyer.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages.

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1. (1869) 2 PC 393.
2. (1877) 2 QBD 376; (Cf.) *Glegg* v. *Bromley,* (1912) 3 KB 474.
3. *In re. Westzinthus,* (1883) 110 ER 992 : 39 RR 665. **See also** *Bapuji* v. *Clan Line Steamers,* (1910) 34 Bom. 640 : 12 Bom. LR 553 : 7 IC 650.

Analogous law.—Sec. 48 of the English Act runs thus.—

"48. (1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien (or retention) or stoppage in transit.

(2) Where an unpaid seller who has exercised his right of lien (or retention) or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract."

Clause (1)—Sale not rescinded.—In *United States Steel Products Co.* v. *Great Western Ry. Co.*,[1] Lord Atkinson said, "The vendor by stopping the goods *in transitu* does not thereby regain the property in them, nor does he thereby cancel the sale. In no proper sense, does he by the stoppage become the "owner of the goods". In *Jainarain* v. *Narain*,[2] it is pointed out that the suit for damages for loss on resale, is a remedy, which springs from the contract.

Clause (2)—Right to re-sell.—The right of resale may be conferred on the seller by contractual terms or may be statutory. When the right is expressly reserved by a contract of sale, it is not necessary that ownership should have passed to the buyer.[3] The right is intended to effectuate the right of lien and stoppage in transit. The section can obviously apply only where property has passed to the buyer.[4] In *Harparshad Tulsiram* v. *Jindar Parshad*,[5] the Lahore High Court has emphasised this aspect of the matter. But it is possible

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1. (1916) 1 AC 189. **See also** *Kemp* v. *Falk*, (1882) 7 AC 573; *Greaves* v. *Ashlin*, (1813) 170 ER 1433 : 14 RR 771.
2. (1922) 3 Lah. 296 : 69 IC 583 : (1922) Lah. 369.
3. **See** *Natarajan* v. *Parsuram Perumal & Co.*, AIR 1963 Ker. 13 : ILR (1962) 2 Ker. 319 : *Hirji Barmal* v. *Bombay Cotton Ltd.*, AIR 1958 Bom. 411.
4. *Doraisami* v. *Subbanna*, (1927) Mad. 880 : (1927) MWN 549 : 105 IC 613; *Asa Ram* v. *Kishanchand*, (1930) Lah. 386 : 120 IC 166; *Nanak Chand* v. *Pannalal*, (1930) Lah. 389; *Sundar Singh* v. *Gulab Singh*, (1927) Lah. 269; *Ishar Das* v. *Dhanpat Rai*, (1927) 8 Lah. 514 : (1927) Lah. 687 : 106 IC 59; *Narsingirji* v. *Budan Saheb*, (1924) 26 Bom. LR 523 : (1924) Bom. 390; *Hari Das* v. *Kalumull*, (1903) 30 Cal. 649 : 7 CWN 562; *Clive Jute Mills* v. *Ebrahim*, (1896) 24 Cal. 177; *Yule & Co.* v. *Mahomed Hussain*, (1896) 24 Cal. 124; *Mohanlal* v. *Gyaniram*, (1935) Nag. 111 : 31 NLR 250 : 155 IC 778; *Ujagar Mal* v. *Nanhe Mal*, (1935) 157 IC 963; *Bhajan Singh Hardit Singh & Co., Delhi* v. *Karson Agency*, AIR 1967 Del. 101 (FB).
5. (1934) Lah. 191. **See also** *Zippel* v. *Kapur & Co.*, (1932) Sind 9 : 139 IC 114; *Hunt* v. *Sin Gee*, (1921) 66 IC 510.

that the contract itself may provide a re-sale clause.[1] In such a case the power may be exercised, though the property in the goods may not have passed.[2] In a case where the contract provided for re-sale in case of failure to pay by the time stipulated, it was held that re-sale without notice was valid.[3]

Ordinarily, even where the power of sale is provided by the contract, the goods must be ascertained or appropriated for the purpose of the contract.[4] For, in the absence of such appropriation there is, strictly speaking, nothing on which to exercise the power of re-sale.[5] But it will of course be open to parties to stipulate for the power of re-sale even in the absence of appropriation.[6] And, though the contract may provide for a power or re-sale, the seller is not bound to exercise it.[7] As has been observed, though the seller has a right to re-sell, no statutory duty is cast upon him to do so.[8]

PROFIT.—In a case arising under the Indian Contract Act, the Allahabad High Court had held that the buyer was entitled to any surplus remaining after re-sale. Under the present Act, the seller will be entitled to keep it.[9]

It has been suggested that in case of payment in advance of part of the price, the term profit must be construed as surplus realised by re-sale after giving credit for advance payment.[10] Though as a matter of equity, the suggestion seems commendable, there would appear to be no warrant for it in the section as it stands. Besides, the policy of the law would rather lean in favour of a provision calculated to induce people to perform their contract.

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1. *Eng Ban Hwat* v. *Latiff Hazi,* (1927) Ran. 81.
2. *Nanak Chand* v. *Panna Lal,* (1930) Lah. 389 : 126 IC 519; *Bubby Hurry & Co.* v. *Hertz & Co.,* (1923) 4 Lah. 215 : (1923) Lah. 541 : 73 IC 421; *Moll Schutte* v. *Luchmi Chand,* (1898) 25 Cal. 505 : 2 CWN 283 (FB); *Basdeo* v. *John Smidt,* (1899) 22 All. 55 : (1899) AWN 172; *Best* v. *Haji Muhammad Sait,* (1898) 23 Mad. 18.
3. *Tukun Singh* v. *Hanuman Das,* (1901) 7 CWN 108; *Harichand* v. *Gosko Kabushiki,* (1925) 49 Bom. 25 : 86 IC 521 : (1925) Bom. 28 : 26 Bom. LR 921. See *Gopala Krishna Pillai* v. *K.M. Mani,* AIR 1984 SC 216.
4. *Dayal Singh* v. *Beli Ram,* (1929) Lah. 38 : 115 IC 77.
5. *Angulia* v. *Sassoon,* (1912) 39 Cal. 568 : 16 CWN 593 : 13 IC 705.
6. *Rattan Lal* v. *Tek Chand,* (1930) Lah. 379 : 120 IC 785; *Ishar Das* v. *Dhanpat Rai,* (1927) 8 Lah. 514 : 106 IC 59 : (1927) Lah. 687.
7. *Jamal* v. *Moola Dawood,* (1915) 43 Cal. 493 : 20 CWN 105 : 30 MLJ 73 : 31 IC 949 : (1915) PC 48.
8. *Mahomed Abdul Subhan* v. *Ghulam Hussain,* (1935) Nag. 66 : 31 NLR 159 : 156 IC 156.
9. *Peare Lal* v. *Dev Karan Das,* (1930) All. 886 : 125 IC 592; *Ambalavana Chettiar & Co.* v. *Express News Papers Ltd., Bombay,* AIR 1968 SC 741; *Maheshwari Metals etc., Refinery* v. *J.N. Small Scale Industries Corporation,* (1982) 1 MLJ 35; *Kirorimal Kashiram* v. *Venekatachalapathy Chettiar,* AIR 1973 Mad. 256.
10. Pollock & Mulla, Sale of Goods Act, p. 280.

Statutory right of re-sale.—This right is subject to the condition laid down in clause (2).

(1) Goods must be of a perishable nature. The word 'perishable' has not been defined in the Act. It means "not merely physically perishable, but commercially perishable, as by deteriorating in market value by delay or by deteriorating in quality so as to become unmerchantable."[1]

(2) The goods re-sold must be the goods contracted for. In cases arising under Sec. 107 of the Contract Act, it has been held that before a plaintiff can substantiate a claim for loss on re-sale, he must show that the goods re-sold by him were goods, which the defendant would have been obliged to take under the contract.[2]

(3) Notice must be given of the vendor's intention to re-sell. But in the case of perishable goods, no notice is necessary. It is for the seller to plead and prove notice. Where no notice is given, the section provides the penalty.

(4) The re-sale must be within a reasonable time. What is a reasonable time is a question of fact. In *Parthasarathy* v. *Gajapathi,*[3] *where* goods, which had a seasonal value, were re-sold eight months after, at a very low price, the court held the delay unreasonable. In *Prag Narain* v. *Moolchand,*[4] a delay of eleven months was similarly held unreasonable. **[1131]**

The seller must act as a reasonable man of business in like circumstances, otherwise he cannot claim the benefit of the section.[5] The seller who omits to sell within a reasonable time will not be entitled to recover his actual loss, but only the difference between the contract rate and the market rate at the date of breach.[6]

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1. **See** *Maclean* v. *Dunn,* (1828) 130 ER 947 : 29 RR 714; *Asfar* v. *Blundell,* (1896) 1 QB 123.
2. *Chidambara Nadar* v. *Vadivelu Nadar,* (1935) MWN 1233 : 43 LW 208 : 159 IC 1031 : (1936) Mad. 47; *Parthasarathy* v. *Gajapathi,* (1925) 48 Mad. 787 : 49 MLJ 215 : 22 LW 417 : (1925) MWN 756 : (1925) Mad. 1258; *Buchanam* v. *Avdell,* (1875) 15 Ben. LR 276 (Hurried re-sale without advertisement); *Phul Chand* v. *Jugal Kishore,* (1928) 8 Lah. 501 : (1927) Lah. 673 : 106 IC 10; *Nathu Mal* v. *Ram Sarup,* (1931) 32 PLR 609.
3. *Parthsarthy* v. *Gajapathi,* (1925) ILR 48 Mad. 787 : 49 MLJ 215 : 22 LW 417: (1925) MWN 756 : AIR 1925 Mad. 1258.
4. (1896) 19 All. 535. **See also** *Nikku Mal* v. *Gur Prasad,* (1931) 12 Lah. 452 : 134 IC 777: (1931) Lah. 714; *Abdul Hakim* v. *Jantzen,* (1924) Lah. 319 : 72 IC 772; *Coorla Spg. & Weaving Mills* v. *Vallabhdas,* (1925) 27 Bom. LR 1168 : 94 IC 575; *Raggu Mal* v. *Ram Sarup,* (1935) 16 Lah. 358 : (1935) Lah. 593 : 37 PLR 525; *Sheo Narian* v. *N.S.S. & G. Co.,* (1938) ALJ 227 : 175 IC 552 : (1938) All. 272; *Jasrat Mal* v. *Jaini,* (1937) 39 PLR 945.
5. *Mackertich* v. *Nobo Coomar,* (1903) 30 Cal. 477 : 7 CWN 431.
6. *Harichand* v. *Gosho Kabushiki,* (1925) 49 Bom. 25 : 26 Bom. LR 921; *Nikku Mal* v. *Gur Parshad,* (1931) 12 Lah. 452 : 134 IC 777 : (1931) Lah. 714; *Shambi Dayal* v. *Durga,* (1922) 56 IC 647; *Maung Gyi* v. *Moosagi,* (1917) 36 IC 252 (Low Burma); *Raggu Mal* v. *Ram Sarup,* (1935) 16 Lah. 358 : (1935) Lah. 593 : 37 PLR 525.

The question has, however, been raised whether the rule as to sale within a reasonable time applies where the seller is, as it were, given *carte blanche* to re-sell when he chooses.[1]

In *Sital Prasad* v. *Ranjit*,[2] a case under old Sec. 107 of the Contract Act it has been pointed out by the Allahabad High Court that the section is mandatory and that a re-sale contravening it will be invalid unless there is a trade usage sanctioning it.

MODE OF RE-SALE.—The re-sale may be in auction and the seller himself may buy therein.[3]

Measure of damages.—*Prima facie*, the measure of damages that could be got from a defaulting purchaser is the difference between the contract price and the price realised, together with the expenses of the re-sale.[4] But a re-sale commission cannot be charged.[5] Where the goods contracted for have not been appropriated to the particular contract, damages will be measured by the difference between the contract rate and the rate on the date of breach.[6]

Clause (3)—Buyer acquires a good title.—Under the old Contract Act, the position of the buyer at a wrongful re-sale was rather doubtful. The present sub-section makes it clear that the buyer at a re-sale, even though wrongful, acquires a good title. The reason suggested is that the first buyer being in default cannot sue to recover the goods from the buyer at the re-sale.[7]

Where the re-sale has been held without justifying circumstances (*e.g.*) before the due date for payment, the buyer may treat it as a ground for repudiation.[8]

Clause (4)—Right expressly reserved.—This sub-section is based on the case of *Lamond* v. *Dawall*.[9] The position was somewhat different under the Contract Act, but the present sub-section is in accord with the English law.

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1. See *Ramier* v. *Durvas J. Subbier*, (1927) 50 MLJ 264 : (1927) Mad. 352; *Pearl Mills Co.* v. *Ivy Tannery Co.*, (1919) 1 KB 78.
2. (1931) ALJ 390 : (1931) All. 583 : 136 IC 158.
3. *Nathu Mal* v. *Ram Sarup*, (1931) 12 Lah. 692 : 135 IC 778 : (1932) Lah. 169.
4. *Ex parte Stapleton*, (1879) 10 Ch.D. 583; *Nikku Mal* v. *Gur Prasad*, (1931) 12 Lah. 452 : 134 IC 777 : (1931) Lah. 714; *Mahomed Abdul Subhan* v. *Ghulam Hussain*, (1935) Nag. 66 : 156 IC 156.
5. *Gillanders Arbuthnot* v. *Official Assignee*, (1931) Sind 26 : 129 IC 912.
6. *Angulia* v. *Sassoon*, (1912) 39 Cal. 568.
7. *Lord* v. *Price*, (1874) 9 Ex. 54; *Milgate* v. *Kebble*, (1841) 134 ER 1073 : 60 RR 475.
8. *Kishori Lal* v. *Jiwan Lal*, (1923) All. 242 : 67 IC 231.
9. (1847) 115 ER 1569 : 72 RR 502; *Mysore Sugar Co.* v. *Manohar Metal Industries*, AIR 1982 Kant. 283.

The seller's claim for damages is expressly reserved by the section.

Other remedies of seller.—The remedy provided by this section is not exhaustive. As was said by Pontifex, J. in *Buldeo Doss* v. *Howe* [1]:

> "No doubt the section [old Sec. 107] declares one remedy, but it is only a partial remedy, for the purchaser may be an insolvent and the market depressed, in which case it will be small satisfaction for the vendor to re-sell."

Right, not a duty to re-sell.—It will be noticed that the seller is not bound at his peril, to re-sell the goods. It will not be open to the buyer to plead that the seller ought to have re-sold the goods on his committing the breach. This has been pointed out in *Buldeo Doss* v. *Howe,*[2] where, after a wrongful refusal by the buyer to accept delivery, the undelivered residue was destroyed by fire, and the seller was held entitled to recover the balance of the purchase money. The English case of *Robinson* v. *Behar,*[3] *is* also to the point. **[1134]**

If the buyer's conduct amounts to a repudiation of the contract, the vendor may rescind the contract and on rescission the property in the goods vests in him again.

Further, the seller may sue the buyer under Sec. 55 for the price of the goods.

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1. (1880) 6 Cal. 64. **See also** *Muthayya* v. *Lekku,* (1912) 37 Mad. 412 : (1912) MWN 436 : 14 IC 225 : 22 MLJ 413.
2. (1880) 6 Cal. 64. **See also** *Jamal* v. *Dawood,* (1915) 43 Cal. 493 (PC) : 18 Bom. LR 315 : 23 CLJ 137 : 20 CWN 105 : 30 MLJ 73 : 3 LW 181 : 31 IC 949; *Mahomed Abdul Subhan* v. *Ghulam Hussain,* (1935) Nag. 66 : 156 IC 156.
3. (1927) 1 KB 513.

CHAPTER VI

Suits For Breach Of The Contract

55. Suit for price.—(1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

(2) Where under a contract of sale, the price is payable on a certain day irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

Analogous law.—Sec. 49, Cls. (1) and (2) of the English Act, same as the present section except for the words *"maintain an action against him"* appearing in the English Act instead of *"sue him"* in the present section.

Suit for price—Clause (1)—WHERE PROPERTY HAS PASSED.—As a rule, a suit for the price lies only when property has passed to the buyer. Where, the defendant acting not as an agent of the plaintiff, sold the plaintiff's goods to several purchasers, the defendant is liable to the plaintiff for the payment of the price as there is no *locus standi* between the plaintiff and such purchasers.[1] Clause (2) however, provides an exception to the rule. It follows that in cases where the passing of the property is dependent on a condition, no suit for the price is maintainable where the condition is not fulfilled, even if such non-fulfilment is due to the buyer's default. The remedy in such cases is under the succeeding section.[2]

Where the Government entered into a contract for manufacture of steel bins and wrongfully terminated it, the property in bins not completely manufactured not having passed to Government, Section 55 has no application but damages for non-acceptance of the goods by wrongful termination of the contract can be claimed under Section 56.[3]

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1. *Kalyan Singh* v. *Ranjot Singh*, AIR 2002 HP 180 : 2003 (1) Arbi. LR 425 : 2003 (1) Civil LJ 623 : 2002 (2) Shimla LC 382.
2. *Colley* v. *Overseas Exporters*, (1921) 3 KB 302; *Mitchell Reid* v. *Buldeo Doss*, (1887) 15 Cal. 1.
3. *Bungo Steel Furniture (P) Ltd.* v. *Union of India Ltd.*, AIR 1967 SC 378 : (1961) 2 SCJ 647.

The seller cannot sue for the price unless the buyer wrongfully neglects or refuses to pay.[1] Therefore, in the case of a sale on credit, no suit is competent unit expiry of the credit period.[2] Where the price is to be paid by a negotiable instrument payable at a future date, even if the buyer fails to give the instrument, the seller must wait till the date fixed elapses and then sue.[3] Where a bill is given for the price, the seller cannot sue during the currency of the bill. In case of dishonour of the bill on presentment, the seller has the option of suing for the price or on the bill, in case he has not negotiated it, or has taken it up himself.[4] But if the buyer repudiates the contract or if the sale was for cash with the option of a negotiable instrument, and the instrument is not given, the seller may sue at once.[5]

It may be noted that a claim for the price of the goods is quite different from a claim of damages for non-acceptance.[6]

Where beer was sold in bottles put in crates, there is no out and out sale of bottles and crates since the parties intended the empty bottles to be returned and take refund of security deposit collected for the bottles and crates. [7]

Clause (2)—WHERE PROPERTY NOT PASSED.—In cases falling under this clause delivery is not a condition precedent to payment of the price.[8] The section may apply even where the price is payable by instalments.[9] Where the buyer deals with the goods in a manner inconsistent with the seller's right, the latter may sue in trover.[10]

Jurisdiction of Courts : Where the defendant seller agreed to deliver the second consignment of rice through Railway Wagon at Wardha Railway Station and as per the custom in trade the plaintiff purchaser was to make payment through Hundi in the Bank and to receive the Railway receipt for taking delivery at Wardha Railway Station by producing the same, by no stretch of imagination it can be said that the Court at Wardha did not have the jurisdiction to entertain the suit for claiming damages.[11]

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1. *Vithaldas* v. *Jagjivan,* (1939) 41 Bom. LR 33.
2. *Helps* v. *Winterbottam,* (1831) 109 ER 1203 : 36 RR 609.
3. *Paul* v. *Dod,* (1846) 135 ER 1158.
4. *Davis* v. *Reilly,* (1898) 1 QB 1.
5. *Rugg* v. *Weir,* (1864) 143 ER 1212 : 139 RR 582; *Bartholomew* v. *Markwick,* (1864) 143 ER 964 : 137 RR 729.
6. *Anderson Wright* v. *Kalagarla Surji Narain,* (1885) 12 Cal. 339.
7. *United Breweries* v. *State of A.P.,* AIR 1997 SC 1316 : (1997) 3 SCC 530, 536 : 1997 (3) Supreme 454 : 1997 (3) JT 265.
8. *Dunlop* v. *Grote,* (1845) 175 ER 64 : 86 RR 834.
9. (Cf.) *Workman Clark & Co.* v. *Lloyd,* (1908) 1 KB 968; *Stein Forbes* v. *County Tailoring Co.,* (1916) 115 LT 214 : 86 LJKB 448.
10. *Peruvian Guano Co.* v. *Dreyfus,* (1892) AC 166.
11. *Himalaya Drug Co.* v. *Gufic Ltd.,* AIR 2005 Bom 278.

56. Damages for non-acceptance.—Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.

Analogous law.—Sec. 50 (1) English Sale of Goods Act—same as the section except for the words *"maintain an action"* instead of *"sue"*.

Scope of the section.—This section is based on Sec. 50 (1) of the English Act. Clauses (2) and (3) of Section 50 of the English Act are omitted as Secs. 73 and 74 of the Contract Act deal with the matter.

Essentials.—Before the seller can sue, there must be a wrongful neglect or refusal by the buyer.[1] So, if the seller fails to perform a condition precedent, there is no right of suit, unless the buyer has waived it.[2] When at resale the consignment of rice could fetch the market price, the same cannot be said of deteriorated quality so as to afford ground to the buyer the refuse to accept the delivery.[3]

Measure of damages.—See Commentary on Sec. 73 Contract Act. Ordinarily, the measure is the difference between the contract price and the market price at the date of breach.[4] Any rise or fall in prices subsequent to the date of breach is immaterial.[5] Where there is no market, the value is taken at the price of the nearest substitute.[6] Or the market price at the nearest place or the price ruling at the final destination of the goods may be the criterion.[7] Or the re-sale price of the goods is taken as the measure,[8] except in cases where the resale is not held within a reasonable time after breach.[9]

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1. *Bungo Steel Furniture (P) Ltd.* v. *Union of India,* AIR 1967 SC 378 : 1967 (1) SCR 633.
2. *Greaves* v. *Legg,* (1854) 156 ER 304 : 96 RR 931; *Braithwaite* v. *Foreign Hardwood Co.,* (1905) 2 KB 543.
3. *Suresh Kumar Rajendra Kumar* v. *K. Assan Koya & Sons,* AIR 1990 Ker. 20 : 1989 (2) Ker. LT 337.
4. *Union of India* v. *Nuddea Mills Co. Ltd.,* ILR (1966) 2 Cal. 98.
5. See *British Westinghouse Electric Co.* v. *Underground Electric Co.,* (1912) AC 62; *Jamal* v. *Moolla Dawood,* (1916) 43 Cal. 493 : 20 CWN 105 : 30 MLJ 73 : 18 Bom. LR 315 : 31 IC 949 : (1915) PC 48; *Keshavlal* v. *Dewanchand,* (1923) 47 Bom. 563 : 45 MLJ 630 : 27 CWN 974 : 74 IC 396 : (1923) PC 105 (PC); *Mohan Bhasin* v. *Khuda Baksh,* (1939) Lah. 260 (where seller holds up in the hope of a rise in price, but there is a fall and he then resells the speculation is his, and not of buyer).
6. *Hinde* v. *Liddell,* (1875) 10 QB 265; *Elbinger* v. *Armstrong,* (1874) 9 QB 473.
7. *Wertheim* v. *Chicoutimi Pulp Co.,*(1911) AC 301.
8. *Maclean* v. *Dunn,* (1828) 130 ER 947 : 29 RR 714.
9. **See** *Mohan Bhasin* v. *Khuda Baksh,* (1939) Lah. 260.

The date with reference to which damages have to be assessed will be the date fixed for performance or where it is not fixed, the date of refusal of performance.[1]

Forfeiture of deposit[2].—See commentary on Secs. 73 and 74, Contract Act.

57. Damages for non-delivery.—Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

Analogous law.—Sec. 51 (1) of the English Sale of Goods Act—same as the section except for the words *"maintain an action"* instead of *"sue"*.

Scope.—Clauses (2) and (3) of the English Act are not reproduced in the Indian Act in view of Secs. 73 and 74 of the Contract Act.

Rights of buyer.—They are three. (i) Damages for non-delivery, (ii) A suit for specific performance, (iii) A suit for conversion.

Damages.—See commentary under Sec. 73, Contract Act. In a C.I.F. contract, the measure of damages is the difference between what the buyer has in fact paid or had to pay to the seller and the market price of the goods.[3]

In a suit for damages for non-delivery the loss to be ascertained is the loss on the date of the breach. The measure of damages would, therefore, be the difference between the contract price and the market price on date of breach.[4]

Failure on the part of the buyer to prove the alleged damage caused because of short supply of goods by the seller and also not serving notice under Sec. 55 to the seller would not entitle him for damages.[5]

In cases where the price has been prepaid, wholly or in part, the buyer may recover the amount paid with interest and sale the difference between

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1. *Mackertich* v. *Nobo Kumar,* (1903) 30 Cal. 477; *Sharpe* v. *Nosawa,* (1917) 2 KB 814 (C.I.F. Contract—Date is the probable date when the documents will be ready); *Melechrino* v. *Nickoll,* (1920) 1 KB 93 (Date fixed by reference to the happening of an event).
2. *Dies* v. *British and International & Co. Corpn.,* (1939) 1 KB 724 (Sale of goods—Breach by buyer—Seller treating contract as at an end—Part payment if recoverable—Distinction between deposit and part payment).
3. *James Finlay* v. *Kwik Hoo Tong,* (1929) 1 KB 400.
4. *Union of India* v. *Tarachand Ramprasad Agarwal,* AIR 1976 MP 101 : (1976) Jab. LJ 457.
5. *Gujarat Agro Oil Enterprises Ltd., Ahmedabad* v. *Arvind H. Pathak,* AIR 1993 Guj. 47.

the contract price and the price on the date when delivery was to be made.[1] Where the goods are obtainable in the market, damages are assessed with reference to the cost of the nearest substitute.[2]

When the purchaser has accepted part or short delivery from the supplier and made over payment the buyer cannot be said as not ready and willing to perform the contract, but the supplier wrongfully withholding the remaining, delivery must be construed as not ready and willing.[3]

Where such an assessment in not possible, the market price is arrived at by adding to the price of the goods at the place of purchase, the charges of bringing them to the place where delivery was to be made, and the importer's profits.[4]

Where the plaintiff alleged that he suffered loss on account of defendants breach of contract and non delivery of goods, in the absence of any cogent evidence that the market price of the goods was higher instead of a bare averment in the plaint without producing either documentary evidence or a witness who is a prospective purchaser of the plaintiff's goods, no damages can be awarded. [5]

It may be added that in assessing damages, the sub-contracts of the buyer are not taken into consideration,[6] for they are incidental matters with which the seller has nothing to do. As observed in *Williams* v. *Agaus* [7]:

> "Barring special circumstances, the defaulting seller in neither mulcted in damages for the extra profit which the buyer would have got owing to a forward re-sale at over the market price nor can he take benefit of the fact that the buyer has made a forward re-sale at under the market price."

58. Specific performance.—Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it

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1. *Startup* v. *Cortazzi,* (1835) 4 LJ Ex. 218 : 41 RR 710.
2. *Hinde* v. *Liddell,* (1875) 10 QB 265.
3. *Pravara Sahakari Sakhar Karkhana Ltd.* v. *Express Industrial Corporation,* AIR 2002 Bom 185, 192.)0
4. *Borries* v. *Hutchinson,* (1865) 114 ER 518 : 144 RR 563; *Haji Ismail* v. *Wilson & Co.,* (1918) 41 Mad. 709 : (1918) MWN 399 : 45 IC 942.
5. *Thakral & Sons* v. *Indian Petro Chemical Corp. Ltd.,* AIR 1994 Del. 226, 231 : 1993 (3) Cur. CC 218 : (1993) 50 DLT 561 : 1993 (25) DRJ 479 : (1993) 2 BC 45.
6. *Muhammad Habibullah* v. *Bird & Co.,* (1921) 43 All. 257 : (1922) PC 178 : 63 IC 589.
7. (1914) AC 510 (522); *G.W.Ry Co.* v. *Redmayne,* (1865) 1 CP 329; *Rodoconachi* v. *Milburn,* (1887) 18 QBD 67.

thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree.

Analogous law.—Sec. 52 of the English Sale of Goods Act same as the section but for the omission of the words *"Subject to the provisions of Chapter II of the Specific Relief Act, 1877"* appearing in the Indian Act and the addition of the words *"Judgment or"* before the word *"decree"* in the English Act. Specific Relief Act 1877 is replaced by Specific Relief Act 2 of 1963.

Specific performance.—The *rationale* of specific performance is the inadequacy of remedy of damages and the practical impossibility of fixing damages. The jurisdiction to grant specific performance is entirely discretionary.[1]

Where there is an agreement between the seller and buyer by which the seller agrees not to sell the goods to any one else except the buyer, the agreement is binding on the seller, although it is in the negative form operating as restraint on the seller. [2]

The section applies to all cases where the goods are specific or ascertained, whether the property has passed to the buyer or not.[3]

Section 58 deals with the case of a purchaser and does not provide for the case of a seller. It would not be proper to read the section as intended to cover the case of the seller also.[4]

59. Remedy for breach of warranty.—(1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—

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1. **See** *Cohen* v. *Roche,* (1927) 1 KB 169 (Definite finding that damages will be inadequate, is a necessary condition of relief under the section); *In re. Wait,* (1927) 1 Ch. 606.
2. *Vijaya Minerals Pvt. Ltd.* v. *Bikash Chandra Deb,* AIR 1996 Cal. 67, 77.
3. **See** *Jones* v. *Tankerville,* (1909) 2 Ch. 440; *Thames Sack* v. *Knowles & Co.,* (1918) 88 LJKB 585 ('Spot' contract for sale of Hessian bag—Goods held not ascertained); *In re. Wait,* (1927) 1 Ch. 606.
4. *Maheswari & Co. (P) Ltd.* v. *Corporation of Calcutta,* AIR 1975 Cal. 165.

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) sue the seller for damages for breach of warranty.

(2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damages.

Analogous law.—Sec. 53, Clauses (1) and (4) of the English Sale of Goods Act same as the section except for the substitution of the word *"sue"* in the Indian enactment in place of *"maintain an action against"* appearing in the English Act.

Breach of warranty.—A breach of warranty does not justify rejection, unless in case of fraud.[1] But the buyer may plead it in diminution or extinction of the price.[2] Where he elects or is compelled to treat a breach of a condition as a breach of warranty, he may counter claim for damages in the seller's action for the price.[3]

Where the defendant dealer selling defective asbestos sheets not suiting the purpose and guilty of breach of implied warranty, awarding compensation of 75% of the value of the goods for the loss suffered by the plaintiff buyer as result of damage to the walls of plaster of paris of his cinema theatre by rain water leakage is justified.[4]

The fact that a third party chooses to file a suit however frivolous the claim may be cannot by itself lead to the conclusion that the seller had not made out a marketable title free from all doubts.[5]

The measure of damages is generally the difference between the value of the goods at the time of delivery, and the value they would have had if they had answered the warranty.[6]

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1. *Holdsworth* v. *City of Glasgow Bank,* (1880) 5 AC 317; *Urquhart* v. *MacPherson,* (1878) 5 AC 831.
2. *Basten* v. *Butter,* (1806) 103 ER 185; *Street* v. *Blay,* (1831) 109 ER 1212 : 36 RR 626; *Poulton* v. *Lattimore,* (1829) 109 ER 96 : 32 RR 673. This must be distinguished from re-sale **see** *Gopala Krishna Pillai* v. *K.M. Mani,* AIR 1984 SC 216 : (1984) 2 SCC 83 : 1983 Scale 795.
3. *Khoyee & Co.* v. *Gordon Woodroffe & Co.,* ILR (1937) Mad. 479 : 44 LW 676 : (1936) MWN 970 : 166 IC 313 : (1937) Mad. 40 : (1937) 2 MLJ 131; *Commr. of Income-tax* v. *Profulla Kumar Mallik,* AIR 1969 Orissa 187; *Bengal Corpn. (P) Ltd.* v. *Commr. for the Port, Calcutta,* AIR 1971 Cal. 357; **see also** *The Board of Trustees of Port of Calcutta* v. *Bengal Corporation (P) Ltd.,* AIR 1979 Cal. 142.
4. *Eternit Everest Ltd.* v. *C.G.Abraham,* AIR 2003 Ker.273, 277 : (2003) 10 ILD 148 (Ker).
5. *Taranath Anantraj Parekh* v. *Gangaram Shamdas,* 1975 Mah. LJ 726.
6. *Jones* v. *Just,* (1868) 3 QB 197; *Heilbut* v. *Dickson,* (1872) 7 CP 438; *Khaliquzzaman* v. *Parakh,* (1939) OWN 339.

Where there was no previous examination of the quality of the goods and when they were delivered at the destination and the buyer claimed that the goods were delivered in breach of warranty, then part of the causes of action arises at a place where the goods are delivered.[1]

Where there is a breach to deliver goods, the crucial test is the market price on the date of breach. The damages shall be the difference of market rate and the contract rate. Once the breach of non-delivery is established, it is not essential for the purchaser to prove that he actual repurchased the goods and sustained loss. The law does not penalise the purchaser's inaction in not making the re-purchase, the object of damage is only to place the purchaser in the same situation with respect to damage as if the contract has been performed.[2] Where the buyer accepted goods supplied by the seller from time to time by instalments and made payment although the goods did not strictly conform to the specifications, he must be deemed to have waived breach of condition as to the specification and in the absence of a notice to elect breach of condition as breach warranty, cannot withhold payment for the goods supplied.[3]

In the case of consumer goods, if there is a market, (*i.e.,*) if the goods are available in the market the claim for loss of profits is not sustainable.[4]

60. Repudiation of contract before due date.—Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

Analogous law.—Sec. 39 of the Contract Act reads thus.—

> "39. Where a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract unless he has signified, by words or conduct, his acquiescence in its continuance."

It may be mentioned that the English Sale of Goods Act contains no section corresponding to this.

Anticipatory breach.—[See commentary on Sec. 39 Contract Act.] This section deals with what is called "anticipatory breach" of contract—a

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1. *Koel Sales & Services* v. *Vijayalakshmi Talkies,* (1987) (1) ALT 36 (NRC).
2. *Standard Chemicals Co. Pvt. Ltd.* v. *Palakol Co-op. Sugars Ltd.,* 1988 (1) ALT 40 NRC.
3. *City & Industrial Development Corporation Ltd.* v. *Nagpur Steel & Alloys Pvt. Ltd.,* AIR 1992 Bom. 55.
4. *Shantilal Mutha & Co.* v. *Chiralal Co-op. Spg. Mills Ltd.,* 1986 (2) APLJ 291.

well-known and convenient, but somewhat inappropriate expression. As Lord Wrenbury pointed out in *Bradley* v. *Newsom* [1]:

> "There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due.
>
> .....[The] breach is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future."

The law on the subject was laid down long ago in a Madras case *Mansuk Das* v. *Rangayya* [2] *by* Scotland C.J.

Measure of damages.—In the case of sale of goods it is measured by the difference between the contract price and the market price on the day of delivery.[3] This has been recently pointed out by the Rangoon High Court in *Maung Po* v. *Saw Tago.*[4] While the Sale of Goods Bill was being drafted, a suggestion was made that the damages may be assessed on the basis of the market price on the date of repudiation. But the Select Committee did not provide in that manner, observing that it would make it possible for a part apprehending heavy loss on the due date to take advantage of a favourable market and repudiate the contract before the due date:

In *Roper* v. *Johnson,*[5] the rule as to the measure of damages has been laid down by Brett, J.—

> "Even if the defendant absolutely repudiates his contract at any period previous to the final date specified in the contract, yet in considering the question of damage, they will be estimated with reference to the times at which the contract ought to have been performed."

But in *Ram Gopal* v. *Dhanji Jadhavji,*[6] in the case of an anticipatory breach of a contract to gin cotton, Lord Summer said.—

> "The contract was repudiated as soon as it was made and the intended operation being thus baulked, the plaintiff was

1. (1919) AC 16.
2. (1863) 1 MHCR 162. **See also** *Steel Bros.* v. *Dayal Khatau,* (1923) 47 Bom. 924 : 25 Bom. LR 1063.
3. *Mackertich* v. *Noboo Coomer,* (1903) 30 Cal. 477 : 7 CWN 431; *Manindra Chandra* v. *Aswini Kumar,* (1921) 48 Cal. 427 : 28 CWN 297 : (1912) Cal. 185; *Bilasiram* v. *Gubbay,* (1916) 43 Cal. 305 : 20 CWN 240 : 23 CLJ 62 : 33 IC 1; *Krishna Jute Mills* v. *Innes,* (1911) 21 MLJ 182 : (1911) 1 MWN 17 : 9 IC 104; *Cooverji* v. *Rajendra,* (1909) 36 Cal. 617 : 2 IC 831.
4. (1933) Ran. 25.
5. (1878) 8 CP 167.
6. (1928) 55 IA 299 : (1928) 55 Cal. 1048 : 55 MLJ 248.

entitled to measure his damages *as they then stood* and could not be required by the defendants to buy the cotton which they had announced in advance they would not gin for him."

61. Interest by way of damages and special damages.—(1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price—

(a) to the seller in a suit by him for the amount of the price—from the date of the tender of the goods or from the date on which the price was payable;

(b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller—form the date on which the payment was made.

Analogous law.—Sec. 54 of the English Sale of Goods Act—same as Sec. 61 (1) of the Indian Act.

Sec. 49 (3) of the English Acts runs as follows.—

"49 (3). Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be."

Interest by way of damages.—The rule in English Common Law before the Act of 1934 was that, interest on a debt will not be given in the absence of specific agreement or trade usage.[1] In Indian law, the Interest Act of 1839 (now the Interest Act 1973) reproduced the corresponding section of Lord Tenterden's Act and has provided for the payment of interest at the current rate in the following cases:

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1. *London, Chatham & Dover Ry. Co.* v. *South Eastern Ry. Co.*, (1893) AC 429. **See** *Rajpati Prasad* v. *Kaushalya Kuer,* AIR 1981 Pat. 187.

(1) On all debts or sums certain payable at a certain time under a written instrument, from the due date mentioned in the instrument;

(2) On all debts or sums certain not payable at a certain time, from the time that demand in writing is made with a claim for interest from the date of demand.

On the question whether interest may be awarded as damages under Sec. 73 of the Contract Act, there was till the pronouncement of the Judicial Committee in *B.N. Ry* v. *Ruttanji Pamji,*[1] a divergence of opinion among the High Courts in India. In *Kandappa* v. *Muthuswami,*[2] it was held that interest cannot be given under Sec, 73. Illustration (n) where it was not recoverable under the Interest Act. A similar view was taken by the Bombay High Court.[3] But, the High Court of Calcutta held in *Khetra Mohan* v. *Aswini Kumar,*[4] *that* interest could be awarded even apart from the Interest Act. The Allahabad High Court has held similarly in *Ghanshiam Singh* v. *Daulat Singh.*[5]

This section sets at rest this difference of opinion by specifically providing that interest may be given in the cases covered by the section. Interest may be payable in spite of the absence of any provision therefor in the contract.[6] A purchaser can recover the money paid to the seller with interest where the seller was found to have no title to the property and the purchaser had acted *bona fide.*[7] In the absence of contract that interest shall not run the Court can award the same at a rate, which it considers just and reasonable from the date indicated in clauses (a) and (b) of Section 6 (2).[8] A clause in a tradesman's bill charging interest at a particular rate is not a contract to the contrary.[9] The buyer is bound by stipulation for payment of interest in the seller's bills unless he shows absence of knowledge of it.[10] In the absence of a contract to the

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1. ILR (1938) 2 Cal. 72 : (1938) ALJ 169 : 19 Pat LT 125 : 47 LW 281 : (1938) OWN 261 : 40 Bom. LR 746 : 42 CWN 985 : 67 CLJ 153 : (1937) MWN 646 : 173 IC 15 : (1938) AC 67 : (1938) 1 MLJ 640. *Indra Agencies* v. *L.D. Seynour & Co. India Ltd.,* AIR 1966 Punjab 105; *M.B. Electric Supply Co. Ltd.* v. *State of Rajasthan,* AIR 1973 Raj. 132; *M.K.M. Moosa Bhai Amin, Kota* v. *Rajasthan Textile Mills,* AIR 1974 Raj. 194.
2. (1926) 50 Mad. 94 : 51 MLJ 765 : 24 LW 782 : (1927) Mad. 99 : 99 IC 609 (FB). **See also** *Kamalammal* v. *Peeru Meera Levvai,* (1897) 20 Mad. 481 : 7 MLJ 263.
3. *Campbell* v. *Williams Chard & Co.,* (1923) 25 Bom. LR 837 : (1924) Bom. 131 : 87 IC 122.
4. (1917) 22 CWN 488 : 45 IC 667. **See also** *Surja Narain* v. *Pratap Narain,* (1899) 26 Cal. 955.
5. (1896) 18 All. 240
6. *Girja Prasad Sharma* v. *Sardarlabh Singh,* AIR 1977 Pat. 241.
7. *Appa Rao* v. *Someswara Rao,* (1977) 1 An. WR 440 : (1977) 1 APLJ 358.
8. *Manohar Lal* v. *Firm Radhakrishna,* 1965 All. LJ 546.
9. *Standard Printing Machinery Co.* v. *Vinayagam & Co.,* (1959) 1 MLJ 157.
10. *Subba Rao* v. *Subramaniam,* (1964) 2 An. WR 229.

contrary interest can be claimed at 6% per annum provided a demand had been made.[1]

Where the buyer deposited the amount with the seller for the supply of goods and seller commits a breach of contract by not supplying the goods Sec. 61 entitles the buyer to claim interest at a modest rate of 13%.[2] Also where the goods supplied by the seller is of poor quality, the buyer suffered loss owing to the rejection of the goods by the sub buyers, the buyer would be justified in delaying the payment of price and the seller is not entitled for the interest.[3]

In a sale transaction the Bill book contained a version that the seller is entitled to collect an interest of 12% per annum from the buyer on the amount due to him, the buyer cannot escape the liability of paying the interest unless there is any express or implied condition to the contrary.[4]

In the absence of a contract to the contrary the court may award interest at such rate as it deems fit on the amount of the price to the buyer in a suit for its refund on breach of contract by the seller.[5] Likewise in the absence of a contract to the contrary the seller can claim interest at 6% per annum on the price of the goods sold to the buyer from the date the price is payable.[6]

Special damages.—[See also Sec. 73 Contract Act.] In *Ratcliffe* v. *Evans,*[7] *Bowen,* L.J. said:

> "Special damage, when contrasted with general damage means the particular damage beyond the general damage, which results from the particular circumstances of the case."

Sec. 73 of the Contract Act deals with both classes of damages. The case of *Hydraulic Engineering Co.* v. *Mc Haffie,*[8] is an illustration. In this case, the defendant knew of plaintiff's contract with a third party for supply of an

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1. *Srinivasa Naidu* v. *Jayarama Reddiar Firm,* AIR 1977 Mad. 56 : (1976) 2 MLJ 166 : *Musa Bhat* v. *Rajasthan Textiles,* AIR 1974 Raj. 194; *Bibhuti Bhusan Bose* v. *National Coal Trading Co.,* AIR 1966 Pat. 346; *Rudnap Export Import* v. *Eastern Associates Co.,* AIR 1984 Del. 20.
2. *Manipal Industries Ltd.* v. *Fertiliser Corporation of India Ltd.,* AIR 1996 Karn. 355, 359.
3. *J. Patel & Co.* v. *National Federation of Industrial Co-op. Ltd.,* AIR 1996 Cal. 253, 256.
4. *S. Balasubramaniam Chettiar* v. *Arvind Enterprises, Tirunelveli,* AIR 2001 Mad 86, 88.
5. *Union of India* v. *A.L. Rallia Ram,* AIR 1963 SC 1685; *Gopala Krishna Pillai* v. *K.M. Mani,* AIR 1984 SC 216 : (1984) 2 SCC 83 : 1983 Scale 795.
6. *State of Madras* v. *M.A.S Mehta,* (1964) 2 MLJ 263 : AIR 1964 Mad. 509; *Ram Lal* v. *Balkishan* AIR 1959 Punj. 159; Cf., *Mallayya* v.*Ramaswami & Co.* (1963) 2 SCJ 483 : AIR 1964 SC 818.
7. (1892) 2 QBD 524
8. (1878) 4 QBD 670; (Cf) *Patrick* v. *Russo-British Grains Export Co.* (1927) 2 KB 535.

important piece of machinery and yet failed to supply it with the result that the plaintiff had to commit a breach of contract. The defendant was held liable for the plaintiff's loss of profit as well his charges for making other parts of the machine.

In *Kasler* v. *Slavouski,*[1] there was a chain of buyers and sellers in a string contract and in an action for breach of warranty, the first buyer was held entitled to recover from the first seller the damages which the last buyer in the chain had recovered from his vendor, and the costs of all the actions between the intermediate vendors.[2]

Failure of consideration.—The general rule applicable to all contracts is equally applicable to sale of goods.[3] Thus in *Piari Lal* v. *Munna Lal,*[4] it was held that a buyer who had made payment for goods to be delivered at a later date was entitled to recover the sum paid when the seller failed to effect delivery. Such failure of consideration may also be pleaded as defence to an action for the price.[5] But if the failure of consideration is in any way traceable to the buyer's own fault, he cannot recover.[6]

PARTIAL FAILURE.—In cases where the consideration has failed only in part, the money cannot be recovered unless the consideration is severable.[7] A distinction must be made between "a failure of part of the consideration and a partial failure of the consideration." Benjamin says [8]:

> "A failure of part of an entire consideration is a failure of the whole consideration, and the rule of law is in such cases that 'what a sum of money has been paid for an entire consideration and there is only a partial failure of consideration, neither the whole nor any part of such sum can be recovered. On the other hand, if the consideration be originally severable, a failure of

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1. (1928) 1 KB 78; *Hall* v. *Pim* (1928) 139 LT 50; (Cf) *Williams* v. *Agius* (1914) AC 510.
2. For a full discussion of the law as to special damages, **see** *Indian General Navigation and Railway Co.* v. *Eastern Assam Co.,* (1920) 47 Cal. 1027 : (1921) Cal. 315.
3. *Royal Bank of Canada* v. *Rex* (1913) AC 283; *Chanter* v. *Leese* (1839) 151 ER 296 : 51 RR 584 : *Rowland* v. *Divall,* (1923) 2 KB 500; *Bostock* v. *Jardine,* (1865) 169 ER 707 : 140 RR 682.
4. (1928) 50 All. 82 : 25 ALJ 811. see *Hudson* v. *Robinson,* (1818) 105 ER 910; *Mathura Mohan* v. *Rama Kumar* (1916) 43 Cal. 790 : 23 CLJ 26 : 20 CWN 370 : 35 IC 305.
5. *Biggerstaff* v. *Rowatt's Wharf,* (1896) 2 Ch. 93.
6. *Boston Deep Sea Fishing Co.* v. *Ansell,* (1888) 39 Ch. D 339; *Hall* v. *Burnell,* (1911) 2 Ch. 551.
7. *Biggerstaff* v. *Rowatt's Wharf,* (1896) 2 Ch. 93; *Cox* v. *Prentice,* (1815) 105 ER 641 : 16 RR 288.
8. Benjamin on Sale, 7th Edn. (1931) page 445.

part is a total failure of that part, but of that part only, and the buyer's rights are unaffected by his acceptance of the other parts of the consideration."

In *Johnson* v. *Johnson,*[1] where a house and parcel of land which had been separately valued, were sold for the aggregate of the value, and the plaintiff who was evicted from the house owing to defect of title, sued for the return of the purchase money of the house without giving up the land, it was held that the bargain was in effect two contracts and that the plaintiff could recover. The case of *Rowland* v. *Divall,*[2] is also in point.

Further, a contract, though originally entire, may be rescinded partially and the money paid for the part unperformed could be recovered, where the contract is capable of severance, and the conduct of the parties shows assent to such severance.[3]

Interest on price.—PREVIOUS LAW COMPARED.—[See in this connection commentary headed "Interest by way of damages,"]

The Special Committee thought it desirable to provide specifically for interest, both in the case of the seller suing for the price and the buyer suing for refund of the purchase money, in view of the diversity of opinion on this question.[4]

In may be remarked that the general rule of English law before the Law Reforms (Miscellaneous Provisions) Act of 1934, was that damages for the detention of a debt, are purely nominal, and that in an action for price of goods sold, interest is not recoverable.

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1. (1802) 127 ER 89 : 6 RR 736.
2. (1923) 2 KB 500. **See also** *Harnor* v. *Groves,* (1855) 139 ER 587 : 100 RR 535; *Taylor* v. *Hare,* (1805) 127 ER 461 : 8 RR 797; *Lawes* v. *Purser,* (1856) 119 ER 1110 : 106 RR 868; *Chanter* v. *Leese,* (1839) 151 ER 296 : 51 RR 584.
3. *De Vaux* v. *Connolly,* (1849) 137 ER 658 : 79 RR 659.
4. *Kandappa* v. *Muthuswami,* (1926) 50 Mad. 94 : (1927) Mad. 99 : 51 MLJ 765 : 24 LW 782 : 99 IC 609 (FB); *Girja Prasad Sharma* v. *Sardarlabh Singh,* AIR 1977 Pat. 241; *Neyyeli Lignite Corpn Ltd.* v. *S.S. Engineering,* AIR 1982 NOC 101 (Mad.).

CHAPTER VII

MISCELLANEOUS

62. Exclusion of implied terms and conditions.—Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

Analogous law.—Sec. 55 of the English Act—Same as the present section except for the word *'be'* in place of *'is'* in the last line.

Principle.—The section is only an application of the well-known maxims of the law *expresseum facit cessare tacitum,* and *modus et conventio vincunt legem* . As a contract of sale springs from the consensus of parties, it is open to the parties to attach any obligations they may mutually agree to subject to the rule that the agreement or its conditions or considerations must not be illegal or immoral. Thus the effect of the section is to show that the provisions of the Act are not absolute rules of law, but presumptions, which could be negatived or rebutted by the express or implied terms of the particular contract.

Express Agreement.—The express agreement, to have the effect of excluding the term implied by law, must be one inconsistent with it. Thus where an express warranty is perfectly consistent with a warranty implied by law, the latter will not be displaced.[1]

The principle of this section was applied in Allahabad ruling in which parties had agreed that the seller might resell against the buyer in breach, even though the goods might not have been appropriated towards the contract.[2]

Course of dealing.—In *Poahontas Fuel Co.* v. *Ambatielos,*[3] Mc Cardie, J. discusses the expression and observes that the phrase means that past business between the parties raises an implication as to the terms to be implied in a fresh contract where no express provision is made on the point at issue. It is however doubtful whether parties can, by course of dealing, practically

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1. *Bigge* v. *Parkinson,* (1862) 158 ER 758 : 126 RR 783 : *Drummond* v. *Van Ingen,* (1887) 12 AC 284; (Cf.) *Elderslie S.S. Co.* v. *Borthwick* (1905) AC 93; *Gordon Alison* v. *Wallsend S. & Eng. Co.,* (1926) 43 TLR 104.
2. *Sheo Narain* v. *N.S.S. & G. Co.* (1938) ALJ 227 : 175 IC 552 : (1938) All. 272.
3. (1922) Com. Cas. 148

contract themselves out of the essential requirements of the statute.[1] In *Haridas Ranchordas* v. *Mercantile Bank,*[2] it was held that the course of dealings between the bank and its customer (to whom overdrafts had been allowed) showed that there was an agreement to pay compound interest.

Again, in *Venkatachalam* v. *Ponnuswami,*[3] in a suit by a commission agent for value of goods consigned, where the defendants pleaded negligence of the plaintiff in not getting the goods insured, the Court held from the course of dealings between the parties which showed that the goods were always sent without being insured, that the incidence of the risk lay with the defendants. Similarly in *Alagappa* v. *Roopchand,*[4] *the* court declined to apply Sec. 91 of the Contract Act (relating to proper delivery to the carrier) to the circumstances of the case, as the long course of dealings between the parties decidedly pointed to the exclusion Sec. 91 [of the Contract Act] with regard to the dealings between the parties.

Stipulations governing the course of auction sale—At an auction sale the auctioneer is free to prescribe any stipulation governing the course of auction sale and completion of sale and passing of the property depends upon such stipulations. When the stipulation is that the highest bidder must sign the bid sheet after the permission given by auctioning authority accepting the bid, the sale is complete after compliance of the same not withstanding the fact of bid sheet being signed by the auctioning authority.[5] Where the condition of auction sale expressly provides that any sale beyond 1 lac has to be approved by the competent authority, in the absence of such approval sale cannot said to be complete.[6]

'Usage.— In *Smith* v. *Ludah,*[7] Farran, J. in discussing the admissibility of evidence (as to an usage in the Bombay piece-goods trade) under Sec. 92, proviso (5), Evidence Act, cited a passage from *Hutton* v. *Warren* [8]:

> "It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in mattes with respect to which

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1. *Malmberg* v. *Evans,* (1924) 41 TLR 38.
2. (1920) 44 Bom.747 : 22 Bom.LR 545 : 38 MLJ 387 : 18 ALJ 359 : 55 IC 522 : (1920) PC 61.
3. (1924) 47 MLJ 312 : 20 LW 195 : (1924) MWN 499 : 82 IC 536 : (1925) Mad. 46.
4. (1929) 57 MLJ 110 : (1929) Mad. 685; (Cf.) *Holmes Wilson* v. *Bala Kristo,* (1927) 54 Cal. 549 : (1927) Cal. 668.
5. *M/s. Jai Bhawani Timber* v. *State of M.P.,* AIR 1992 MP 250 : 1992 MPLJ 434.
6. *State of M.P.* v. *G.L. Patel & Co.,* AIR 1997 MP 74, 82.
7. (1892) 17 Bom. 129.
8. (1836) 150 ER 517 : 46 RR 368; (Cf) *Cointal* v. *Myham,* (1913) 2 KB 220.

> they are silent. .....And this has been done upon the principle of presumption that in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound but to contract with reference to those known usages."

This evidence is only receivable when the incident, which it is sought to import into the contract, is consistent with the terms of the written instrument.[1]

The usage, to be binding, must be known to both parties.[2]

Again, as pointed out in *Jamnadas* v. *Chetandas,*[3] a business custom, as opposed to a land or family custom, need not possess the attribute of antiquity. To make out a trade usage it need only be shown (1) that it is certain, (2) that it is reasonable and not inconsistent with law,[4] (3) that it was so universally acquiesced in that everybody in the trade knew it or could have ascertained it, if he had taken the pains to inquire.[5] The last point was thus put by the Judicial Committee in *Juggmohan* v. *Manikchand*[6]:

> "The usage must be so well known and acquiesced in *that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract,"*

63. Reasonable time a question of fact.—Where in this Act any reference is made to a reasonable time, the question what is a reasonable time is a question of fact.

Analogous law—Sec. 56 of the English Act—same as the Indian section except that the word *"by" is* used for *"in"*

Sec. 46 (Explanation) of the Indian Contract Act runs thus.—

> "The question 'what is reasonable time' is, in each particular case, a question of fact."

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1. *Holmes Wilson* v. *Bala Kristo* (1927) 54 Cal. 549 : (1927) Cal. 668.
2. *Robinson* v. *Mollett,* (1875) 7 HL 802.
3. (1928) 30 Bom. LR 1317 : 112 IC 610 : (1928) Bom. 487; following *Plaice* v. *Allcock,* (1866) 176 ER 913 : 142 RR 747; *Bechuanaland Exploration Co.* v. *London Trading Bank,* (1898) 2 QB 658; *Moult* v. *Halliday,* (1898) 1 QB 125 (It may be in the process of growth).
4. *Mercantile Bank of India* v. *Rochaldas Gidumal,* (1926) Sind 225.
5. *Russian Steam Navigation Trading Co.* v. *Silva,* (1863) 143 ER 242 : 134 RR 676.
6. (1859) 7 MIA 263. **See also** *Chandanmull* v. *National Bank,* (1924) 51 Cal. 43 : 79 IC 757 : (1924) Cal. 552; *Wittenbaker* v. *J.C Galstaun,* (1917) 44 Cal. 917 : 43 IC 11.

Scope.—Before the passing of the English Sale of Goods Act the question of what is a reasonable time was regarded as a question of law and decided with reference to certain artificial rules. The English Act altered the law on the point and made it a question of fact.[1]

64. Auction sale.—In the case of a sale by auction—

(1) where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale;

(2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner; and, until such announcement is made, any bidder may retract his bid;

(3) a right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bid at the auction;

(4) where the sale is not notified to be subjected to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person; and any sale contravening this rule may be treated as fraudulent by the buyer;

(5) the sale may be notified to be subject to a reserved or upset price;

(6) if the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

Analogous law.—English Sale of Goods Act, Sec. 58, Clauses (1), (2) and (3) same as (1), (2) and (4) in the present section while Clause (4) runs thus—

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1. See *Ramudu Ayyar* v. *Ramayyar,* (1925) Mad. 221 : 78 IC 1051; *Empire Engineering Co.* v. *Municipal Board, Bareilly,* (1929) All. 801 : 119 IC 853.

"(4) A sale by auction may be noticed to be subject to a reserved (or upset) price, and a right to bid may also be reserved expressly by or on behalf of the seller. Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf may bid at the auction."

Auction sales.—There is a contract of sale even in the case of auction sales.[1] Sales by auction are according to Benjamin of three kinds [2]:

1. Sale without reserve where the employment of a puffer renders the sale voidable.
2. Sale with a condition that the highest bidder shall be the purchaser, nothing being said about reserve.
3. Sale with a right expressly reserved to bid by or on behalf of the seller.

The provisions of Sec. 64 could be subject to the contrary. The auctioneer can prescribe his own terms and conditions on the basis of which the property is exposed to sale by auction. The acceptance of the bid as well as the passing of the property in the goods sold at the auction would be governed by those terms and conditions.[3]

Clause (1)—Each lot a separate contract.—This clause lays down only the *prima facie* rule.

"But the nature of the contract or its subject-matter or circumstances known to both seller and buyer may show that two or more sales at auction were intended by both to be inter-dependent."[4]

Clause (2)—Auction sale when complete.—The bid at an auction is an offer, which is accepted by the fall of the hammer (which constitutes the communication of the acceptance).[5] It therefore follows that a bid may be recalled any time before the fall of the hammer.[6] Likewise, it is open to the

1. *Ballabh* v. *State of M.P.,* AIR 1961 MP 274 (FB).
2. Benjamin on Sale (1931, 7th Edn.) pages 497-98. As to essentials of an auction, **see** *Raja Bhupendra Narayan* v. *Maharaj Bahadur* (1932) 36 CWN 888 : (1933) Cal. 54.
3. *Consolidated Coffee Ltd.* v. *Coffee Board,* AIR 1980 SC 1468 : 1980 (3) SCR 625 : (1980) 3 SCC 358 : 1980 (46) STC 164.
4. (Cf.) *Holliday* v. *Lockwood* (1917) 2 Ch. 47; *Dykes* v. *Blake,* (1838) 132 ER 866 : 44 RR 761.
5. *A.V. Thomas & Co.* v. *Deputy Commissioner,* AIR 1964 SC 569 : (1964) 1 SCJ 373.
6. *McManus* v. *Fortescue,* (1907) 2 KB 1; **see also** *Warlow* v. *Harrison,* (1858) 120 ER 920 : 117 RR 219 ; *Agra Bank* v. *Hamlin,* (1891) 14 Mad. 235; *Mackenzie* v. *Chamroo,* (1889) 16 Cal. 702; *Champa Lal* v. *Jaigopal,* (1922) MWN 564 : 16 LW 816 : (1922) Mad. 486. **See** for the scope of the sub section *Consolidated Coffee Ltd.* v. *Coffee Board,* AIR 1980 SC 1468 : 1980 (3) SCR 625 : (1980) 3 SCC 358.

seller to withdraw the goods from the auction, at any time before the fall of the hammer.[1] A condition that no bid may be retracted is unenforceable.[2] **[35-36]**

As soon as the hammer falls, the goods become the property of the buyer and he is vested with the right to deal with them as owner there and then.[3]

The terms of a particular auction may import a right in the seller to accept any bid whether it is the highest or not.[4]

At an auction sale, the bid made by the auctioneer must be definite in terms of money. If a vague bid is made quoting one percent more over the highest bid, acceptance of such bid as highest bid is improper.[5]

In an auction sale where the tender with fair price having been accepted and also possession of property was handed over, the validity of the sale cannot be challenged since the property in goods has passed to the purchaser.[6]

AUTHORITY OF AUCTIONEER:—*Vide,* Commentary on Sec. 182, Contract Act. As to the authority of an auctioneer to sell without reserve, it may be mentioned that in *Mc Manus* v. *Fortescue,*[7] the Court of Appeal held that an auctioneer is a special agent and has no ostensible authority to sell without reserve; and Fletcher Moulton, L.J., observed that *Rainbow* v. *Howkins,* (which had held to the contrary) was not in harmony with well established principles.

Clause (3)—Right to bid—where reserved.—The seller or any person on his behalf may bid only if the right to bid has been expressly reserved.

"One person."—These words appear to suggest that more than one agent cannot bid on behalf of the seller.[8]

The sale is not fraudulent simply because other interested persons make pretended bids without the auctioneer's knowledge.[9]

Clause (4)—Right to bid—where not reserved.—This is the analogue to Sec. 58(3) of the English Act which in turn was based on the "Puffers Act" of 1867.

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1. *Harris* v. *Nickerson,* (1873) 8 QB 286; *Lachia Setty & Sons Ltd.* v. *Coffee Board, Bangalore,* AIR 1981 SC 162, and AIR 1981 All 172.
2. *Freer* v. *Rimmer,* (1844) 60 ER 409 : 65 RR 617.
3. *Sweeting* v. *Turner,* (1871) 8 QB. 310; *Scott* v. *England,* (1844) 2 D & L 520; (Cf) *Robinson* v. *Behar,* (1927) 1 KB 513.
4. *The Coffee Board* v. *Famous Coffee and Tea Works,* AIR 1965 Mad. 14 : ILR (1964) 1 Mad. 249.
5. *Amco Traders* v. *W.B. State Electricity Board,* AIR 1990 Cal. 18.
6. *Patel Scrap Traders* v. *State of Gujarat,* AIR 2005 Guj 13.
7. (1907) 2 KB 1.
8. *Mortimer* v. *Bell,* (1865) 1 Ch. Ap 10 : 148 RR 26.
9. *Union Bank* v. *Munster,* (1887) 37 Ch. D 51.

Where a sale is made in contravention of this section, the buyer may avoid the same on the ground of fraud.

"KNOCK OUT."—It has been held that a combination of bidders, not to bid against each other is not illegal.[1] The mere act of dissuading purchasers is not a fraudulent act,[2] but if the purchaser manages to get the thing himself by fraudulently dissuading others from bidding, the vendor may avoid the sale.[3] An agreement between the participating bidders, in an auction sale to form a ring or knock out with a view to refrain from competing with each other in the bidding in order to depress the price cannot be considered as illegal or immoral. The auctioneer can protect himself against such ring by fixing a reserve price and reserving a right to reject the bid on justifiable grounds.[4]

Clause (5)—Reserve or upset price.—The expression 'upset price' seems to be familiar in Scotland.

Clause (6)—This simply incorporates old Sec. 123 of the Contract Act. For the English cases on the point see below.[5]

64-A. In contracts of sale, amount of increased or decreased Taxes to be added or deducted.—(1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid, where tax was chargeable at that time :

(a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect

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1. *Jyotiprakash* v. *Jhowmull*, (1909) 36 Cal. 134 : 13 CWN 87 : 1 IC 784; *Hari* v. *Naro*, (1894) 18 Bom. 342; *Rawlins* v. *General Trading Co.*, (1921) 1 KB 635.
2. *Doorga Singh* v. *Sheo Prasad*, (1889) 16 Cal. 194.
3. *Fuller* v. *Abrahams*, (1821) 129 ER 1226 : 23 RR 626.
4. *M/s. Jai Bhawani Timber* v. *State of M.P.*, AIR 1992 MP 250 : 1992 MPLJ 434.
5. *Bexwell* v. *Christie*, (1776) 1 Comp. 395; *Crowder* v. *Austin*, (1826) 130 ER 555 : 28 RR 646; *Doolubdas* v. *Ramlall* (1850) 18 ER 836 : 83 RR 42.

of such tax or increase of tax, and he shall be entitled to be paid, and to sue for and recover such addition, and

(b) if such decrease or remission so takes effect that the decreased tax only or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or tax be sued for or in respect of such deduction.

(2) The provisions of sub-section (1) apply to the following taxes namely:

(a) any duty of customs or excise on goods,

(b) any tax on the sale or purchase of goods.

Effect of the section.—The purpose of enacting Sec. 64A is that no party should be made to unnecessarily gain or suffer on account of state action in increasing or decreasing duty.[1] The section states according to the section that the buyer is entitled to deduct the amount of the decreased or remitted levy from the Price payable by him to the seller and the process of calculation it may happen that the liability to pay the price is wiped off.[2] In case the buyer had already paid the price he would be entitled to sue the seller for its recovery.[3]

Where the defendant selling rectified spirit to the plaintiff collected export duty in addition to the sale price and subsequently got the levy of export duty to the government quashed by the judgment of the High Court, the defendant who received the refund of the export duty paid by him from the government cannot retain the same.[4]

Where the question arose whether the department of Telecommunication of Union of India is liable to pay Sales Tax under U.P. Trade Tax Act, 1948 on the rentals collected, it was held by the Supreme Court of

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1. *Sramajibi Stores* v. *Union of India,* AIR 1982 Del. 76.
2. *Central Hindustan Italian Trading Co.* v. *Pitty Bros.,* AIR 1962 Bom. 222 : 63 Bom. LR 956.
3. *Chhotabhai Jethabhai Patel & Co.* v. *Union of India,* AIR 1962 SC 1006 : 1962 Supp. (2) SCR 1.
4. *Alco Chem. Ltd.* v. *Hyderabad Chemical and Pharmaceutical Works Ltd.,* (2003) 8 ILD 700 (AP).

India that the principle of non-separability will apply only in regard to sale of goods where the service is incidental but not to a case where it is not possible to split the service of telephone connection artificially into various categories — supply of instruments and accompaniments on the one hand and supply of telephonic line connection on the other, to name the former as "sale" and the later as "service".[1]

The supplier and the purchaser of goods having agreed under the contract of sale that the agreed sale price is inclusive of all duties except the sales-tax, any increase or reduction of excise duty thereafter has no bearing on the contract of sale and does not attract Sec. 61 of Sale of Goods Act.[2]

Where the defendant supplying the rectified spirit collected the amount towards the levy of export duty from the plaintiff purchaser besides the price and recovered the export duty money from the government in consequence of the levy of export duty being quashed by the judgment of the High Court, the defendant cannot retain the money thus recovered.[3]

When there was no mention about the imposition of excise duty payable under the contract of sale payable by the seller, the seller is entitled to recover the excise duty paid by him, which was subsequently imposed on him by the buyer State Government.[4]

65. Repealed Chapter VII of the Indian Contract Act, 1872, is hereby repealed.—Repealed by the Repealing Act, 1938, Sec. 2 and Schedule.

66. Savings.—(1) Nothing in this Act or in any repeal effected thereby shall affect or be deemed to affect—

(a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(b) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability, or

(c) anything done or suffered before the commencement of this Act, or

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1. *State of U.P.* v. *Union of India,* (2003) 3 SCC 239.
2. *Pravara Sahakari Sakhar Karkhana Ltd.* v. *Express Industrial Corporation,* AIR 2002 Bom 185, 192.
3. *Alco Chem. Ltd.* v. *Hyderabad Chemical and Pharmaceutical Works Ltd.,* (2003) 8 ILD 700 (AP).
4. *State of Bihar* v. *Shakti Tubes Ltd. Co.,* AIR 2007 Pat 99.

(d) any enactment relating to the sale of goods which is not expressly repealed by this Act, or

(e) any rule of law not inconsistent with this Act.

(2) The rules of insolvency relating to contracts for the sale of goods shall continue to apply thereto, not withstanding anything continued in this Act.

(3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

Savings—Clauses—(a).—These show that the Act is not retrospective.

Clause (d).—For instance, enactments like the Merchant Shipping Act are saved by this clause.

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THE INDIAN PARTNERSHIP ACT, 1932

(ACT No. IX OF 1932)

An Act to define and amend the law relating to Partnership

WHEREAS it is expedient to define and amend the law relating to partnership; it is hereby enacted as follows :

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement :—(1) This Act may be called the Indian Partnership Act, 1932.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on the 1st day of October 1932, except Section 69, which shall come into force on the 1st day of October 1933.

History of the Act.—Prior to the Act, the law relating to Partnership was contained in Chapter XI of the Indian Contract Act, which was by no means a complete code relating to partnership law. In fact, the Select Committee said in terms that many important matters had been purposely left untouched by Chapter XI. The consequence was that the Indian Courts had to draw largely on English analogies where the Act was silent. But, the developments of trade in India necessitated definite legislation on many matters unprovided for by Chapter XI of the Contract Act.

So a Bill was drafted in 1930 and a Special Committee of experts and a Select Committee sat, examined its provisions, and submitted a report.

Unlike the Sale of Goods Act, which is very closely modelled on the English Sale of Goods Act, the Special Committee felt that it was necessary and desirable to use the English Act with a certain degree of freedom. But they took scrupulous care that the main principles of the English law were retained. Deviations in principle were generally confined to minor points, with a view to suit local conditions in India.

Difference between English and Indian Acts.—One main difference between the Bill and the English Act was in the greater prominence given in the Indian enactment to the personality of a firm. On the strict theory of the English law with its stress on the abstract relation of partnership every change in the *personnel* of a partnership constitutes it a new. But the common place view endows a partnership with a personality more continuous. In fact, the necessities of the case call for such recognition of a continuous personality persevering through numerous changes of the members constituting the partnership. The Bill accordingly collected together in one chapter entitled, "Incoming and outgoing partners" all the provisions relating to the introduction, retirement, expulsion etc., of partners in those cases where the business is carried on without a dissolution of a partnership. These matters were dealt with the nature of partnership, the relations of partners *inter se* and as regards third parties, and dissolution of the firm.

The Bill also contained some other provisions not found in the English Act. For instance, the English Act did not deal with the disposal of the "goodwill". The Indian Act contains specific provisions on this matter.

Again, a new chapter on the registration of firms has been added in response to a long-standing agitation from various commercial bodies, recommending the compulsory registration of firms.

The Bill as examined by the Special Committee was referred to the Select Committee of the Legislative Assembly, and was passed into law in April 1932.

Scope of the Act—The Preamble states that the Act is intended to *define and amend* the law relating to partnership. Sec. 3 provides that the unrepealed provisions of the Indian Contract Act shall apply to firms, provided, such provisions are not inconsistent with the express provisions of this Act. Thus, like the Sale of Goods Act, the Partnership Act is made part of the general law of contracts.

Act, if retrospective—Section 74 *infra* provides that the Act shall not have retrospective operation. Generally, declaratory Acts will operate retrospectively, but not amending Acts, which introduce substantive law.

Commencement.—As the Special Committee recommended, Sec. 69 of the Act came into force, only one year after the rest of the Act, in order to give firms a reasonable chance to register before the section began to operate against them.[1]

2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

(a) an "act of a firm" means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm;

(b) "business" includes every trade, occupation and profession;

(c) "prescribed" means prescribed by rules made under this Act;

(d) "third party" used in relation to a firm or to a partner therein means any person who is not a partner in the firm; and

(e) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872, shall have the meaning assigned to them in that Act.

Analogous law.—Sec. 45 of the English Partnership Act defines "business" thus:

"The expression 'business' includes every trade, occupation or profession".

Repugnancy in subject or context.—In *Ibrahimsa Rowther* v. *Commissioner of Income-tax,*[2] the Court observed that a question of context or repugnancy in the subject can arise only if the same expression that is defined occurs or is repeated in any particular section.

"Act of a firm".—According to the definition any act of the partners is binding on the firm. A letter written by one of the partners stating that the firm was suspending or was going to suspend payments to all creditors was held to be an act of insolvency by the firm.[3]

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1. **See** *Gopinath Motilal* v. *Ramdas,* (1936) Cal. 133 : 161 IC 741; *Shazad Khan* v. *Darbar Babu,* (1936) 17 Pat. LT 713.
2. (1928) 51 Mad. 455 : (1928) Mad. 543 : 5 MLJ 524 : 27 LW 601 : (1928) MWN 313 : 110 IC 207.
3. *Structee Mech. India* v. *Bharat Kumar,* AIR 1982 Mad. 51 : (1981) 94 Mad.LW 529.

"**Business**"—The definition is identical with that in Sec. 45 of the English Act. The Contract Act contained no definition of the term. The definition is rather vague and as Underhill points out.

> "It is not every occupation which can be called a business. For instance a landowner does not carry on a business.....[The term] must be limited to what are recognised among businessmen, as commercial and professional business, i.e., callings in which men hold themselves out as willing to sell to all comers goods or skilled assistance or other service."[1]

In *Mink* v. *Roshan Lal,*[2] the Lahore High Court has discussed the meaning of the word "business". It has been held that a turf club carries on a business within the meaning of the Excess Profits Duty Act.[3]

Business indicates operations having a certain method and continuity about them from which profit or income may be derived irrespective of whether it is actually derived or not and irrespective of its ultimate destination.[4] For the purpose of Section 4 it is used in the sense of trade or commerce; even a single transaction may constitute business if it carries with it intrinsically the quality of trade or commerce.[5]

The definition must, of course, be understood so as not to exclude any rule of law, which forbids a business in certain instances (*e.g.*) where it is opposed to public policy or is immoral or illegal.[6]

3. Application of Provisions of Act IX of 1872—The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to firms.

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1. Underhill on Partnership 5th Edn. (1936) pages 4 & 6. **See** *Smith* v. *Anderson,* (1880) 15 Ch. D. 247 (258 et seq); *Harris* v. *Amery,* (1865) 1 CP 148 ("Business" has a more extensive signification than trade).
2. (1931) Lah. 390 : 130 IC 644.
3. *Calcutta Turf Club* v. *Secy. of State for India,* (1921) 48 Cal. 844.
4. *Keshawan Nair* v. *Babu Naidu,* AIR 1954 Mad. 299 : (1954) 2 MLJ 149.
5. *Rangaswami Goundar* v. *Eawaramurthy Goundar,* AIR 1967 Mad. 437 : (1967) 2 MLJ 163 : ILR (1967) 2 Mad. 112.
6. *Mewa Ram* v. *Ramgopal,* (1926) 48 All. 735 : 24 ALJ 777 : (1926) All. 591 : 97 IC 90 (Company incorporated in contravention of the Companies Act); *Saktay Sah* v. *Mahadin,* (1929) 4 Luck. 669 : (1930) Oudh 196; *Fazal Muhammad* v. *Ata Muhammad,* (1929) 11 Lah. 8 : (1929) Lah. 663 (Trading in heron's feathers). **See** cases under S. 23, Contract Act.

CHAPTER II

THE NATURE OF PARTNERSHIP

4. Definition of "Partnership".—"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

"Partner", "Firm and firm-name".—Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business carried on is called the "firm-name".

Analogous law :—Secs. 1(1) and 4(1) of the English Partnership Act run thus:

> "1(1) Partnership is the relation which subsists between persons carrying on a business in common with a view to profit."
>
> 4(1) Persons who have entered into partnership with one another are for the purpose of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name."

Definition of Partnership.—The special Committee pointed out that some confusion had occurred in English law in the use of the term "partnership". While strictly speaking, it must mean only a relationship, it has been employed in English law to denote also a group of persons. To steer clear of this confusion, the word 'firm' has been used in the Act to denote the partners collectively, while the word 'partnership' is used to connote the relationship.

Elements of the definition—

(1) AGREEMENT—There must be an agreement entered into by all the persons concerned. For definition of 'agreement' see Sec. 2, Clause (e), Contract Act. Such an agreement may be express or implied from a course of conduct.[1] But there must be a voluntary act by the persons. So a body of co-heirs becoming such heirs by operation of law will not be partners.[2] Similarly,

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1. *Haji Isa* v. *Saru Bai*, (1938) Nag. 324; *Tajammul* v. *Ahmed Ali*, (1937) Oudh 438 : 167 IC 839; *Chief Commr. Sales Tax New Delhi* v. *Raj Kishan Goyal*, AIR 1982 NOC 110 (Delhi).
2. *Habib Bux* v. *Samuel Fitz*, (1926) 23 ALJ 961 : 89 IC 22 : (1926) 23 ALJ 961 : 89 IC 22 : (1926) All 161; (Cf.) *Basanti Bibi* v. *Babu Lal*, (1930) ALJ 1517 : (1931) All. 225 : 124 IC 19; *Tajammul* v. *Ahmed Ali*, (1937) Oudh 438 : 167 IC 839.

persons who are all minors cannot agree with each other to form a partnership.[1] On the same principle, where property is dedicated to *wakf* there can be no partnership with the *wakf* as partner.[2] Again, if a manager or member of a Hindu joint family enters into a partnership with some strangers to the family, the other members are not necessarily partners with the strangers.[3] **[1145]**

Existence of the partnership deed is mandatory for the constitution of the partnership firm and it is hard to conceive that a partnership firm would have been entered into in the absence of the terms and condition of the constitution of the partnership firm and any accounts being run in the name of the partnership firm.[4]

Even when a deed is named a partnership deed, courts have held that the nature of the relationship is not determined by the mere use of the word 'partnership' either in the agreement or in the pleadings unless three elements exists before any relationship which can be called a partnership comes into existence.

(i) there must be an agreement entered into by all the parties concerned;

(ii) the agreement must be to share the profits of the business; and

(iii) the business must be carried on by all or any of the persons concerned in action for all.[5]

(2) PROFITS—The agreement must be to share the profits of a business. The profit contemplated is pecuniary gain[6] and a business carried on in common is essential to a partnership.[7] The definition of partnership presupposes a business carried on for profit. And so, it would follow that associations of individuals running businesses but not with a view to profit individually will not fall within the definition. Thus, charitable associations, mutual benefit societies,[8] mutual investment societies,[9] mutual insurance

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1. *Chidambaram* v. *National City Bank of New York,* (1936) Mad. 707 : 44 LW 310 : (1936) MWN 669 : 164 IC 806; 71 MLJ 373.
2. *Hossen Kasam* v. *Commr. of Income Tax,* ILR (1937) 2 Cal. 160 : 41 CWN 629.
3. *Mirza Mal* v. *Rameshwar,* (1929) 51 All. 827 : (1929) ALJ 641 : (1929) All. 536 : 118 IC 145.
4. *Diljeet Titus* v. *Mr. Alfred A. Adebare,* 2006 (3) R.A.J. 112 (Del).
5. *S.K. Parthasaradhi Naidu* v. *K. Rama Naidu,* AIR 2001 Mad 399, 407.
6. *R.* v. *Robson* (1885) 16 QBD 137; AIR 1978 MP 116; *Md. Hafeez Khan* v. *S.T.A.T.*
7. *Abdulla* v. *Allah Diya,* (1927) 8 Lah. 310 : 100 IC 846 : (1927) Lah 333; *Seth Suganmal* v. *Mt. Umraobi,* (1938) Nag. 550; *Coope* v. *Eyre,* (1788) 126 ER 24 : 2 RR 706.
8. (Cf.) *Jennings* v. *Hammond,* (1882) 9 QBD 225 ; *Shaw* v. *Benson,* (1883) 11 QBD 563.
9. *Smith* v. *Anderson,* (1880) 15 Ch. D. 247.

societies,[1] trade protection societies,[2] social clubs,[3] buildings societies,[4] etc., will be outside the definition. Profits are the net balance arrived at after deducting from the income all the expenses, liabilities and losses.[5] They are "the excess of returns over advances, the excess of what is obtained over the cost of obtaining it." **[1151]**

This leads to the question whether participation in profits by itself constitutes a partnership. Under the definition, no doubt an agreement to share profits is necessary to constitute a partnership.[6] But it has been now settled that participation of profits though a strong test of a partnership,[7] raises by itself only a presumption of fact. But the circumstance that a person is to share profits only and not losses, does not by itself militate against the presumption of partnership.[8] In the matter of sharing profits, partners may agree to share them in any way they like.[9] **[1153]**

(3) MUTUAL AGENCY—The business must be carried on by all or any of the persons concerned, acting for all.[10] This is a very important feature and it is this, which distinguishes partnership from simple co-ownership. Every one of the partners is in contemplation of law an agent for the firm, and a partner is therefore liable for his co-partner's acts and contracts, provided they are within the scope of objects of the partnership. As was said

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1. (Cf.) *Ex parte Hargrove,* (1875) 10 Ch. Ap. 542; *In re: Padstow Assurance Assn.,* (1882) 20 Ch. D. 137.
2. *Caldicott* v. *Griffiths,* (1853) 155 ER 1618 : 91 RR 824.
3. *Wise* v. *Perpetual Trustee Co.,* (1903) AC 139; *Flemyng* v. *Hector,* (1836) 150 ER 716 : 46 RR 553.
4. *Tosh* v. *North British Building Society,* (1886) 11 AC 489; *Brownlie* v. *Russell,* (1886) 8 AC 235; *In re : Siddall,* (1885) 29 Ch. D. 1.
5. *In re : Spanish Prospecting Co.,* (1911) 1 Ch. 92. **See** *Farmer* v. *Scottish North American Trust,* (1912) AC 118; *Gresham Life Assurance Co.* v. *Styles,* (1892) AC 309; *Russell* v. *Town and County Bank,* (1888) 13 AC 418; *Mersey Docks* v. *Lucas,* (1883) 8 AC 891; *Lawless* v. *Sullivan,* (1881) 6 AC 373.
6. *Abdulla* v. *Alla Diya,* (1927) 8 Lah. 310 : 100 IC 846 : (1927) Lah. 333.
7. *Cox* v. *Hickman,* (1860) 11 ER 431 : 125 RR 148; *Mollwo March* v. *Court of Wards,* (1872) 17 ER 495; *In re : Abdul Rahman Sahib,* (1928) 51 Mad. 308 : 55 Mad. 890; *Chockalinga* v. *Muthuswami,* (1925) 48 MLJ 518 : 21 LW 541 : 87 IC 663 : (1925) Mad. 768; *Ramnath* v. *Pitambar,* (1917) 43 Cal. 733; *Madho Prasad* v. *Gouri Dutta,* (1939) Pat. 323. **See** however *Haji Isa* v. *Saru Bai,* (1938) Nag. 324 : 177 IC 831 (Quaere, whether it is permissible to invoke presumptions as to the normal and usual course of human conduct); *Grace* v. *Smith,* (1775) 96 ER 587.
8. *B.C.G.A.* v. *I.T. Commr. of Punjab,* (1937) 18 Lah. 306 : 39 PLR 998 : 168 IC 549 : (1937) Lah. 338 (FB).
9. *Raghunandan* v. *Harmasji,* (1927) 51 Bom. 342 : 29 Bom. LR 207 : 100 IC 1025 : (1927) Bom. 187.
10. *Janki Nath Paul* v. *Vhokar Mall,* (1935) Pat. 376 : 156 IC 200; *In re : Bai Sakinaboo,* (1932) Bom. 116 : 34 Bom. LR 100.

in *Emperor* v. *Jwala Prasad*,[1] the law of partnership is a branch of the law of agency. [1001] Group of co-owner merely collecting rent from the property without the fact of carrying on any business by or all of them is not partnership and the co-ownership could be terminated by partition.[2]

CARRIED ON—It is necessary that the business should be carried on.[3] So, a mere executory agreement of partnership will not make the parties partners till they actually start business.[4] It is not necessary that there must be more than one transaction or venture. The business may consist of a single adventure or undertaking.[5]

Test of partnership.—[See commentary under Sec. 6, *infra*.] The question as to the existence of a partnership depends on the real intention of the parties[6] to be spelt out of the contract, the conduct of the parties, the nature of the accounts, and other circumstances of the case.[7] As was said in *Davis* v. *Davis*,[8] where there are other circumstances (than the receipt of a share of the profits of a business) to be considered, they ought to be considered fairly together, not attaching undue weight to any of them, but drawing an inference from the whole; and where the circumstances point to the existence of the legal relation of partners, the mere fact that it is not called a partnership will not matter. Where parties have stipulated for all the rights of partners, an agreement that they shall not be partners is a useless protest against the consequences of their real agreement. As Lord Halsbury said in *Adam* v. *Newbigging*[9]:

> "If a partnership in fact exists, a community of interest in the adventure being carried on, in fact, no concealment of name, no verbal equivalent for the ordinary phrases of profits and loss, no indirect expedient for enforcing control over the adventure will prevent the substance and reality of this transactions being

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1. (1923) 45 All. 642 : 82 IC 139 : (1924) All. 101.
2. *Ibrahim Shah Mohammad* v. *Noor Ahmed Noor Mohd*, AIR 1984 Guj. 126.
3. *Seth Suganmal* v. *Mt. Umraobi*, (1938) Nag. 550 (Isolated act of money lending no "business).
4. *Dickinson* v. *Valpy* (1829) 109 ER 399; *Rowe* v. *Pugh*, (1924) Cal. 940. **But see** *Shiam Lal* v. *Shiam Lal*, (1935) All. 1008 : (1935) ALJ 1251 : 159 IC 433 (Partnership commences from date of deed and not the date of commencing business unless deed itself postpones commencement).
5. *K. Jaggiah* v. *K.V. Suryanarayana*, AIR 1984 AP 149.
6. *Madho Prasad* v. *Gouri Dutt*, (1939) Pat. 323.
7. *Lala Baij Nath* v. *Ram Gopal*, ILR (1938) 1 Cal. 369; *Raghunandan* v. *Harmasji*, (1927) 51 Bom. 342 : 29 Bom. LR 207 : 100 IC 1025 : (1927) Bom. 187; *Bansi Ram* v. *Jagan Nath*, (1935) Lah. 209 : 153 IC 969; *Hakam Rai* v. *Ganga Ram*, (1920) 7 Lah. 206 : (1926) Lah. 340 : 94 IC 638 : 8 LLJ 111.
8. (1894) 1 Ch. 393.
9. (1888) 13 AC 308.

adjudged a partnership.....and no phrasing of it by dexterous draftsmen will avail to avert the legal consequences of the contract".

In a Lahore case, *Daulat Ram* v. *Dharm Chand,*[1] where two owners of ice factories with a view to avoid competition agreed that only one factory should work at a time and after deducting the cost of production etc., the proceeds of sale should be divided, the Court held there was a partnership.

In *Champaran Cane Concern* v. *State of Bihar,*[2] two persons acquired lands and carried on agricultural operations on six farms extending to about 2000 acres, their shares in the lands being 1 : 3. They engaged a common manager to supervise the operations and the resulting profits were shared by them. There was no evidence of any mutual agency between them, express or implied. In those circumstances the Supreme Court held that there was no partnership observing: "the fact that the profits or even the losses are distributed in accordance with the shares of the two owners in the property and the result of the operations does not necessarily establish a partnership". Merely because a person is to get a specified share of the profits as remuneration for his services it does not follow that he is a partner entitled to such specified share of the assets of the firm as it was prior to its dissolution.[3]

Where the defendant orally denied of being a partner, his oral denial to contradict the direct evidence of the bank employee, that the signature in the loan application form made on behalf of the partnership firm was that of the defendant and when the loan application bore his name.[4]

In case of partnership firm merely because the nomenclature of the firm is in the name of a particular person or persons, it cannot be concluded that the firm belongs to such persons in the absence of any proof to that effect.[5]

SHARING OF LOSSES--The sharing of losses was considered as a test of the existence of a partnership, in some early case, but in *Walker* v. *Hirsch,*[6] it was held that it was not a conclusive test.

The Special Committee said:

"It is claimed that the definition includes all the essential elements contained in all the definitions quoted by Lindley, the

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1. (1934) Lah. 110 : 146 IC 1030.
2. AIR 1963 SC 1737 : 1964 (2) SCR 921 : 1963 (49) ITR 152.
3. *Murlidhar* v. *Bansidhar,* AIR 1973 Cal. 193.
4. *Vijaya Kumar* v. *Punjab & Sindh Bank,* AIR 2003 Raj. 176
5. *Chodey Sanyasi Rao* v. *Cheekati Parasuram Naidu,* 2004 (4) ALD 609 : 2004 (5) ALT 39 (DB).
6. (1884) 27 Ch. D. 460 ; **see** *Mirza Mal* v. *Rameshar,* (1929) 51 All. 827 : (1929) ALJ 641 : 118 IC 145 : (1929) All. 536.

only exception being the element of the sharing of losses.....The Bill does not seek to make agreement to share losses a test of the existence of partnership, but takes the course of treating the sharing of losses as a legal consequence, arising out of the relation of partnership which is established otherwise".

FIRM—English law did not recognise the firm as a *persona*, as distinguished from the partners composing it.[1] According to Lindley, it is one of the defects in the English law of partnership. But even in English law, the mercantile view gained some measure of recognition, for the English Act speaks of changes in a firm, of debts due from the firm to a partner, suggesting that there is a continuous personality inhering through numerous changes in *personnel.* The Indian Partnership Act maintains a distinction between a partnership and a firm. The firm signifies the concrete legal entity composed of the several members. Though for the sake of convenience the firm is referred to as an entity it has no independent legal existence except as composed of the several members for the time being. The firm is not a juristic person and it is impossible to think of it apart from the members constituting it.[2] A suit by a partnership firm for libel or defamation of the firm is not maintainable.[3] In *Seodoyal* v. *Joharmull,*[4] it was pointed out that a firm is not a person or an entity, but merely a collective name for the individuals who are members of a partnership and that therefore a firm as such cannot be a member of a partnership.[5] As observed in *Ghisulal* v. *Ghambirmall,*[6] where one firm enters

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1. *In re Sawers,* (1879) 12 Ch. D 522; *Sadler* v. *Whiteman,* (1910) 1 KB 868.
2. **See** *Duli Chand* v. *C.I.T.,* AIR 1956 SC 354; *Jagat Ram & Sons* v. *Bodh Raj,* 1979 Kash LJ 246; *Mohd. Hafeez Khan* v. *State Transport Appellate Tribunal,* AIR 1978 MP 116 (FB) : 1978 MPLJ 351 ; *Addl. C.I.T.* v. *Vinayak Sharma,* (1977) 2 An.WR 380 (FB); *Jayanarayan* v. *Biswanath,* 1971 (2) CWR 721; *Chidambaram Pillai* v. *C.I.T.,* AIR 1970 Mad. 479 (FB); *CIT* v. *Hind Construction Ltd.,* 78 ITR 664 : (1969) 2 ITJ 250; *Brij Kishore* v. *Sheo Charan,* ILR (1938) All. 100; *Brogo Nath* v. *Budha Nath etc., Co.* (1928) ILR 55 Cal. 551; **see** further *Bharat Sarvodaya Mills Co. Ltd.* v. *Mohatta Brothers,* AIR 1969 Guj. 178 : 10 Guj. LR 457.
3. *P.K. Oswal Hosiery Mills* v. *Tilak Chand L.Ghasita Ram Jain,* AIR 1969 Punj. 150.
4. (1924) 50 Cal. 549 : 75 IC 81 : (1924) Cal. 74; *Chandrika Prasad Ram Swarup* v. *Commissioner of Income Tax,* (1939) ALJ 419 (FB); *Kanhya Lal* v. *Devi Dayal,* (1936) Lah. 514; **but see** *Kader Bux* v. *Bukt Behari,* (1932) 36 CWN 489; *Sathappa Chetty* v. *Subramania Chetty,* (1927) 53 MLJ 245; *Basanti* v. *Babu Lal,* (1931) All 225 : 124 IC 19: (1930) ALJ 1517.
5. *Meyer & Co.* v. *Faber,* (1923) 2 Ch. 422; *In re: Smith Fleming & Co.,* (1879) 12 Ch. 557; *Louis Dreyfus & Co.* v. *Purshotham Das,* (1919) 47 Cal. 29; In the matter of the *Jai Dayal,* (1932) ALJ 999; *Brojo Lal* v. *Budh Nath,* (1929) 55 Cal. 551 : 105 IC 549 : (1928) Cal. 148; *Vyankatesh Oil Mill* v. *Velmahomed,* (1928) Bom. 191 : 109 IC 99 : 30 Bom. LR 117; *Ram Das* v. *Ram Babu* (1935) 158 IC 25 : 16 Pat. LT 649.
6. (1935) 62 Cal. 510 : 39 CWN. 606 : (1938) Cal. 377 **see also** *Hakmaji* v. *Punnaji Devichand,* (1938) Bom. 453 : 40 Bom. LR 995 : 178 IC 419.

into an agreement of partnership with another, what happens in law and in fact is that the individual partners of the one firm join with the individual partners in the other firm, the result being that all the individual partners of the two firms become individually partners in the new firm. But, as pointed out in *Kader Bax* v. *Bukt Behari,*[1] a person within the meaning of Section 4 may be a combination of persons and therefore it is possible that there can be a partnership between an association of persons and an individual. The Madras High Court has held to the same effect.[2]

Firm Name—While the law allows the use of any firm name,[3] it must at the same time be noted that a person should not trade under a name so closely resembling that of another as to be mistaken for it.[4] As Mulla, J., remarked in *National Bank of India* v. *National Bank of Indore*[5]:

> "There is no property in the word, but at the same time it is a fraud on a person who has established a trade and carries it on under a given name that another person should assume the same name with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who had given a reputation to that name".

In such cases, the Courts will restrain the defendant by injunction from assuming the name, which is calculated to deceive the public.[6] **[1162]**

Though the term 'firm name' is defined in Section 4, the name is not however an essential ingredient of a firm. A firm may carry on business without assuming a firm name.[7]

Since partnership firm has no personality of its own, the experience of partners can be treated as experience of firm.[8]

Sub-partnership.—[See also Sec. 29]. This is a partnership within a main partnership. Where one of the members of a partnership agrees to share

1. (1932) 36 CWN 489.
2. *Mahomed Abdul Latif* v. *Sheik Ismail,* (1933) 38 LW 849.
3. *Acerators Ltd.* v. *Tollitt,* (1902) 2 Ch. 319; *Cowley* v. *Cowley,* (1901) AC 450.
4. *Re. Merchants Banking Co. of London,* (1878) 9 Ch. D 560; *William Dimech* v. *Goffredo,* (1931) 61 MLJ 334 : 34 LW 977 : 130 IC 312 : (1931) PC 15; *Hussain Meah Sahib* v. Abdul Rahim, (1931) MWN 254 : 131 IC 829 : 33 LW 554 : (1931) Mad. 326; *Singer Machine Manufacturing Co.* v. *Wilson,* (1877) 3 AC. 376; *Croft* v. *Day,* (1843) 49 ER 994: 64 RR 18.
5. (1922) 24 Bom. LR 1181; **see also** *Levy* v. *Walker,* (1879) 10 Ch. D. 436.
6. *West End Watch Co.* v. *Berna Watch Co.,* (1912) 35 Bom. 425 : 13 Bom. LR 242 : 10 IC 805; *Oriental Govt. Security Life Assurance Co. Ltd* v. *Oriental Assurance Co. Ltd.* (1913) 40 Cal. 570.
7. *Delight Stores* v. *ITO.,* (1971) 1 ITJ 173.
8. *Avula Construction (P) Ltd.* v. *Sr. Divisional Electrical Engineer, Traction Distribution & Ors.,* AIR 1999 AP 318 : 1999 (3) ALT 236.

the profit received by him with a stranger, there arises a sub-partnership between such third person and the partner.[1] A sub-partner is not necessary party to a suit between the main partners.[2] His rights and liabilities are referable to the contract with the sub-partner.[3] **[1180]**

Partnership and Company.—There is no real analogy between the two, as pointed out in *Smith* v. *Anderson.*[4] The ordinary partnership is one composed of definite individuals bound together by contract for certain purposes, while a joint stock company or association consists of a fluctuating number of individuals. The former has, no distinct legal personality apart from its members; the latter is a fictitious legal person, whose rights and obligations are not the rights and obligations of the persons who compose it. While the rights and liabilities of the partnership are those of the partners enforceable by and against them individually, the corporation is an artificial or fictitious person in regard to which there can be no rights or obligations against the individual members but only against the fictitious whole.[5] A shareholder has no interest in the property of the company whereas a partner has an interest in the assets of the firm.[6] **[1163]**

Joint venture and Partnership.— An informal partnership between two or more persons to take up a joint enterprise is a joint venture, which can be time bound involving partner's contribution of finances, knowledge, technical know-how, mutual control of management, expectation of profit and sharing of profits.[7]

Illegal Partnerships—A partnership may be illegal because of its object or because of the fact that in formation, it contravenes some statute. If a partnership is illegal, the Courts will not recognise it or enforce any rights of the supposed partners.[8] But it may be sued by a person who is not a party to

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1. *Exp. Barrow,* (1815) 2 Rose, 252; *Bainco* v. *Demaroco,* (1932) PC 63; *Kharidar* v. *Daya Kishan,* (1920) 43 All. 116; *Gangayya* v. *Venkataramayya,* (1917) 41 Mad. 454; *Thazath Soopi,* v. *Abdulla,* (1924) 47 MLJ 554 : 20 LW 390; *Ramanathan* v. *Egappa,* (1916) 30 MLJ 241; *Sokkanada* v. *Sokkanada,* (1904) 28 Mad. 344.
2. *Chidambaram Chetty* v. *Karuthan Chetty,* (1916) 39 MLJ 511, *Sattappa* v. *Subramania,* (1927) 53 MLJ 245 : 101 IC 17 : 31 CWN 857 : 25 ALJ 687 : (1927) MWN 500 : 26 LW 265 : (1927) PC 70; *Cassels* v. *Stewart,* (1881) 6 AC 64.
3. *Bianco* v. *Demarco,* (1932) PC 63 : 136 IC 396.
4. (1880) 15 Ch. D. 247; *Birch* v. *Cropper* (1889) 14 AC 525; *Samuvier,* v. *Ramasubbier,* (1931) 55 Mad. 72 : 360 MLJ 527 : 132 IC 305 : (1931) Mad. 14 AC 525, 580.
5. *Jayanarayana* v. *Biswanath Bhagat,* 1971 (2) CWR 721.
6. *Bacha F. Guzdar* v. *CIT,* AIR 1955 SC 74 : 1955 (1) SCR 876.
7. GVPREL-MEE (J.V.) v. Government of AP, AIR 2006 AP 169 : 2006 (3) ALD 703 (DB).
8. *Jeffrey* v. *Bamford,* (1921) 2 KB 351; *Shaw* v. *Benson,* (1883) 11 QBD 563; *Jennings* v. *Hammond,* (1882) 9 QBD 225 (Illegal banking firm cannot recover money lent); *Rodriguez* v. *Speyer Bros.,*(1919) AC 59; *Ewing* v. *Osbaldiston,* (1837) 40 ER 561 : 45 RR 9.

the illegality *i.e.*, who is not a *particeps criminis*.[1] However, as between the members of an illegal partnership, no suit for contribution or account is maintainable,[2] though, where the illegal object has not been carried out, the Court may award relief.[3]

Section 4 does not prohibit the formation of a partnership with a foreigner. Such a partnership is not illegal. Hence a suit by a partnership having a foreigner as a partner who is not pleaded as a foreigner from an enemy country cannot be dismissed as not maintainable.[4]

5. Partnership not created by status.—The relation of partnership arises from contract and not from status;

and, in particular, the members of a Hindu Undivided Family carrying on a family business as such, or a Burmese, Buddhist husband and wife carrying business as such, are not partners in such business.

Scope.—As the Special Committee points out, this section emphasizes one of the elements in the definition, (*viz.*) that partnership is the result of a voluntary agreement. The English Act contains no provision analogous to this; and the section was put in, only "in view of the vast extent of non-contractual *quasi* partnership relations in India, of which the Hindu trading family is an outstanding example".

There was a suggestion made to the Special Committee that provision should be made for the rights and obligations of the members of a joint Hindu family where the manager acting for the joint family enters into the partnership with a stranger. But it was thought that it would create confusion into the partnership law, and so, the suggestion was not adopted.

This and the succeeding section may be said to formulate negative definitions of the term Partnership which has been already defined in positive terms in Sec. 4.

Contract—One essential ingredient of a partnership is that there must be a *contract* between two or more individuals or persons as the Act says.[5] But,

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1. *Appa Dada* v. *Ram Krishna*, (1930) 53 Bom. 652 : 31 Bom. LR 1187 : 121 IC 581.
2. *Sykes* v. *Beadon*, (1879) 11 Ch. D 170; *Firm of Senaji* v. *Firm Pannaji*, (1930) 34 CWN 1107 : (1930) PC 300 : 59 MLJ 435.
3. *Greenberg* v. *Co-operstein*, (1926) 1 Ch. 657; (Cf) *U. Sein Po* v. *Phyn*, (1930) 7 Ran. 540.
4. *Bachomal Sadoromal* v. *Milkiram Lahrumal*, 1975 MPLJ 473.
5. (Cf) *Sutton* v. *Grey*, (1894) 1 QB 285; *Sanyasi Charn* v. *Krishnadhan*, (1922) 49 Cal. 560 : (1922) PC 237 : 43 MLJ 41 : 24 Bom. LR 700; *Raghunandan* v. *Harmasji*, (1927) 51 Bom. 342 : 2 Bom. LR 207 : 100 IC 1025 : (1927) Bom. 187.

such contract need not necessarily be express.[1] All the rules relating to the creation of a valid and enforceable contract are applicable to the contract out of which a partnership springs. Thus persons who agree to become partners at a future time or on fulfilment of certain conditions will not be partners unless the time arrives or the conditions are fulfilled or waived.[2]

Hindu Joint Family Firm—As partnership springs form contract and not out of status, it would follow that the members of an undivided joint Hindu Family carrying on the family business are not partners in it.[3] For a compendious statement of the differences between the incidents of a partnership and a Hindu Joint Family firm, see *Ramakrishna Transports* v. *C.I.T., Andhra Pradesh.*[4] The Joint Family Firm is governed by rules of Hindu Law. The death of one member does not, as in the case of ordinary partnership, dissolve the firm.[5] Again, one coparcener severing his connection with the firm cannot generally ask for an account.[6] A third ground of distinction is that whereas in an ordinary partnership the act of each partners will usually bind the rest, in the joint family business, it is only the manager that can act and it is open to the manager to sue alone for recovery of debts due to the business.[7] Further, in a joint family business, the manager is personally liable, but the other members are not, though their shares will be liable, for the debts of the business.[8] Again, a Hindu Joint Family firm is not governed by Sec. 69, and so the disability consequent on non-registration of firms does not apply to it.[9] In fact the relationship between the members of a Hindu Joint Family business are more

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1. *Tajammul* v. *Ahmad Ali,* (1937) Oudh 438 : 167 IC 839.
2. *Dickinson* v. *Valpy,* (1829) 109 ER 399 : 34 RR 348; *Howell* v. *Brodie,* (1839) 133 ER 17 : 54 RR 711 (Share not taken in a scheme for making and letting out market, but money's advanced previously—Held no partnership till the share was taken). **See also** *In re : Young, Ex parte Jones,* (1896) 2 QB 484 (Person with an option to become partner, does not become a partner till he exercises the option); *Gabriel* v. *Evill,* (1842) 152 ER 125; *Downs* v. *Collins,* (1848) 67 ER 1228 : 77 RR 171; *Page* v. *Cox,* (1852) 68 ER 882 : 90 RR 314.
3. *Lalchand Amonmal* v. *M.C. Boid & Co.,* (1934) 61 Cal. 975 : 152 IC 991 : 38 CWN 914 : (1934) Cal. 810; *Udaychand* v. *Thansing Karamchand,* (1935) 62 Cal. 586 : 157 IC 937 : 39 CWN 357 : (1935) Cal. 537; *Govindlal Mohata, In re,* (1935) 39 CWN 275.
4. AIR 1968 AP 34 : (1968) 1 An. LT 397 : (1967) 1 An. WR 161.
5. *Samalbhai* v. *Nattubhai,* (1880) 5 Bom. 38; *Ramanathan* v. *Egappa,* (1916) 30 MLJ 241.
6. *Gangayya* v. *Venkataramayya,* (1917) 41 Mad. 454; *Fakir Chand* v. *Nanug Ram,* (1923) 74 IC 721 : (1924) All. 277.
7. *Lutchmanen* v. *Sivaprakasa,* (1899) 26 Cal. 349; *Lal Chand* v. *Ghanayalal,* (1930) Lah. 243; *Krishna* v. *Krishnaswami,* (1900) 23 Mad. 597.
8. *B. Bank* v. *Krishna Das,* (1932) Pat. 206; *Sitharama* v. *Sivagurunatha,* (1930) MWN 437; *Sanka Krishnamurthi* v. *Bank of Burma,* (1911) 35 Mad. 692; *Rampartab* v. *Foolibai,* (1896) 20 Bom. 767; *Chalameyya* v. *Varadayya,* (1898) 22 Mad. 166.
9. *Debi Sahai* v. *Gillu Mall,* (1938) Lah. 563 : 40 PLR 456 : 177 IC 918; *Hardeo Ram* v. *Ghirdar Lal,* (1935) All. 280 : 153 IC 510.

like that of trustee and *cestui que trust,* than of partners.[1] **[1164]** Where a person nominated by the HUF joins a partnership, the partnership is legally said to be between such nominated person and other individual partners but HUF by itself cannot be deemed to have become a partner.[2]

A Hindu undivided family as a jural unit may enter into a partnership with a stranger or strangers either through the manager or by consensus of the members.[3] When the manager enters into such a partnership in a business, the capital being derived wholly or partly from joint family funds, the other members do not become *ipso facto* partners with the stranger.[4]

Where a stranger is associated with the members of a Joint Hindu Family in a business, the rights and liabilities are determined more by the Contract Act than by Hindu Law.[5]

When a coparcener enters into a partnership with the Karta of Hindu United Family and contributes his skill and labour, it cannot be said that no contribution of any separate asset belonging to such partner is made to meeting requirement of a valid partnership.[6]

Where the Karta of Hindu Family Trading Firm filed a suit to recover damages against the defendant, the question raised by the defendant about the plaintiff constituting HUF Trading Firm cannot be entertained unless proof is offered by the defendant in support of his assertion and the Court will regard the plaintiff as HUF Trading Firm.[7]

The Judicial Committee has made it clear that where a managing member of a Joint Hindu Family enters into a partnership with a stranger, the other members of the family do not *ipso facto* become partners in the business so as to clothe them with all the rights and obligations of a partner as defined in the Indian Contract Act and that in such a case the family as a unit does not become a partner but only such of its members as in fact enter into a contractual relation with the stranger.[8] The Rangoon High Court has held with reference

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1. *Annamalai* v. *Murugesa,* (1903) 26 Mad. 544 : 7 CWN 754 : 13 MLJ 287 : 5 Bom. LR 494.
2. *Rashiklal & Co.* v. *I. T. Commissioner, Orissa,* AIR 1998 SC 401, 404.
3. *Lala Lachman Das* v. *C.I.T.,* (1947) 74 IA 277.
4. *Kshetra Mohan* v. *E.P.T. Commissioners,* AIR 1953 SC 516 : 1953 SCJ 673 : 1954 SCR 268 : 1953 (24) ITR 488.
5. *Mangu Lal* v. *Munni Lal,* (1933) All. 311 : 144 IC 76.
6. *Chandrakant Manilal Shah* v. *I. T. Commissioner, Bombay,* AIR 1992 SC 66 : 1992 Tax LR 30 : (1992) 1 SCC 76 : 1991 : AIR SCW 2912.
7. *Rakesh Kumar Dinesh Kumar* v. *U.G. Hotels & Resorts Ltd.,* AIR 2006 HP 135.
8. *Pichappa Chettier* v. *Chockalingam Pillai,* (1934) 40 LW 256 : (1934) MWN 828 : 38 CWN 1185 : 60 CLJ 136 : 36 Bom. LR 976 : (1934) ALJ 895 : 36 PLR 225 : 11 OWN 984: 15 PLT 655 : 150 IC 802 : (1934) PC 192 : 67 MLJ 366.

to Sec. 5, that a Hindu Joint Family business cannot at the same time be a partnership business and that the two things are inconsistent and therefore in a suit brought on the footing of partnership as between the defendants a decree cannot be granted on the footing that the business is a Joint Hindu Family business.[1] **[1166]**

Where the sleeping partners issued notice to the bank and cause stoppage of payment of cheques leading to the paralysing of the partnership business, it being an arbitrable dispute the appellant Managing Partner is entitled for grant of injunction restraining the respondents from interfering with the management of business of the Firm.[2]

Burmese Buddhists—The relationships between a Burmese Buddhist and his wife, with regard to their property has some analogies to the ordinary partnership but as they flow out of status and not contract, there is no partnership in the eye of the law.[3]

Cutchi Memons—A family of Cutchi Memons carrying on business does not fall within the latter part of the section. It will be therefore subject to Sec. 69.[4]

6. Mode of determining existence of partnership.—In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

Explanation 1.—The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

Explanation 2.—The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of

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1. *Rambilas* v. *Gopiram,* (1938) Ran. 205; *Chidambaram* v. *Muthayya,* (1936) 14 Ran. 122 : (1936) Ran. 160 : 162 IC 184.
2. *Modern Metal Industries* v. *Shanti Parolia,* AIR 2005 All 249.
3. **See** *N.A.V.R. Chettyar Firm* v. *Maung Than Daing,* (1931) 9 Ran. 524 : (1931) Ran 252 : 134 IC 1252; *Ma Paung* v. *Maung Shwe Hpan,* (1927) 5 Ran. 478 : (1927) Ran. 274 : 104 IC 516; *V.R.M.A. Chettyar Firm* v. *Maung Ham,* (1927) 5 Ran. 443 : (1927) Ran. 299 : 105 IC 244; *T.C.T. A.R. Firm* v. *Muigal Myouk Society,* (1930) Ran. 345 : 128 IC 844.
4. *Soomar Sait* v. *Cherian,* (1937) 2 MLJ 221 : (1937) MWN 412 : (1937) Mad. 666.

profits or varying with the profits earned by a business, does not by itself make him a partner with the persons carrying on the business;

and, in particular, the receipt of such share or payment—

(a) by a lender of money to persons engaged or about to engage in any business,

(b) by a servant or agent as remuneration,

(c) by the widow or child of a deceased partner, as annuity, or

(d) by a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof,

does not of itself make the receiver a partner with the persons carrying on the business.

Analogous law :—Sec. 2 of the English Act runs thus:

"2. In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned whether the tenants or owners do or do not share any profits made by the use thereof.

(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business but the receipt of such a share, or of a payment contingent on or varying with the profits of a business; and in particular—

(a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profit of a business does not of itself make him a partner in the business or liable as such;

(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business

does not of itself make the servant or agent a partner in the business liable as such;

(c) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such;

(d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business does not of itself make the lender a partner with the person or persons carrying on the business or liable as such; provided that the contract is in writing and signed by or on behalf of all the parties thereto;

(e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the good-will of the business is not by reason only of such receipt a partner in the business or liable as such."

Principle of the section.—Section 6 embodies not merely the English law as to the mode of determining the existence of partnership but also indicates the manner in which the general principle is to be applied to particular circumstances. Whether there is a partnership or not depends on the real intention and contract of the parties.[1] The opening para of the section is a comprehensive statement of the rule in *Cox* v. *Hickman,*[2] which, though followed in many cases subsequently, was not incorporated in the English Partnership Act. All the decided English cases have laid uniform stress on the real relation of the parties, and not merely their expressed intention. All the incidents of the relation between the parties have to be examined in order to get at the real legal character,[3] of their relationship; and as the Special Committee said, the present section is only intended to guide the Courts in India along these lines.

A bare statement that the parties are to be partners will not necessarily make them so in law.[4] The facts that A was found in B's shop for a few months,

1. *Hari Sao* v. *Gulab Chand,* AIR 1940 Pat. 116; *J.K. Somayya* v. *Commissioner, E.P.T.,* AIR 1950 Hyd. 87; *Ram Avtar* v. *Ramjivan,* AIR 1956 Hyd. 131.
2. (1860) 11 ER 431 : 125 RR 149.
3. *Mollwo March* v. *Court of Wards,* (1872) 17 ER 495; *Badeley* v. *Consolidated Bank,* (1888) 38 Ch. D. 238; *Davis* v. *Davis,* (1894) 1 Ch. 393.
4. *M.P. Davis* v. *Commissioner of Agricultural Income Tax,* AIR 1959 SC 719 : 1959 (35) ITR 803.

that he had supplied goods to the defendant and other customers from the shop and that during the absence of B on many occasions he was receiving the outstandings from customers and giving credit therefor, whether considered cumulatively or as independent pieces of evidence were held insufficient to draw an inference of partnership between A and B.[1] Though A and B may have stated in writing that they are not partners, yet the Court may hold that they are, on an examination of all the relations between them, or *vice versa.*[2] When the parties to a contract agree to become partners, it is not necessary to state in terms that they agree to combine property, labour or skill.[3]

The Explanations to the section are reproductions in a condensed form of the series of rules given in Sec. 2 of the English Act to determine the existence of partnership.

Explanation (1)—Sharing Profits.—In the repealed chapter of the Contract Act, illustration (e) to Sec. 239 about joint owners of a ship instanced co-ownership not amounting to a partnership. Where property owned in common is let, the proceeds realised are nothing more than rent: they cannot be described as *profits* of any *business;* and so no question of partnership will arise in such cases.[4] But where, in addition to co-ownership there is an agreement to use the common property in business for profit there will be a partnership.[5] (See Illustration (a) to old Sec. 239, Contract Act). Thus, in one case in the Rangoon High Court, when two co-owners of land not only shared the profits out of the land between themselves, but jointly worked it, jointly engaged coolies, and both took active part in raising crops, the Court held they were no mere co-owners, but partners.[6] Similarly, where one furnishes capital and the other brains or labour, there may be a partnership.[7] (See Illustration (c) to old Sec. 239, Contract Act). Therefore participation in profits,

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1. *Maliram Chowdhury* v. *Jagannath Modi,* 1971 (1) CWR 848.
2. In the matter of the *R.K. Abdul Rahman,* (1928) 51 Mad. 308 : 28 LW 290 : 55 MLJ 12 : 112 IC 486 : (1928) Mad. 800; *Raghunandan* v. *Harmasji,* (1927) 51 Bom. 342 : 29 Bom. LR 207 : 100 IC 1025 : (1927) Bom. 187; *Bhaggulal* v. *De Gruyther,* (1881) 4 All. 74; *Porter* v. *Incell,* (1905) 10 CWN 313; *Raghumull* v. *Official Assignee, Calcutta,* (1924) 28 CWN 34 : 81 IC 17 : (1924) Cal. 424; *Mamooji* v. *Tayfbali,* (1933) Sind 210 : 146 IC 730.
3. *Ambalal Sarabhai, In re,* (1924) 25 Bom. LR 1225 : 77 IC 699 : (1924) Bom. 182.
4. (Cf.) *Hyder Ali* v. *Elahee Bux,* (1882) 8 Cal. 1011; *Vanamti Satti Raju* v. *Bollapragada,* (1918) 41 Mad. 939; *French* v. *Styring,* (1857) 140 ER 455 : 109 RR 716; *Crawshay* v. *Maule,* (1818) 36 ER 479 : 18 RR 126.
5. *Jeffreys* v. *Smith,* (1820) 37 ER 389 : 21 RR 175.
6. *P.L.S.A.R.S Chettiyar Firm* v. *R.M.P. Chettiyar Firm,* (1933) Ran. 120 : 144 IC 1007; but compare *Mamooji* v. *Tayfbali,* (1933) Sind 210 : 146 IC 730 (Joint purchase of land with object of selling it at a profit no partnership).
7. *Kelly's Directories* v. *Gavin & Lloyds,* (1902) 1 Ch. 631; *Reade* v. *Bentley,* (1858) 70 ER 273 : 116 RR 493.

though not conclusive, is a cogent piece of evidence which must be given due weight in the light of other circumstances.[1] **[1151]**

Explanation (2)—Receiving share varying with profits—In *Chockalinga* v. *Muthuswami,*[2] it was held that an arrangement to share in the profits does not necessarily show that the person who shares in such profits is a partner of the firm, but that this fact will have to be considered along with evidence of other characteristics of a partnership. **[1151]**

Where a person stipulates for a share of the gross returns or *gross profits* of a business, he is not a partner, because he does not bear any expenses or liabilities of the business.[3] But, participation in the net profits of a business may render the person liable as partner.[4] **[1152]**

Clause (a)—Creditor or Partner—In *Nagendrier* v. *Muthiah Bhagavathar,*[5] that it was held that a loan to a person engaged in any trade upon a contract that the lender shall receive interest and also a share of the profits does not of itself constitute the lender a partner. Though the parties may call themselves partners, yet if it appears that one party is to do nothing more than advance money to the other, and is to be repaid by a share of the profits, they must be treated only as creditor and debtor.[6] Again, where a person deposited money with others and received in return a share in the net profits, but did not have any part or lot in the management, and nothing else was in evidence about the intention of the parties, it was held that it was only a case of a deposit.[7] **[1155]**

Clause (b)—Partner or Servant—Where a servant or agent receives a share of profits as remuneration, that fact does not by itself make him a partner.[8] The servant has no kind of interest in the capital; the losses, if any be suffered, do not count except in so far as they may lessen his remuneration, which is assessed in terms of the profits. Thus the *gumastah* of a firm, who is

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1. *Tajammul* v. *Ahmad Ali,* (1937) Oudh 438; *Madho Prasad* v. *Gouri Dutt,* (1939) Pat. 323.
2. (1925) 48 MLJ 518 : 21 LW 541 : 87 IC 663 : (1925) Mad. 768.
3. *Lyon* v. *Knowles,* (1863) 122 ER 209 : 129 RR 452; *Cox* v. *Coulson,* (1916) 2 KB 177; *Sutton* v. *Grey,* (1894) 1 QB 285; *Dry* v. *Boswell,* (1808) 170 ER 975.
4. *Grace* v. *Smith,* (1775) 96 ER 587; *Ex parte Tennant,* (1877) 6 Ch. D. 303; *Bansi Ram* v. *Jagan Nath,* (1935) Lah. 209 : 153 IC 969.
5. (1927) 52 MLJ 303 : 101 IC 93 : (1927) Mad. 1096; (Cf.) *Bhaggu Lal* v. *De Gruyther,* (1881) 4 All. 74.
6. *Mahomed Yousuf* v. *Pir Mahomed,* (1922) Nag. 67 : 65 IC 368; *Badeley* v. *Consolidated Bank,* (1888) 38 Ch. D 238.
7. *In re R.K. Abdul Rahiman,* (1928) 51 Mad. 308 : 55 MLJ 12. **See also** *Gosling* v. *Gaskell,* (1897) AC 575; *Singleton* v. *Knight,* (1888) 13 AC 788.
8. (Cf.) *Walker* v. *Hirsch,* (1884) 27 Ch. D. 460; *Harrington* v. *Churchward,* (1816) 29 LJ Ch. 521.

paid by a share of the profits, has been held to be not a partner.[1] The case of an agent is illustrated in *Secy. of State* v. *G.I.P. Ry.*[2] **[1157]**

Clause (c)—Partner or Annuitant—For an illustration of this kind, see *Mussamatt Jatti* v. *Banwarilal.*[3]

Clause (d)—Partner or Previous owner—The English case of *Hawsley* v. *Outram,*[4] is an illustration of this type of cases. There the Court of Appeal held on a construction of the agreement that it did not create a partnership, but was merely an agreement for the sale of a business for a sum of money, a portion of which was undetermined, and had to be ascertained, and which portion, until paid, was to carry a certain share of profits. Similarly, where a medical practitioner sold his goodwill in consideration of a fixed sum to be paid at once, and a share of the first year's practice after the sale, it was held that there was no partnership with the vendee.[5]

7. Partnership-at-will—Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership-at-will".

Analogous law—Sec. 27 of the English Partnership Act runs thus:

> "27 (1) Where a partnership entered into for a fixed term is contained after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term so far as is consistent with the incidents of a partnership at will".

Scope and object of the section.—The Special Committee observes that the English Act does not define the term "partnership at will" though it uses the expression in Sec. 27. The difference in language between Secs. 26 and

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1. *Ramadayal* v. *Junmeenjoy,* (1887) 14 Cal. 791; *Commr. of Income Tax* v. *Muhomed Kasim,* (1927) 54 MLJ 219 : 26 LW 659 : (1927) MWN 869 : 106 IC 308 : (1927) Mad. 1053; *Morrison* v. *Verchoyle,* (1901) 6 CWN 429. **See also** *Ex parte Tennant,* (1877) 6 Ch. D 303.
2. (1924) 49 Bom. 320 : 27 Bom. LR 810 : 30 CWN 76 : 48 MLJ 539 : (1925) MWN 358 : 88 IC 107 : (1925) PC 103; *Abdul Latif* v. *Gopeswar,* (1932) 56 CLJ 172; *Ross* v. *Parkeys,* (1875) 20 Eq 331.
3. (1923) 4 Lah. 350 : 45 MLJ 355 : 18 LW 273; **see also** *In re. Hiralal,* (1927) 21 SLR 280.
4. (1892) 3 Ch. 359; *Holme* v. *Harmond,* (1872) 7 Ex. 18; **see also** *Ogdens* v. *Nelson,* (1905) AC 109.
5. *Rawlinson* v. *Clarke,* (1846) 153 ER 860.

32 of the English Act gave rise to difficulty in the case of *Moss* v. *Elphick*[1] With a view to get over the difficulty, this section was added.

To predicate that a partnership is a partnership-at-will two requirements must be satisfied, namely, the partnership deed must not contain expressly or impliedly any provision as to (1) or (2) as to its determination.[2] A provision as to the retirement of a partner cannot be regarded as a provision for 'determination of their partnership within the meaning of Section 7.[3] Where a partnership entered into for a fixed term is continued after the expiry of the term it would be regarded as having become a partnership-at-will.[4] Provision for termination of partnership on expiry of a managing agency agreement or by withdrawal from the partnership by one partner relinquishing his rights in favour of the other are instances of conditions inconsistent with the partnership being at will.[5] Where no term is expressly limited for its duration and contract does not fix it the partnership may be determined at moment's notice.[6]

In the absence of any mention about the duration of the partnership in the partnership deed, the partnership is deemed to be a partnership at will liable to be dissolved by a notice by any partner to all other partners.[7]

When the partnership deed manifests the intention of the parties that so long there are two partners, the partnership shall not be determined, the partnership shall continue despite the fact of retirement or death of one of the partner.[8]

Where out of three partners, the absence of one does not put an end to the partnership and in the absence of any condition as to the duration or determination, the partnership is treated as partnership at will.[9]

Where the agreement provides for the determination of a partnership only by *mutual agreement,* it is not a partnership at will.[10]

Where the partnership deed contains a conditions that the partnership would continue till the completion of a particular venture for which the partnership was constituted and as such the partnership would come to end

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1. (1910) 1 KB 846.
2. *Iqbalnath* v. *Rameshwarnath,* AIR 1976 Bom. 405 : 1977 Mah.LJ 51 : (1977) Mah LJ 5. *Keshavlal Lallubhai Patel* v. *Patel Bhailal Narandas,* AIR 1968 Guj. 157 : 9 Guj.LR 649.
3. Ibid. **See also** *Talakchand* v. *K.D. Sheth,* AIR 1973 Cal. 279.
4. *Gulab Singh* v. *Gattulal,* 1970 MPLJ 387.
5. *Thiagarajan* v. *Muthappa,* AIR 1961 SC 1225 : 1961 (3) SCR 998.
6. *Gobardhan Chakraborty* v. *Abani Mohan,* AIR 1991 Cal. 195.
7. *Madhukar* v. *Dayalbabu,* 2002 AIHC 563, 564 (Bom).
8. *M.O.H. Uduman* v. *M.O.H. Aslum,* AIR 1991 SC 1020 : 1991 (1) JT 138 : (1991) 1 SCC 412.
9. *Rathindra Nath Dey* v. *Dilip Kumar Dey,* AIR 2001 Cal. 172, 175.
10. *Syers* v. *Syers,* (1876) 1 AC 174 : **See also** Note 1.

only after the completion of such venture and the partnership cannot said to be at will.[1]

The characteristic of a partnership at will is that one of several partners may determine it by notice to the others of his intention to dissolve it.[2] And this right to dissolve the partnership is a legal right and not a mere equity.[3] In *Sahappa Chetty* v. *Subrahmanyan Chetty,*[4] the Judicial Committee held that the filing of a plaint for dissolution by one partner is enough in itself to put an end to a partnership at will.

A lease of land for partnership purposes for a term is by itself no indication that the partnership is limited to the term of the lease.[5] Where one partner creates a sub-partnership, there is no presumption that the sub-partnership is for the same term as the main partnership.[6] Where a partnership is continued beyond its original term, it is generally presumed to be a partnership at will. So too, where partnerships are continued on the death of one partner, by the surviving partners without any new agreement, it is presumed that they are partnerships at will.[7] **[1243]**

8. Particular Partnership.—A person may become a partner with another person in particular adventures or undertakings.

Principle of the section.—According to the Special Committee Report, this section is intended to meet the practice of establishing "particular partnerships" which is much favoured by Indian firms with numerous branches.

Particular Partnership.—The agreement generally refers only to a specific adventure or business,[8] for instance, persons agreeing to buy a jewel and sell it for profit.[9] **[1148]**

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1. *Deoki Prasad Rajgarhiah* v. *Anar Dai Poddar,* AIR 1999 Pat. 22, 28.
2. (1910) KB 846.
3. *Ram Singh* v. *Cam Chand,* (1924) 5 Lah. 23 : 22 ALJ 14 : 19 LW 4 : (1924) MWN 76 : 46 MLJ 158 : 26 Bom. LR 196 : 28 CWN 566 : 79 IC 944 : 40 CLJ 276.
4. (1927) 53 MLJ 245 : 31 CWN 857 : 25 ALJ 687 : (1927) MWN 500 : 26 LW 265 : 101 IC 17 : (1927) PC 70.
5. *Crawshay* v. *Maule,* (1818) 36 ER 479 : 18 RR 126; *Featherstonhaugh* v. *Fenwick,* (1819) 34 ER 115 : 11 RR 77.
6. *Frost* v. *Moulton,* (1856) 52 ER 990 : 111 RR 251.
7. *Haji Hedayatulla* v. *Mohamed Kamil,* (1924) 19 LW 425 : 81 IC 525 : (1924) MWN 660 : 39 CWN 161 : (1924) PC 93; *Suresh Kumar* v. *Amrit Kumar,* AIR 1982 Delhi 131. (Partnership under the term of the agreement on the date on retirement continue Partnership not at will).
8. *Karamali Abdulla* v. *Karinji Jivanji,* (1914) 42 IA 48 : 39 Bom. 261 : 17 Bom. LR 103 : 28 MLJ 515 : (1915) MWN 603 : 21 CLJ 122 : 19 CWN 337; *Seth Suganmal* v. *Umraobi,* (1938) Nag. 550; *Cruickshank* v. *M'Vicar,* (1844) 50 ER 42 : 68 RR 29.
9. *Oppenheimer* v. *Frazer,* (1907) 2 KB 50; *Reid* v. *Hollinshead,* (1825) 107 Er 1281.

A partnership between two or more persons who have agreed to enter into and carry on forward or other contracts with a particular person will fall within Section 8 and will stand dissolved when such contracts are closed.[1]

Where two companies have agreed to undertake a joint venture for constructing market complex at municipal site, the joint venture agreement makes them partners and the partnership so created will be determined when the joint venture is accomplished.[2]

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1. *Gherulal Parkash* v. *Mahadeodas Maiya,* AIR 1959 SC 781 : 1959 Supp. (2) SCR 580.
2. *Akla Builders Pvt. Ltd.* v. *Cityscape Developers Pvt. Ltd.,* AIR 2003 NOC 264 (Cal).

CHAPTER III

Relations Of Partners To One Another

9. General duties of partners—Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.

Analogous law.—Sec. 28 of the English Partnership Act runs thus:

> "28. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives".

Duties of partners.—The relation of partnership is grounded on mutual trust and confidence, and though partners are not trustees for each other,[1] the utmost good faith is required between partners *inter se.* The principle of good faith is the basis of the internal law of partnership, as Lindley says; and such good faith is required at every stage from the inception to the termination of the partnership.[2] In the absence of fraud, clandestine dealing in any special circumstances partnership by itself does not create fiduciary relationship.[3] In *Adam* v. *Newbigging,*[4] the contract of partnership was held liable to rescission because of a material misrepresentation made at the time of formation of the contract. In *Kurundili Ammal* v. *Kunhi Kannan,*[5] where the question arose between sleeping and working partners, it was held that utmost *bona fides* should be shown before an action could be sustained on a promissory note by the sleeping partners executed in reliance on the accounts produced by the working partners.

A person who joins a partnership is entitled to assume that the representation made to him by the partners are true without actually looking into the books.[6]

As to carrying on the business to the greatest common advantage, see *Peacock* v. *Peacock.*[7] **[1202]**

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1. *Piddocks* v. *Burt,* (1894) 1 Ch. 343.
2. *Fawcett* v. *Whitehouse,* (1829) 36 ER 51 (same rule applies even to persons who have agreed to become partners).
3. *Prem Bhallab* v. *Mathura Dutt,* AIR 1967 SC 1342 : (1967) 2 SCC 298.
4. (1888) 13 AC 308 **See also** *Clements* v. *Hall,* (1858) 44 ER 954 : 119 RR 74; *Law* v. *Law,* (1905) 1 Ch. 140.
5. (1930) Mad. 141 : 123 IC 596.
6. *Rawlins* v. *Wickham,* (1838) 44 ER 1285 : 121 RR 134.
7. (1808) 33 ER 902 : 10 RR 138.

As to the duty to give full information see *Liquidators of Imperial Mercantile Credit Association* v. *Coleman.*[1]

Accounts—There is a duty to render true accounts.[2] Where the accounts are kept by one party, he is, as pointed out in a Lahore case, the person to explain and give information about them.[3] And where an account is settled, the settlement must be fair and correct.[4] Where fraud or serious error is made out, the settlement may be reopened.[5] Again, while it is true that the relief of rendition of accounts cannot be given except where there is a prayer for dissolution of the partnership, yet where the agreement of partnership itself provides that the managing partner shall account to the others in a particular manner say, annually, the Court may enforce the right created under such agreement.[6]

A suit by a partner who advanced finances for rendition of accounts is maintainable even if the partnership agreement is found to be void.[7]

10. Duty to indemnify for loss caused by fraud—Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.

Indemnity for loss caused by fraud—In the English Act, there is no section corresponding to this. The section casts an *absolute* liability to indemnify for loss caused by a partner's fraud; [8] and it is not open to parties to contract themselves out of this liability. Old Sec. 250 of the Contract Act provided for cases of neglect and fraud together; but the present Act makes separate provision for wilful neglect in Sec. 13. **[1058]** Under that section, the liability is not absolute but subject to contract between the partners.

11. Determination of rights and duties of partners by contract between the partners :—(1) Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be expressed or may be implied by a course of dealing.

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1. (1873) 6 HL 189; *Law* v. *Law,* (1905) 1 Ch. 140; *Ramanath* v. *Pitamber,* (1917) 43 Cal. 733 (Partner may buy partnership property, if the parties deal at arm's length); *Brunson* v. *Brunson,* (1925) Mad. 360 : 78 IC 299.
2. *Blisset* v. *Daniel,* (1863) 68 ER 1022 : 90 R R 454.
3. *Sukh Dayal* v. *Sukha Nand,* (1836) Lah. 312 : 147 IC 1013.
4. *Wedderburn* v. *Wedderburn,* (1936) 48 ER 807 : 44 RR 331; *Beaumont* v. *Boultbee,* (1800) 31 ER 695; *Millar* v. *Craig,* (1843) 49 ER 893 : 63 RR 134.
5. **See** *Melbourne Banking Co.* v. *Brougham,* (1882) 7 AC 307.
6. *Binraj* v. *Kisanlal,* (1933) Nag. 127 : 141 IC 277 : 16 NLJ 10.
7. *Budh Ram* v. *Dhuri Co-operative etc. Society,* AIR 1972 P & H 185 : 74 Punj. LR 605.
8. *Robertson* v. *Southgate,* (1848) 67 ER 1276 : 77 RR 227.

Such contract may be varied by consent of all the partners, and such consent may be expressed or may be implied by a course of dealing.

(2) Agreements in restraints of trade—Notwithstanding anything contained in Section 27 of the Indian Contract Act, 1872, such contracts may provide that a partner shall not carry on any business other than that of the firm while he is a partner.

Analogous law—Sec. 19 of the English Partnership Act reads:

> "19. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing".

Scope—In an Allahabad ruling, the Court observed that the opening words mean that the relation of partners shall be governed by contract unless the contract they enter into is one prohibited by the Act.[1] The contract between the parties is subject to the provisions of the Act.[2] The contract may also be varied by the consent of all the partners.[3]

Clause (1)—Mutual rights and duties—This clause on the principle that, as far as possible, the partners should have freedom to arrange their own affairs amongst themselves. The contract may be expressed or implied; and such contract may be varied by express consent or consent implied from the course of conduct between the partners.[4] Thus, where the partners have for a long period adopted a certain mode of valuing the assets,[5] or adjusting the profit and loss account,[6] that mode will be binding, though not strictly consistent with the original articles.

Clause (2)—Restraint on partner—This sub-section is a reproduction of Sec. 27, Exception (3) (now repealed) of the Contract Act.

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1. *Dropadi* v. *Bankey Lal,* (1939) ALJ 440.
2. *Sardar Hardutt Singh* v. *Mukha Singh,* AIR 1972 Kash. LJ 194.
3. *Gur Dayal Prasad* v. *Raghunath Prasad,* AIR 1976 All. 141.
4. **See** *Observations of Lord langdale in England* v. *Curling,* (1844) 50 ER 51; *Geddes* v. *Wallace,* (1820) 4 ER 328 : 21 RR 66 (Articles providing for contribution by partners to losses — one partner never called on to contribute for losses — articles held varied by conduct); *Const* v. *Harris,* (1824) 37 ER 1191 : 24 RR 108 (Effect of course of dealing); *Coventry* v. *Barclay,* (1864) 46 ER 659 : 142 RR 80 (Articles followed by long course of practice in the nature of a departure from the articles — held evidence of a new agreement varying the articles).
5. *Coventry* v. *Barclay,* **see** Note 1 above.
6. *Ex.p. Barber,* (1870) 5 Ch. 687.

"It is obviously necessary, in many cases of partnership that the partners or some of them should stipulate to give up the whole of their time to the management of the partnership concerns. This would be impossible but for the present exception. Hence, it is unusual to insert in a partnership agreement, a clause forbidding the partners to engage directly or indirectly in any business except upon the account and for the benefit of the partnership. Such a clause is valid and may be enforced by injunction or otherwise. But the partner who, in breach of his covenant has carried on another business cannot be compelled to render an account of the profits made in it, unless the business was analogous to or connected with the partnership business or the defendant had derived some exclusive advantage from the employment of the partnership property." **[1206]**

12. The conduct of the business.—Subject to contract between the partners—

(a) every partner has a right to take part in the conduct of the business;

(b) every partner is bound to attend diligently to his duties in the conduct of the business;

(c) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners; and

(d) every partner has a right to have access to and to inspect and copy any of the books of the firm.

Analogous law.—Sec. 24, Clauses (5), (6), (8) and (9) of the English Partnership Act run thus—

"24 (5) Every partner may take part in the management of the partnership business.

(6) No partner shall be entitled to remuneration for acting in the partnership business.

(8) Any difference as to ordinary matters connected with partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.

(9) The partnership books are to be kept at the place of the business of the partnership (or the principal place if there is more than one), and every partner may, if he thinks fit, have access to and inspect and copy any of them".

Clause (a)—Right to Manage.—All the partners have the right to take part in the management.[1] Even a mortgage of the interest of a partner to another partner does not divest the mortgaging partner of his right of management.[2] And the right is enforceable by suit and injunction at the instance of the partner who is so excluded.[3] But as the section operates only in the absence of any contrary agreement, it is open to the partners to agree that some alone shall manage the business.[4] **[1189]**

Where the written partnership agreement conferred a legal right on the appellant partner to participate in the affairs of the partnership business such right cannot be taken away by means of a memorandum of understanding conferring the right on the respondent partner for taking over the management of business excluding the appellant partner, since the partnership agreement has to be given reference.[5]

Clause (b)—Duty of diligence.—The section does not lay down any standard of diligence, but considering that a partner is an agent of the other partners, he may be required to use the diligence required of an agent under Sec. 212 of the Contract Act.[6] In *Sasti Kenker* v. *Man Govindu,*[7] it was held that a partner is not liable for negligence if he can show that he used such skill and judgment as he possessed in the conduct of the business. It has been held

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1. *Donaldson* v. *Williams,* (1833) 149 ER 432 : 38 RR 613; *Goodman* v. *Whitcomb,* (1820) 37 ER 492 : 21 RR 244; *Bawa Jodh Singh* v. *Bawa Gurdial Singh,* AIR 1984 NOC 13.
2. *Rowe* v. *Wood,* (1822) 37 ER 740 : 22 RR 208; *Hall* v. *Hall,* (1850) 50 ER 1119 : 87 RR 15.
3. *Ganpat* v. *Annaji,* (1898) 23 Bom. 144 : (Cf.) *Anant* v. *Gopal,* (1894) 19 Bom. 269.
4. *In re. Ambalal Sarabhai,* (1923) 77 IC 699 : (1924) Bom. 182 : *Daji Abaji* v. *Govind,* (1908) 10 Bom. LR 811; *Haramohan* v. *Sudarsan,* (1922) 25 CWN 847 : 66 IC 311 : (1921) Cal. 538.
5. *Prakash Boolu Kundar* v. *Shankar Aithu Poojari,* 2007 (1) R.A.J 326 (Bom).
6. *Mc. Lure* v. *Ripley,* (1850) 42 ER 105 : 86 RR 109; *Cragg* v. *Ford,* (1842) 62 ER 889 : 57 RR 320; *Mahadev Vitho Patil* v. *Gamo Changoo Patil,* (1925) 27 Bom. LR 500 : 87 IC 735 : (1925) Bom. 324.
7. (1919) Pat. 419 : 53 IC 2.

in *Krishnamachariar* v. *Sankar Sah,* [1] the refusal and neglect on the part of any one partner to perform the duties undertaken, would give the others the right to apply for dissolution. **[1202]**

Clause (c)—Difference of opinion.—If while a partner exercises his right to participate in the conduct of the business under Section 12 (a) a difference arises as to a routine or ordinary matter between him and the other partners decision by majority would be necessary; otherwise Section 12 (c) would not be attracted.[2] Here a distinction must be made between *ordinary* matters connected with the business, and special matters affecting the *nature* of the business. Where differences of opinion arise in regard to ordinary matters (*e.g.*) taking an apprentice,[3] or appointment or dismissal of servants, the verdict of the majority will prevail, provided that every partner is previously consulted before the final decision is made and the decision of the majority is arrived at *bona fide.* In the absence of such consultation, the act of the majority will be invalid. As Lord Eldon said in *Const* v. *Harris* [4] :

> "For a majority of partners to say, we do not care what one partner may say; we being the majority, will do what we please is what a Court of Equity will not allow".

Again, where powers are conferred on a majority present at a meeting of not less than a certain number, unless such meeting is duly convened, and the required number be present, the powers cannot be exercised; for there is no majority as contemplated.[5]

Where in respect to such matters, the partners are equally divided those who forbid a change will have the day in consonance with the maxim, *in re communi potior est conditio prohibentis.* [6] **[1191]**

As to the second class of matters, a change in the nature of the business cannot be made without the consent of all the partners. Thus no majority,

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1. (1920) 39 MLJ 257 : 12 LW 777 : 22 Bom. LR 1343 : 57 IC 713 : 25 CWN 314 : (1921) PC 91.
2. *Erin's Estate* v. *C.I.T.,* AIR 1958 SC 779, 783 : (1958) 2 MLJ 145 : 1958 SCJ 212.
3. *Highley* v. *Walker,* (1910) 26 TLR 685.
4. (1824) 37 ER 1191 : 24 RR 108. **See also** *Great Western Ry. Co.* v. *Rushout,* (1852) 64 ER 1121 : 90 RR 87; *Wall* v. *London Northern Assets Corporation,* (1898) 2 Ch. 469 (Minority should not be merely obstructive—After discussion, they may closured); *Blisset* v. *Daniel* (1853) 68 ER 1022 : 90 RR 454.
5. *Young* v. *Ladies Imperial Club,* (1920) 2 KB 523; *Re. London & Southern Counties Freehold Land Co.,* (1886) 31 Ch. D. 223. *Suresh Kumar* v. *Amrit Kumar,* AIR 1982 Delhi 131.
6. *Donaldson* v. *Williams,* (1833) 149 ER 432 : 38 RR 63 (Engaging new or dismissing old servant against the will of a co-partner); *Clements* v. *Norris,* (1878) 8 Ch. D 129 (Change of place of business).

however large, can engage the partnership matters outside the partnership business against the will of even one dissentient,[1] and this rule applies even where the new business is profitable.[2] Similarly, no majority can expel any partner unless the agreement provides such a power.

In a Madras case under the old Section 253 (5) of the Contract Act, where an assignment by one partner of a decree at less than half its face value was purported to be subsequently approved by the other partners, the Court held that such *ex post facto* confirmation will not validate a transaction initially invalid.[3]

Clause (d)—Inspection of firm's books—*Difference between English and Indian Law.*—The Select Committee remarked that the provision in the draft Bill which followed the English law that the books of the firm shall be kept at its place of business, or where there is more than one such place, at the principal place of business, may give rise to difficulty. They added—

> "Where a firm has its headquarters in an Indian State, the provision will be of no value, as the Act will not be in force in an Indian State. Secondly, no definition is possible of the 'principal place of business', as this place must depend upon arrangement among the partners. We think therefore that it will be preferable to confine this clause merely to declaring the right of each partner to have access to all the books of the firm."

The section as it stands therefore differs from the corresponding section under the English Act.

Accounts—Inspection.— Every partner may either in person or through an unobjectionable agent,[4] inspect and copy the books of the firm.[5] The motive of the inspection is entirely immaterial.[6] But the partner or his agent must not make improper use of the information gained by such inspection,[7] and where an agent is sent for inspection, he may be made to give an undertaking to that effect.[8] **[1190]**

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1. *Natusch* v. *Irving,* (1824) 47 ER 1196 : 76 RR 54; *Const* v. *Harris,* (1824) 37 ER 1191 : 24 RR 108.
2. *Attorney General* v. *G.N. Ry. Co.,* (1860) 62 ER 337 : 127 RR 51.
3. *Nagappa* v. *Bhagabanji Rasaji,* (1936) 59 Mad. 1036 : 43 LW 769 : 164 IC 239 : (1936) MWN 716 : (1936) Mad. 593 : 71 MLJ 378.
4. *Trego* v. *Hunt,* (1896) AC 7; *Taylor Rundell,* (1843) 41 ER 616 : 65 RR 372; *Stuart* v. *Lord Bute,* (1842) 59 ER 1209 : 56 RR 93; *Bevan* v. *Webb,* (1901) 2 Ch. 59 (Agent to be unobjectionable).
5. *Greatrex* v. *Greatrex,* (1847) 63 ER 1254 : 75 RR 251; *Pickering* v. *Pickering,* (1883) 25 Ch. D. 247 (Entries not relating to partnership may be sealed up).
6. *Davies* v. *Gas, Light & Coke Co.,* (1909) 1 Ch. 248.
7. *Trego* v. *Hunt,* (1896) AC 7.
8. *Dodd* v. *Amalgamated Marine Worker's Union,* (1923) 2 Ch 236, affirmed in (1924) 1 Ch. 116; *Bevan* v. *Webb,* (1910) 2 Ch. 59.

The right to inspect cannot be evaded by keeping the accounts in a private book, containing matters extraneous to the accounts of the partnership.[1]

A partner will be bound by an agreement to accept as correct the balance sheet prepared by the other partners.[2] But where an agreement made on a dissolution is based on a false account, it may be set aside.[3]

An assignee of a partner's share has no right during the continuance of the partnership, require any accounts of the partnership transactions or to inspect the account books. (See Sec. 29 *infra*). In *Goa Petha* v. *N.H. Moss,*[4] a case decided before the Partnership Act, the Patna High Court, held on the analogy of Sec. 31 of the English Act that the assignee or mortgagee of a partner's share is not entitled to accounts of the partnership transactions before dissolution or interfere in any way with the management or administration of the partnership.

Where no account books are kept at all, or if they are destroyed or withheld, and the Court directs an account to be taken, every presumption will be made against those to whose negligence the non-production of the accounts is traceable.[5]

Although the right of a partner of a partnership firm to demand for accounts is substantive right and maintainable in a court of law but when such partner withdraws the suit for some or other reason, it amounts to abandoning of such vested right and bars from filing fresh suit in such matter.[6]

13. Mutual rights and liabilities—Subject to contract between the partners—

(a) a partner is not entitled to receive remuneration for taking part in the conduct of the business;

(b) the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm;

1. *Freeman* v. *Fairlie,* (1812) 36 ER 13 : 17 RR 7; *Toulmin* v. *Copland,* (1839) 160 ER 851 : 51 RR 429; *Dipchand* v. *Kishan Bai,* (1928) Sind 133 : 108 IC 873.
2. *Turney* v. *Bayley,* (1864) 46 ER 947 : 146 RR 342; *Knight* v. *Marjoribanks,* (1849) 42 ER 4 : 83 RR 166 : *Maddeford* v. *Austwick,* (1826) 57 ER 512 : 27 RR 167.
3. *Chandler* v. *Dorsett,* (1679) 23 ER 235; *Law* v. *Law,* (1905) 1 Ch. 140.
4. (1931) 10 Pat. 792 : 133 IC 40; **see also** *Dhanji* v. *Gulabchand,* (1925) 27 Bom. LR 409: 87 IC 812 : (1925) Bom. 347.
5. *Walmsley* v. *Walmsley.* (1846) 72 RR 129; *Gray* v. *Haig,* (1854) 52 ER 587 : 109 RR 396; *Dipchand* v. *Kishan Bai,* (1928) Sind 133 : 108 IC 873; *Gagulu* v. *Changamma,* (1925) Mad. 237: 85 IC 397 : 47 MLJ 871.
6. *Budh Prakash Rastpgi* v. *Santosh Pal Dublish,* AIR 1998 All. 84, 87 : 1998 (1) Bank Cas 34 : 1997 (4) ICC 312 : 1998 All.LJ. 543 : 1997 All.CJ 619.

(c) where a partner is entitled to the interest on the capital subscribed by him, such interest shall be payable only out of profits;

(d) a partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six per cent per annum;

(e) the firm shall indemnify a partner in respect of payments made and liabilities incurred by him—

(i) in the ordinary and proper conduct of the business, and

(ii) in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances; and

(f) a partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm.

Analogous law.—Sec. 24 of the English Partnership Act—

Clause (a)—Remuneration—This section is a kind of corollary to the general rule that partners must conduct the business to the best advantage of all of them. So, unless there is a specific agreement, a partner is not entitled to remuneration for his services, even if it happens that he bears the burden of a major portion of the work.[1] Remuneration for personal labour by one partner exceeding that contributed by another is left to the honour of the other partners, and if that principle is wanting, the Court will not step in, to help the partner.[2]

But there are some exceptions to the rule. Thus where one partner is guilty of wilful neglect in the conduct of the business, and so extra work is thrust upon another partner, the latter will be entitled to compensation for

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1. *Thompson* v. *Williamson,* (1831) 5 ER 833; *Thornton* v. *Proctor,* (1792) 145 ER 810 : 3 RR 558; *Hutcheson* v. *Smith,* (1842) 5 Ir Eq. 117 (Expenses for treating customers disallowed); *Bentley* v. *Craven,* (1852) 52 ER 29 : 104 RR 373 (No commission for buying or selling goods).
2. *Webster* v. *Bray,* (1849) 68 ER 65 : 82 RR 44; (Cf.) *Robinson* v. *Anderson,* (1855) 52 ER 539; *Khemchand* v. *Mulchand,* (1932) Sind 126 : 139 IC 614.

extra services rendered. In *Airey* v. *Borham*,[1] where two partners quarrelled, and one only attended to the business the Court held him entitled to an allowance for having managed the business alone. Similarly in *Krishnamachariar* v. *Sankara Sah*,[2] where one partner deliberately withheld services, which he was bound to perform under the agreement, the Judicial Committee held the other partner entitled to compensation for extra work done. Again, where one partner has to work unequally owing to the other being unable to take an active part (*e.g.*) because of being a pardanashin lady,[3] the rule is relaxed, so as to allow reasonable compensation. So too, where a surviving partner carries on the business of the firm for the benefit of the firm, he has been held entitled to remuneration.[4]

But remuneration can be had only in case profits are realised.[5] Where the surviving partner is also an executor of the deceased partner, no remuneration will be payable, the reason being that he carries on the business not for the benefit of the other partners but as representative of the deceased.[6] A partner who had been appointed receiver in a suit for dissolution was held entitled to wages for manual work, which was no part of his ordinary duties as receiver.[7] So, too, where a partner became a lunatic, and the others continued the business they were held entitled to compensation.[8]

Clause (b)—Equal share of profit and loss—Section 13(b) makes the partners liable to contribute equally to the losses only when they are entitled to share equally in the profits. In the absence of any contrary indication, where the partners have agreed to share the profits in certain proportions the presumption is that the losses are to be shared in like proportion.[9] The shares may be inferred by reading the partnership agreement as a whole.[10] Where the parties are not agreed it is not for the Court to imply such an agreement and supply the omission.[11] In a general way the position of partners is

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1. (1861) 54 ER 768 : 131 RR 736.
2. (1920) 39 MLJ 257 : 20 Bom. LR 1343 : 12 LW 777 : 25 CWN 314 : 57 IC 713 : (1921) PC 91.
3. *Gokulkrishnadoss* v. *Sashi Mukhi*, (1911) 16 CWN 299.
4. *Featherstonhaugh* v. *Turner*, (1858) 53 ER 693 : 119 RR 462; *Meyer & Co.* v. *Faber*, (1923) 2 Ch. 421; *Brown* v. *De Tastet*, (1819) 37 ER 858; *Crawshaw* v. *Collins*, (1808) 33 ER 736
5. *In. re : Aldridge*, (1894) 2 Ch. 97.
6. *Burden* v. *Burden*, (1813) 35 ER 67 : 12 RR 210; *Stocken* v. *Dawson*, (1843) 49 ER 869 : 63 RR 116.
7. *Harris* v. *Sleep*, (1879) 2 Ch. 80.
8. *Mellersh* v. *Keen*, (1859) 54 ER 92 : 122 RR 390; (Cf.) *Haji Hedayatulla* v. *Mohammed Kamil*, (1924) PC 93 : 19 LW 425 : 22 ALJ 382 : 81 IC 525 : (1924) MWN 660 : 29 CWN 161 (In winding up remuneration may be given).
9. *Mandyala Govindu & Co.* v. *C.I.T., A.P.*, AIR 1975 SC 2284 : (1976) 1 SCJ 104 : (1976) 1 An. WR (SC) 11.
10. *Delhi Beopar Mandal* v. *C.I.T.*, AIR 1967 Punj. 255 : 1967 (1) ITJ 821.
11. *Shelat Brothers* v. *Nanalal Harilal Shelat*, AIR 1973 Mad. 78 : (1972) 2 MLJ 315.

analogous to that of co-promisors.[1] In the absence of a contrary agreement,[2] there is a presumption about the equality of the partners' shares in profit and loss, even in cases where the contributions of capital may be unequal.[3] As Lindley,[4] points out :

> "How is the value of each partner's contribution to be measured? Certainly not merely by the capital he may have brought into the firm. His skill, his connection, his command of the confidence of others, must all be taken into account; and if it is impossible to set a money value on each partner's contribution in this respect, it is impossible to determine the shares of the partners in the partnership. Nor is it unreasonable to infer, in the absence of evidence to the contrary, that the partners have agreed to consider their contributions as of equal value, although they may have brought in unequal sums of money or be themselves unequal as regards skill, connection or character".

The exact import of the proposition that the shares of members are *prima facie* equal, though the capitals are unequal has been thus explained by Lindley:

> "What is meant is that losses of capital like other losses must be shared equally; but it is no meant that, on a final settlement of accounts, capitals contributed unequally are to be treated as one aggregate fund which ought to be divided between the partners in equal shares.

The rule as to presumptive equality applies equally to partnership in a single transaction. Thus in *Robinson* v. *Anderson,*[5] where two solicitors had done unequal amounts of work in regard to certain litigation entrusted to them, and there was no evidence as to the share of profits, it was held they were entitled to equal shares. **[1202]**

In a Madras case, the Court has pointed out with reference to old Sec. 253 (2) that it implies that if unequal shares are admitted by the partners as to profits that applies equally to losses.[6]

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1. *Finance Centre* v. *Ram Parkash,* AIR 1977 NOC 269 (J&K) : 1977 Kash. LJ 218.
2. *Dawood Sahib* v. *Mohideen Sahib,* (1937) MWN 1063 : 46 LW 520 : (1937) 2 MLJ 760.
3. *Webster* v. *Bray,* (1849) 68 ER 65 : 82 RR 44; *Peacock* v. *Peacock,* (1808) 33 ER 902 : 10 RR 138; *Jadobram* v. *Bulloram,* (1899) 26 Cal. 281; *Beejan* v. *Fatima,* (1910) MWN 669.
4. Lindley on Partnership 10th Edn. (1935) p. 424. **See also** Lindley 14 Edn. P. 471; Halsbury 4th Edn. Vol. 35 p. 63.
5. (1855) 44 ER 94 : 109 RR 362.
6. *Pitchiah Chettiar* v. *Subramaniam Chettiar,* (1934) 40 LW 60 : (1934) MWN 457 : 150 IC 777 : (1934) Mad. 494 : 67 MLJ 182.

A contract to the contrary may be inferred from the mode in which the partners have dealt with each other in the partnership books.[1] Where a party pleads an agreement for inequality of shares, he must prove it.[2]

Losses—In the absence of evidence or agreement, to the contrary, the presumption is that losses are to be shared equally.[3] But where the agreement is to share profits in a certain proportion, there may arise a presumption that losses are to be borne in the same proportion.[4]

Under Section 13 the liability of the partner is to the firm and not to one partner.[5]

Clause (c)—Interest on subscribed capital—This sub-section corresponds to Sec. 24 (4) of the English Act, and has been recast so as to make it clear that it applies only in cases where the partner is entitled to interest on his subscribed capital.

In the absence of an express or implied agreement for interest on capital, no interest can be claimed either during the partnership or after dissolution of the same.[6] Profits that have not been drawn do not necessarily bear interest either.[7] On the same principle, perhaps, a partner is not charged interest, at the winding up, on amounts overdrawn by him.[8] But where a partner retains secret profits, he will be liable to pay interest thereon.[9] **[1192]**

In a Madras ruling, where the deed provided that profits were to be ascertained after allowing for "interest expenditure", it was held that the

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1. *Stewart* v. *Forbes,* (1849) 41 ER 1215 : 47 ER 1492.
2. *Jadobram* v. *Bulloram,* (1899) 26 Cal. 281; *Hirchand* v. *Gurdip,* (1927) 8 Lah. 241 : 102 IC 817 : (1927) Lah. 485.
3. *Geddes* v. *Wallace,* (1820) 4 ER 328 : 21 RR 66. **See also** *Syers* v. *Syers,* (1876) 1 AC 174.
4. *Re. Albion Life Assurance Society,* (1880) 16 Ch. D 83; *Garner* v. *Murray* (1904) 1 Ch. 57; *Pitchiah Chettiar* v. *Subramaniam Chettiar,* (1934) 40 LW 60 : (1934) MWN 457 : 150 IC 777 : (1934) Mad. 494 : 67 MLJ 182.
5. *Gur Dayal Prasad* v. *Raghunath Prasad,* AIR 1976 All. 141.
6. *Subramania Iyer* v. *Kannappa Chetty,* (1938) Mad. 38; *Motilal* v. *Sarup Chand,* (1935) 38 Bom. LR 1058; *Commissioner of Income-tax* v. *Subramania;* (1928) 51 Mad. 787; (1928) Mad. 923 : 28 LW 190 : (1928) MWN 474 : 55 MLJ 416 : 110 IC 889; *Khemchand* v. *Mulchand,* (1932) Sind 126 : 139 IC 614; *Millar* v. *Craig,* (1843) 49 ER 893; 63 RR 134 (implied agreement); *Cooke* v. *Benlow,* (1865) 46 ER 538 : 142 RR 1 (Accounts showing interest being charged); *Barfield* v. *Loughborough,* (1872) 8 Ch. Ap. 1; *Watney* v. *Wells,* (1867) 2 Ch. Ap. 250.
7. *Dinham* v. *Bradford,* (1869) 5 Ch. Ap. 519.
8. *Suleman* v. *Haji Abdul Lateef,* (1930) 58 Cal. 208 : 59 MLJ 121 : (1930) PC 185 : 34 CWN 737 : (1930) ALJ 868; *Umamaheswara* v. *Munuswami,* (1926) 50 MLJ 428 : (1926) MWN 465 : 24 IC 306 : (1926) Mad. 642; *Meymott* v. *Meymott,* (1892) 54 ER 1211 : 135 RR 515.
9. *Hart* v. *Clarke,* (1854) 43 ER 1222 : 108 RR 231; *Turner* v. *Burkinshaw,* (1867) 2 Ch. Ap. 488.

collocation of the words showed that the term "interest expenditure" had reference only to payments actually made for interest to strangers, and did not include interest on subscribed capital.[1]

Though under Section 34, Civil Procedure Code interest can be awarded only at six per cent for the period subsequent to the decree, the Court may award interest at a higher rate up to the date of the decree.[2]

Clause (d)—Interest on advance—Amounts advanced by a partner beyond the capital agreed to be subscribed, are treated as a loan, and therefore ordinarily carry interest.[3] He will not be entitled to interest after dissolution of the partnership has taken place.[4] In a Lahore case, interest on advances was given at the rate of nine per cent; and the Court further held that the partner was entitled to interest from the partnership as a whole, and not merely from the other partners.[5] Under the English law, the standard rate is five per cent, but the Special Committee altered it to six per cent, the Indian standard rate. **[1192]**

Clause (e)—Contribution and indemnity—(i) ***Ordinarily.***—On the theory of mutual agency which underlies the notion of partnership, it would follow that the firm must reimburse a partner as to payments made or liabilities incurred by such partner in the ordinary and proper conduct of the partnership business.[6] And this right to indemnity subsists even though the expense may turn out to have been useless provided the same has been acquiesced in by the other partner.[7] Nor is it lost because the partner who incurred the liability was more to blame than the other partners.[8] Of course, the indemnity will not extend to cases where the liability is in regard to a matter outside the scope of the business,[9] or where it is incurred fraudulently or by wilful neglect to the prejudice of the firm.[10]

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1. *Subramania* v. *Kannappa Chetty,* (1938) Mad. 38.
2. *Jubedabi* v. *Jainabi,* AIR 1975 Karn. 7 : (1975) 1 Karn. LJ 66.
3. *Govinda* v. *Haridas,* (1916) 20 CWN 634 : 23 CLJ 148; *Ram Piyari* v. *Sultan Baksh,* (1928) 3 Lah. 382; *Bhola Shah* v. *Commr of Income Tax,* (1930) 12 Lah. 88 : (1930) Lah. 738.
4. *Chandra* v. *Madhaviah,* AIR 1961 Mad. 478.
5. *Iqbal* v. *Ralla Ram,* (1932) Lah. 389 : 137 IC 162; (Cf.) *Nand Kishore* v. *Official Receiver,* (1938) PC 277 : 178 IC 406 (Loan by one partner to enable other partner to acquire Share—Partner advancing is not a creditor of the firm, but of the individual partner only).
6. *Lefroy* v. *Gore,* (1844) 1 Jo & Lat. 571 : 68 RR 337; *Robinson's Executor's Case,* (1856) 43 ER 1356 : 95 RR 199; *Burden* v. *Burden,* (1813) 35 ER 67 : 12 RR 210.
7. *Cragg* v. *Ford,* (1842) 62 ER 889 : 57 RR 320; *Pawsey* v. *Armstrong,* (1881) 18 Ch. D. 698; *Sedgwick* v. *Daniell,* (1857) 157 ER 132 : 115 RR 561.
8. *Millreath* v. *Margetson,* (1785) 93 ER 880.
9. *Ryall* v. *Rolle,* (1749) 26 ER 107; *Re. Webb,* (1818) 129 ER 455 : 20 RR 520.
10. *Thomas* v. *Atherton,* (1878) 10 Ch. D. 185.

(ii) IN AN EMERGENCY.—[See also Commentary under Sec. 21 *infra*.]. Where for the preservation of the business or the property of the firm, the partner incurs expenses in an emergency, the firm is bound to reimburse him.[1] **[1193]**

The claim to contribution is not lost on the ground of illegality,[2] unless the partnership itself is illegal.[3] But it may be lost by virtue of any agreement between partners whereby the partnership effects are to be divided into separate property of each.[4]

Clause (f)—Wilful neglect of partner :—Though the English Act has no corresponding provision, the law on the point is the same. On this point, the Special Committee said that as Secs. 26 and 27 *infra* make the whole firm liable for wrongful acts of partners, it was necessary to provide for a right of indemnity to the partners for loss caused by the wrongful acts or omissions of a partner. They defined the term 'wilful neglect' as meaning that decree of neglect shown by abstention from an obvious day, attended by knowledge of the likely results of the abstention. The draft Bill had put 'fraud' by a partner on a footing with 'wilful neglect'. But the Select Committee thought it improper that anyone should be permitted to contract himself out of liability for fraud, and therefore deleted the word 'fraud', providing for it in an independent section.[5] (Sec. 10 *supra*).

The expression 'wilful neglect' has been much canvassed in railway cases. It implies deliberate abstention from doing a particular act, which the party knew, ought to be done.[6]

The question whether the facts established amount to wilful neglect or not is one of law.[7]

14. The property of the firm—Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the

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1. *Ex parte Chippendale,* (1854) 43 ER 415 : 102 RR 7; *Barden* v. *Barkus,* (1862) 45 ER 1098 : 135 RR 19.
2. *Campbell* v. *Campbell,* (1840) 7 ER 1030.
3. *Aubert* v. *Maze,* (1801) 126 ER 1333 : 5 RR 624.
4. *Holroyd* v. *Griffths,* (1856) 61 ER 966.
5. *Robertson* v. *Southgate,* (1848) 67 ER 1276 : 77 RR 227; *Bury* v. *Allen,* (1845) 63 ER 556 : 66 RR 200.
6. *Ardeshir* v. *Agent, G.I.P. Ry.* (1928) 52 Bom. 169 : 30 Bom. LR 275 : 32 CWN 544 : 26 ALJ 545 : (1928) MWN 938 : 27 LW 667 : (1928) PC 24 : 54 MLJ 167.
7. *Secretary of State* v. *Ghanayalal,* (1928) 10 Lah. 329 : 111 IC 523 : (1928) Lah. 837.

purposes and in the course of the business of the firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm.

Analogous law—Sec. 21 of the English Act runs thus:

> "21. Unless the contrary intention appears, property bought with money belonging to the firm if deemed to have been bought on account of the firm".

Partnership property—The section specifically includes the goodwill among the property of the firm, so that it will, subject to any contract between the partners, be included automatically in all accounts for the determination of shares.[1] **[1182]**

The expression "purchase or otherwise" would mean that the property is to be purchased or is to be obtained by gift, by surrender or by any other means which resembles the expression purchase and therefore the term otherwise as used in Sec. 14 of the Act is to be read *'ejusdem generis'* with the term purchase.[2]

The term 'partnership property' is generally used to denote everything to which the firm, (*i.e.*), all the partners *qua* partners can be considered to be entitled. It should however be remembered that though persons may be entitled jointly or in common to property, and the same persons may happen to be partners, yet the property may not be partnership property.[3] For instance, where a legacy is made in favour of the persons who are partners in a certain business, these persons are entitled in common to the legacy, but the legacy will not on that account become partnership property.[4]

The real test as to whether any property is partnership property is, among other things, the agreement between the parties, and in its absence, the circumstances in which the property was acquired, and the mode in which it has been dealt with by the parties. Furthermore, it is open to partners by

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1. *Addanki Narayanappa* v. *Bhaskara Krishnappa,* AIR 1966 SC 1300 : 1966 (2) SCJ 490; *Vali Pattabhirama Rama Rao* v. *Sri Ramanuja Ginning & Rice Factory (P) Ltd.,* AIR 1984 AP 176.
2. *Rajesh Kumar Agrawal* v. *Virendra Kumar Agrawal,* AIR 1994 All. 135 : 1994 All. CJ 79 : 1994 (1) Civ. LJ 455 : 1993 (3) Cur. CC 434.
3. *Lachhman Das* v. *Gulab Devi,* (1936) All. 270 : 162 IC 143; *Vraj Kuwar Bai* v. *Kunjbiharilal,* AIR 1971 MP 109 : 1971 MPLJ 44.
4. *Morris* v. *Barrett,* (1829) 148 ER 1228 : 53 RR 246.

agreement among themselves to convert what is the joint property of all into the separate property of one or more, and *vice versa.*

Any property including immovable property can be contributed by an individual partner of the firm, and such property will be treated as the property of the firm and for this purpose no formal written or registered document is necessary.[1]

Where a person is granted a lease of certain right by the Government forms a partnership and retires subsequently from the partnership, the leasehold right cannot be said to be the partnership property.[2]

The personal property of a partner although it is used in the business of partnership cannot be regarded as the property of the partnership in the absence of any agreement to that effect.[3]

All property thrown into the common stock at the beginning of the partnership and added thereto during the continuance of the partnership or obtained by means of the partnership, whether directly by purchase or otherwise by employment in trade belongs to the firm unless the contrary is shown. By virtue of Section 14 property can be thrown into the partnership stock without any formal document so as to make it the property of the firm.[4] As an ordinary rule, property bought with money belonging to the firm is deemed to have been ought on account of the firm.[5] Where a partner brings in his personal assets into partnership firm as his contribution to the capital, his exclusive ownership to the assets is substituted by the shared rights in it with the other partners of the firm.[6] For instance, the money payable under a life policy of a partner, effected with partnership funds has been held to be partnership property.[7] And as was pointed out in *Sudarsanam Maistri* v. *Narasimhulu,*[8] where in the case of a partnership, there is no proof that from time to time assets of the partnership were by agreement withdrawn from the partnership and converted into property to be owned by the partners as

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1. *Kallepally Krishnam Raju* v. *Commissioner and Inspector General of Registration and Stamps, AP, Hyderabad,* 2007 (4) ALD 523.
2. *Ganapati Salt Works* v. *State of Gujarat,* AIR 1995 Guj. 61, 67.
3. *Sujan Suresh Sawant* v. *Dr. Kamalakant Shantaram Desa,* AIR 2004 Bom 446.
4. *Ramanathan Chettiar* v. *Controller of Estate Duty,* (1975) 99 ITR 410; *K.D. Pandey* v. *C.W.T.* (1977) 108 ITR 214.
5. *Bank of England Case,* (1861) 45 ER 1029 : 130 RR 276; *Appaya* v. *Subbarao,* ILR (1938) Bom. 102 : 39 Bom. LR 1214 : (1938) Bom. 108 (Debts due to firm are partnership property).
6. *M/s. Shivraj Fine Art Litho Works* v. *Purushottam,* AIR 1993 Bom. 30.
7. *In re. Adarji Mancherji,* (1931) 55 Bom. 795 : 133 IC 845 : (1931) Bom. 428.
8. (1901) 25 Mad. 149. (Cf.) *Tajammal* v. *Ahmad Ali,* (1937) Oudh 438 (441); *Nerot* v. *Burnand,* (1847) 38 ER 798; *Ismail* v. *Tavaballi,* (1929) Sind 182; *Amirchand* v. *Jawahir,* (1916) 32 IC 853.

co-owners, any property bought in the name of one partner and paid for by the firm or from the profits of the partnership business will be *prima facie* partnershi property. The fact that the property stands in the name of one of the partners only is immaterial.[1] But the presumption may be rebutted by proof that at the time of investment, the money, though it came from the partnership funds, had been lent to a partner, and so was not partnership money.[2] But where a partner looking after the business of partnership firm purchased property drawing huge sum of money from partnership account without the consent of other partners, mere non inclusion of property in the income tax assessment register of firm maintained under his supervision, *per se* does not prove that the property was not purchased for the interest and benefit of the firm but for his personal interest in his personal capacity.[3]

It should be further remembered that property used for partnership purposes is not necessarily partnership property. Property belonging to a partner does not become partnership property by being used for purposes of the partnership.[4] There must be some evidence of an intention to treat the property as part of the capital of the business. A person on becoming a partner in a partnership cannot said to lose his separate existence from partnership and merely because he has opted to become a partner in a partnership his individual properties other than partnership property belonging to him cannot be treated as assets of partnership.[5] Thus, the premises wherein the business is carried on may be the separate property of one of the partners.[6] In an Allahabad ruling, where a partnership firm was styled "Saraiya Sugar Factory", the Court held, having regard to the meaning of "factory" that the premises where the business was carried on formed part of the partnership property.[7] In *Steward* v. *Blakeway,*[8] where co-owners of a piece of land used it for carrying on jointly a quarrying business, the land was held not to be partnership property. In *Ex parte Owen,*[9] where a grocer who had stock-in-

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1. *Smith* v. *Smith* (1800) 31 ER 539 : 5 RR 22; *Robley* v. *Brooke* (1833) 5 ER 705 : 38 RR 1; *Ex parte Hinds,* (1850) 64 ER 629 : 149 RR 700; *Forster* v. *Hale,* (1798) 31 ER 603 : 4 RR 128. *Boda Narayana Murthy & Sons* v. *Valluri Venkata Suguna,* AIR 1978 AP 257 : (1977) 2 An.WR 480.
2. *Smith* v. *Smith,* (1800) 31 ER 539 : 5 RR 22. **See** *Gurbax Rai* v. *Punjab National Bank,* AIR 1984 1012 : (1984) 3 SCC 96 : 1984 UJ 439 (2).
3. *Mohanlal Bahri* v. *K.L. Bahri,* AIR 1998 All. 247, 250.
4. *Boda Narayana Murthy & Sons* v. *Valluri Venkata Suguna,* AIR 1978 AP 257 : (1977) 2 An. WR 480.
5. *Shashi Kapila* v. *R.P. Ashwin,* (2002) 1 SCC 583.
6. *Peacock* v. *Carter,* (1912) 1 Ch. 663; *Burden* v. *Barkus,* (1862) 45 ER 1098 (Lease of a coal mine).
7. *Sunder Singh* v. *I.T. Commissioner,* ILR (1938) All. 638 : (1938) ALJ 610 : 177 IC 260 : (1938) All. 452.
8. (1869) 6 Eq. 479.
9. (1851) 64 ER 865 : 87 RR 840; **see also** *Re. Streetfield Lawrence & Co., Bank of England Case,* (1861) 45 ER 1029 : 130 RR 261; *Collins* v. *Jackson,* (1862) 54 ER 1289 : 135 RR 581.

trade and house-hold furniture at his place of business, took two partners, and brought in the firm name new stock, a question arose on the bankruptcy of the firm to whom the stock-in-trade was partnership property, but not the house-hold furniture. But in *Robinson* v. *Ashton,*[1] it was ruled that where a partner brings certain property into the common stock as part of his capital it becomes partnership property.

Cases are also possible where the partnership is limited to the profits of property owned in common. here, for example, tenants in common of land, work it as partners, sharing the expenses and he profit and loss, there will be a partnership, but the land will not belong to the partnership or firm. In regard to the land, the partners are in the position of co-owners only.[2] In such cases, where land is purchased out of the profits by co-owners (who are partners in respect only to the profits) the land so purchased belongs to them as co-owners and not partners.[3] In *Jamnabai* v. *Fazalbhoy,*[4] where certain properties were purchased by the partners, the Judicial Committee found as a fact that the buildings were not treated as partnership assets at all, and therefore held that the parties were, so far as those properties were concerned, only co-owners.

Again, as said already, partners may, by agreement, convert partnership property into the separate property of a partner and *vice versa.* But the agreement though it may require writing for its validity, must be completely executed.[5] This kind of conversion may happen when a firm and one of its partners are carrying on distinct trades, or when there is a change in the *personnel* of a firm. In *Bolton* v. *Pullar,*[6] Eyre, CJ, said:

> "There can be no doubt that.....partners may by their acts converts the joint property of the general partnership into the separate property of an individual partner or into the joint property of two or more partners or *converso.* And their transactions in this respect will, generally speaking, bind third persons, and third persons may take advantage of them in the same manner as if the partnership were transacting business

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1. (1875) 20 Eq 25.
2. **See** *Brown* v. *Oakshot,* (1857) 53 ER 355 : 116 RR 109; *Steward* v. *Blakeway,* (1869) 4 Ch. Ap. 603; *Jackson* v. *Jackson,* (1804) 32 ER 732 : 53 RR 13 (Lands accessory to and necessary for trading business—Difficulty of severing the profits and the land); *Crawshay* v. *Maule,* (1818) 36 ER 479 : 18 RR 126; *Waterer* v. *Waterer,* (1873) 15 Eq. 402.
3. (Cf.) *Davis* v. *Davis,* (1894) 1 Ch. 393.
4. (1923) PC 184 : 46 MLJ 160 : 18 LW 437 : 77 IC 355 : 40 CLJ 272 : 26 Bom. LR 189.
5. *Ex parte Wheeler,* (1814) 35 ER 387.
6. (1796) 126 ER 1053 : 4 RR 723.

with strangers; for instance, suppose the general partnership to have sold a bale of goods to the particular partnership, a creditor of the particular partnership might take those goods in execution for the separate debt of that particular partnership".

In *Ex parte Ruffin,*[1] there was a partnership of two persons in respect of a brewery business. That was dissolved by articles, which provided for the assignment of the buildings, stock-in-trade, debts and effects to one of them by the other who retired. On the bankruptcy of the assignee partner some of the debts of the partnership were sought to be recovered out of what had been partnership property. It was held that there had been a conversion of the partnership property into separate property.

It should however be mentioned that such conversions will be valid only if they are made *bona fide,* without any motive of defeating or delaying creditors.[2]

No partner can use partnership property for his private purposes or for getting a private advantage for himself.[3]

Partners can by agreement convert partnership property into the separate property of an individual partner and *vice versa.*[4]

Where the plaintiff partnership firm claimed its ownership by virtue of the partnership deed, the defendant erstwhile partner cannot deny the legality and validity thereof on the ground that the document is a sham one and interpolated at no point of time the said partnership was acted upon since the defendant has failed to challenged seriously apart from advancing flimsy defence specifically asking for any relief seeking cancellation of the document either by filing a cross suit or making any counterclaim in the instant suit itself.[5]

Goodwill—[See also under Sec. 55 *infra*]. The term is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and

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1. (1801) 31 ER 970 : 5 RR 237. **See also** *Ex parte Williams,* (1805) 32 ER 988 : 8 RR 62; *Nihchalsing* v. *Vishenji,* (1928) Sind 71.
2. *Ex parte Mayou,* (1865) 46 ER 1076 : 146 RR 509; *Ex parte Walker,* (1862) 45 ER 1281 : 135 RR 266.
3. *Vraj Kuwar Bai* v. *Kunjbiharilal,* AIR 1971 MP 109 : 1971 MPLJ 44. *Gurbax Rai* v. *Punjab National Bank,* AIR 1984 SC 1012. (1984) 3 SCC 96 : 1989 UJ 439 (2).
4. *Buban Mohan* v. *Surendra Mohan,* AIR 1951 Cal. 69 (FB).
5. *Broadway Centre* v. *Gopaldas Bagri,* AIR 2002 Cal. 78 : 2002 Cal WN 605 : 2002 Civil Court C 472 : 2002 (4) Rec Civ R 733.

improve it.[1] Lord Macnaughten said in *Trego* v. *Hunt*,[2] "It is the whole advantage, whatever it may be, of the reputation and connexion of the firm which may have been built up by years of honest work or gained by lavish expenditure of money". It is that competent of the total value of the undertaking which is attributable to the ability of the concern to earn profits over a course of years because of its reputation, location and other features.[3] The sale of goodwill implies the probability that the old customers will resort to the old place, that is, to the established business wherever it may be situated.[4]

The Partnership Act has specifically included the goodwill among the property of the firm, which will, therefore, subject to any contract between partners, be included in all accounts for determining shares.[5] In a partnership where, any share of goodwill is excluded by agreement between the parties, such exclusion does not automatically amount to the exclusion of assets.[6]

Whether the goodwill has a saleable value or not is a question of fact in each case. The term has no meaning except in connection with a continuing business. In so far as it has any saleable value, the goodwill of a firm is property, and subject to agreement, all partners are entitled to share in it. The share is descendible to the legal representative of the partner. Where it is simply agreed that a partnership should be dissolved, it will be open to a partner to use the old firm name but not so as to subject the retired partner to any liability.

Goodwill is generally valued at so many years' purchase on the amount of profits.

15. Application of the property of the firm.—Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

Scope.—The section has no analogue in the English Act. It provides for the application of the property of the firm, only for the purposes of the business,

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1. Lindley on Partnership (10th Edn. 1935); p. 23.
2. (1896) AC 7; **see also** *Wedderburn* v. *Wedderburn*, (1856) 52 ER 1039 : 111 RR 267; *Inland Revenue Commissioners* v. *Muller*, (1901) AC 217; *Crutwell* v. *Lye* (1810) 34 ER 129 : 11 RR 93; *Haji Abdul* v. *Suleman*, (1929) Sind 85 : 110 IC 639.
3. *Khushal Khemgar Shah* v. *Khorshed Banu*, AIR 1970 SC 1147 : (1971) 1 SCJ 443.
4. *State of Rajasthan* v. *Bundi Electric Supply Co. Ltd.*, AIR 1970 Raj. 36 : ILR (1969) 19 Raj. 340.
5. *Suleman* v. *Badul Latif*, (1930) 58 Cal. 208 : 34 CWN 737 : (1930) ALJ 868 : (1930) PC 185 : 59 MLJ 121; *Ramakrishna* v. *Muthuswami*, (1929) 52 Mad. 672 : 56 MLJ 657 : (1929) Mad. 456 : 121 IC 609. **See** *Mehru Belgam Vala* v. *G. Bell & Co.*, AIR 1983 Mad. 351.
6. *Shri Chemical Corpn. Ahmedabad* v. *Miraben Prafulbhai Contractor*, AIR 2001 Guj 171, 174.

and a partner who violates the rule is bound to bring the profits into hotchpot.[1] It is not open to a partner to take any portion of the partnership property and say that it is his exclusively.[2] Once, on the agreement a partnership is made out Sec. 15 would become applicable and the money would become the firm's property and could not be transferred to a stranger.[3]

Remedy.—A partner using partnership assets for pushing on a private business of his own may by restrained by injunction.[4]

16. Personal profits earned by partners—Subject to contract between the partners—

(a) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm;

(b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.

Analogous law :—Secs. 29(1) and 30 of the English Act run thus—

"29 (1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name or business connection.

30. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business".

Clause (a)—Accountability for private profits.—Under clause (a) a partner has to account to the firm for any benefit derived by him from

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1. *Gardner* v. *McCutcheon,* (1842) 49 ER 446.
2. *Lingem* v. *Simpson* (1824) 57 ER 236 : 24 RR 249; *Gopala Chetty* v. *Vijayaraghvachariar,* (1922) 45 Mad. 378. (1922) MWN 386 : 16 LW 200 : 43 MLJ 305 : 24 Bom. LR 1197 : 36 CLJ 308 : 26 CWN 977 : 94 IC 621 : (1922) PC 115.
3. *Champaran Cane Concern* v. *State of Bihar,* (1963) 49 ITR (SC) 152.
4. *Clements* v. *Norris* (1878) 8 Ch. D. 129.

any transaction affecting the partnership. Thus the benefit of the renewal of a building, in which the partnership business was being carried, for his own benefit will appertain to the benefit of all the partners if they so desire.[1] On this question, in *Chennuru Gavararaju* v. *Sitaramamurthy,*[2] the Supreme Court observed: "On a close examination of the English precedents it will be found that there is no absolute rule of law or equity that a renewal of a lease by one partner, must necessarily enure for the benefit of all the partners. There is a presumption of fact as distinguished from a presumption of law, that there is an equity in favour of the renewal of the lease enuring for the benefit of all the partners. But such a presumption being one of fact is rebuttable and must depend upon the facts and circumstances of each case." As mutual trust and good faith lie at the root of a partnership, it must follow that a partner ought not to make for himself any private advantage at the expense of the partnership. Of course, to render him liable the profit made must be traceable to some use of the property or business connection of the firm or of the firm name. **[1204]**

Sec. 88 of the Trusts Act also lays down that any advantage gained by a person in a fiduciary position (*e.g.*) the partner is to be held for the benefit of the other person (*i.e.*) the beneficiary.

(i) TRANSACTION OF THE FIRM—If, for example, a partner is buying or selling for a firm, he cannot sell to it or buy from it, at a profit to himself. In *Bentley* v. *Craven,*[3] where a partner employed to purchase goods for the firm, supplied at market rate, goods bought by himself when prices were lower, he was held accountable for the profit made. Where the parties had agreed to buy a mine with a view to resale at a profit, and it was arranged that the defendant should sell it to certain third parties for a sum named, and the profit was to be divided equally, it was held that the defendant who had secretly sold it for more than the sum named was liable to account for the difference.[4]

(ii) USE OF PARTNERSHIP PROPERTY—As Lindley says,[5] a high standard of honour requires that no partner shall derive any exclusive

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1. *Debi Pershad* v. *Jai Ram,* AIR 1952 Pat. 284.
2. AIR 1959 SC 190 : 1959 Supp. (1) SCR 73.
3. (1853) 52 ER 29 : 104 RR 373. **See also** *Kuhlirz* v. *Lambert* (1913) 108 LT 565; *Olympia Ltd. In re,* (1898) 2 Ch. 153 (Interest on secret profit); *Gordon* v. *Holland,* (1913) 108 LT 385.
4. *Dunne* v. *English,* (1874) 18 Eq. 524. **See also** *Fawcett* v. *Whitehouse,* (1829) 39 ER 51 : 32 RR 163 (Partner getting commission on purchase of property for the firm); *Clegg* v. *Edmondson,* (1857) 44 ER 593 : 114 RR 336; **but see** *Bevan* v. *Webb,* (1905) 1 Ch. 620 (Rule does not apply to purchase of a reversion on a lease not renewable by custom or contract).
5. Lindley on Partnership, 10th Edn. (1935) p. 376.

advantage by the employment of the partnership property or by engaging in transactions in rivalry with the firm.

In *Gardner* v. *Mc' Cutcheon,*[1] plaintiff and defendant were part owners of a ship and employed it for the common benefit. But the defendant, who happened to be also the master of the ship, traded on his own account and made profit. The Court held he was bound to account for it to his partner. In a converse Indian case, where a partnership in a ferry had come to an end because the ferry itself had become unworkable and one of the partners thereafter started a new ferry at a different place with new boats, the Court had no difficulty in holding that the defendant was not accountable to his quandom partners.[2]

In the absence of evidence to show that a partner had derived a benefit for himself from any transaction of the partnership business or from the use of any property or business of the partnership or its name, knowledge and information derived by him from the partnership business the impugned benefit cannot be regarded as property of the partnership.[3]

(iii) USE OF BUSINESS CONNECTION OF THE FIRM— In the well known case of *Featherstonhaugh* v. *Fenwick,*[4] two partners who got a 'clandestine' renewal of a lease of the partnership premises, in fraud of a co-partner, were directed, in taking accounts, to treat the lease as part of the property of the firm. Similarly in *Clegg* v. *Fishwick,*[5] the administratrix of one of several partners in a coalmine was held entitled to the benefit of a secretly renewed lease by the other surviving partners. The ground of decision in cases of this kind is that the renewed lease is *prima facie* looked on as a graft on the original interest and subject to the same trusts or limitations.[6] In *Clegg* v. *Edmondson,*[7] where, in a case of partnership at will, the managing partners gave notice of dissolution, and openly renewed the partnership lease, it was held that the benefit of the lease enured also in favour of the other partners. In what is known as *Archer's case,*[8] a director of a company who had made a secret arrangement with the promoter of a projected company was held accountable for the benefit received under the agreement. *Russell* v. *Austwick,*[9] illustrates

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1. (1842) 49 ER 446 : 55 RR 154. **See also** *Burton* v. *Wookey,* (1822) 65 ER 1131 : 23 RR 249; *Williamson* v. *Hine,* (1891) 1 Ch. 390; *Gokul Krishna Das* v. *Sashimukhidasi,* (1911) 16 CWN 299 : 15 CLJ 204 : 13 IC 23.
2. *Mahommed Khalilur* v. *Janardan Prasad* (1934) Pat. 264 : 149 IC 124.
3. *Rattan Lal* v. *Jai Janider Parshad,* AIR 1976 Punj. 200 : 78 Pun.LR 56.
4. (1810) 34 ER 115 : 11 RR 77
5. (1849) 41 ER 1278 : 84 RR 61. **See also** *Clements* v. *Hall,* (1858) 44 ER 954 : 119 RR 74.
6. *Griffiths* v. *Owen,* (1907) 1 Ch. 195.
7. (1857) 44 ER 593 : 114 RR 336.
8. (1892) 1 Ch. 322; (Cf.) *Powell & Thomas* v. *Evans Jones,* (1905) 1 KB 11.
9. (1829) 57 ER 498 : 27 RR 157.

the position that where a partner's connection with the firm enables him to acquire gain, he cannot take it himself on the ground that it arose from a transaction with which the firm as such had nothing to do.

In one case before the Madras High Court,[1] the question arose whether a renewal of a lease by a partner in his own name enures for the benefit of the partnership and whether independently of any contract of understanding between the partners and apart from proof of misconduct on the part of the partner who took the renewal, the other partners could have the benefit of the new lease, on the principle of equity embodied in Sec. 88 of the Trusts Act. The argument founded on *Bevan* v. *Webb*,[2] was, that when part of the assets of a firm consists of leasehold premises, "one partner cannot take a new lease of those premises and then insist on keeping that for his own benefit". The Court after a detailed examination of the English cases, showed that the Statute Law in India has not deviated from the rules of the English law and held that in case of partners, there was no absolute rule of law or irrebutable presumption in respect of renewals of leases taken by one partner. The Court also pointed out that except in cases otherwise specially provided for the statute, a constructive trust can be held to arise only if the conditions of Sec. 88 or 90 of the Trusts Act are satisfied.

It was further held that in the circumstances existing in this country a general presumption that in obtaining the renewal the partner availed himself of his character will not be justified in cases where the lease is not renewable by contract or by custom.

(iv) USE OF FIRM NAME—It is not open to a partner to use the firm name in furtherance of his own private purposes.[3]

Clause (b)—COMPETING BUSINESS—A partner cannot, without his co-partner's assent, carry on a competing business as against the firm.[4] But the mere fact of one partner carrying on a separate business in breach of his covenant not to engage in such business is no ground for making him accountable to the other partners.[5] Clause (b) cannot be invoked if a partner is doing a business, which does not compete with the business of the firm even if the business is of the same nature. The competition in business must be at the same level in the time dimension.[6] Again it is not competent for

1. *Ramalinga* v. *Ramalinga*, (1938) 2 MLJ 790 : 48 LW 334 : (1938) MWN 854 : (1938) Mad. 929.
2. (1805) 1 Ch. 620.
3. *Aas* v. *Benham*, (1891) 2 Ch. 244.
4. *England* v. *Curling*, (1844) 50 ER 51 : 68 RR 39; *Glassington* v. *Thwaites*, (1823) 57 ER 50 : 24 RR 153.
5. *Kirchner & Co.* v. *Gruban*, (1909) 1 Ch. 413, *Dean* v. *McDowell*, (1678) 8 Ch. D. 345; *Grimston* v. *Cuningham*, (1894) 1 QB 125.
6. *Narottamdas Mayabhai Shah* v. *Anubhai Sarabhai Shah*, (1977) 18 Guj. LR 71.

one partner to acquire the share of another without informing the other partners.[1] In *Trimble* v. *Goldberg*,[2] where three partners bought certain building plots with a view to resale, and two of the partners bought in certain other plots without the knowledge of the third, and the third partner claimed the benefit thereof, it was held that the purchase was in no way a competition with the business of the partnership. In *Mohammed Kamil* v. *Hedayetulla*,[3] it was held that a partner is not bound to account for the profits of a non-competing business, even though he may be enabled to push the private trade better than he would otherwise, by reason of his connection with the firm. [1206]

17. Rights and duties of partners :—Subject to contract between the partners—

(a) After a change in the firm—

Where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be;

(b) After the expiry of the term of the firm, and—

Where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership at will; and

(c) Where additional undertakings are carried out—

Where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings.

Analogous law :—Sec 27 of the English Partnership Act runs thus:

"27 (1) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express

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1. *Cassels* v. *Stewart*, (1880) 6 AC 64.
2. (1906) AC 494.
3. (1926) Cal. 380 : 90 IC 492. **See also** *Pulin Behari* v. *Mahendra Chandra*, (1921) Cal. 722 : 67 IC 10 : 37 CLJ 405.

new agreement the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

(2) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership".

Clause (a)—Change in firm—Effect— The Special Committee said that the sub-section is intended to remove doubts in cases similar to *King* v. *Chuck.*[1]

Clause (b)—Partnership for term continued over—A partnership for a term, which is continued after the expiry of the term, is a partnership at will.[2] And such of the terms and conditions (of the original partnership) as are inconsistent with the incidents of a partnership at will, will cease to be operative.[3] Thus a pre-emption clause is not *per se* inconsistent with the incidents of a partnership at will, and will he operative.[4] Similarly, an arbitration clause will apply.[5] But a right of expulsion will be inconsistent, and will not therefore be operative;[6] so too a right of dissolution on the mortgage or assignment of a partner's share.[7] **[1243]**

Clause (c)—Additional undertakings—Compare Sec. 8, which provides for partnership in particular adventures.

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1. (1853) 51 ER 1059 : 99 RR 159.
2. *King* v. *Chuck,* see supra.
3. *Neilson* v. *Mosend Iron Co.,* (1886) 11 AC 298; (Cf.) *Watson* v. *Haggitt,* (1928) AC 127 : 56 MLJ 91 : 29 LW 581 : 107 IC 459 : (1928) PC 115.
4. *Essex* v. *Essex,* (1858) 52 ER 674; *Cox* v. *Willoughby,* (1880) 13 Ch.D. 863; *Daw* v. *Herring,* (1892) 1 Ch. 284.
5. *Gillett* v. *Thornton,* (1875) 19 Eq. 599.
6. *Clark* v. *Leach,* (1863) 46 ER 163 : 137 RR 247.
7. *Campbell* v. *Campbell,* (1893) 6 The Reports 137 (HL).

CHAPTER IV

Relations Of Partners To Third Parties

18. Partner to be agent of the firm—Subject to the provisions of this Act, a partner is the agent of the firm for the purpose of the business of the firm.

Introduction.—This chapter is, in the main, an elaboration of the conception of mutual agency, which lies at the root of partnership. In this chapter, there is a marked divergence from the English Act, and some new provisions have also been added.

Scope of the section.—This section simply states the general proposition that a partner is agent of the firm for purposes of the firm's business but prefaces it with the words "subject to the provisions of this Act". As observed by Garth, C.J., in *Chundee Churn* v. *Eduljee*,[1] the law which regulates the liability of partners for the acts of their co-partners is a breach of the law of agency. The partner embraces the character of both a principal and agent. **[1214]**

The principle that every partner is an agent of the other partners and where he has acted within the scope of his authority his acts would bind the other partners who would be his principals in such transactions applies even if one of the partners is a sleeping partner.[2]

A specific conferment of power on individual partner in a trading firm to borrow money is unnecessary since each partner is an agent of the firm for the purpose of the business of the firm.[3] It is not absolutely necessary for a creditor to prove that a letter written by a partner stating that the firm was suspending or going to suspend payment to creditors had been written on the express authority given by each of the other partners. If the totality of the circumstances show that the statements in the letter should be taken as an act done on behalf of all the partners, then the consequences that follow should have application to all the partners and not only to the partner who had written the letter.[4]

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1. (1882) 8 Cal. 678. For English cases, **see** *Hawken* v. *Bourne*, (1841) 151 ER 1223; *Cox* v. *Hickman*, (1860) 1 ER 431. Cf. *Mann* v. *Darcy*, (1968) 2 All. ER 172; *C.P. Singh* v. *State of U.P.*, AIR 1956 SC 140.
2. *Wallace Brothers* v. *C.I.T.*, AIR 1948 PC 128.
3. *K.A. Lona* v. *Dada Haji Ibrahim Hilari & Co.*, AIR 1981 Ker. 86. Cf. *Md. Latifulla* v. *Gouhati Bank Ltd.*, AIR 1953 Assam 22. **See also** *Finance Centre* v. *Ram Parkash*, AIR 1977 NOC 269 (J&K) : 1977 Kash. LJ 218.
4. (1981) 94 LW 529.

19. Implied authority of partner as agent of the firm—(1) Subject to the provisions of Section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.

The authority of a partner to bind the firm conferred by this section is called his "implied authority".

(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to—

(a) submit a dispute relating to the business of the firm to arbitration,

(b) open a banking account on behalf of the firm in his own name,

(c) compromise or relinquish any claim or portion of a claim by the firm,

(d) withdraw a suit or proceeding filed on behalf of the firm,

(e) admit any liability in a suit or proceeding against the firm,

(f) acquire immovable property on behalf of the firm,

(g) transfer immovable property belonging to the firm, or

(h) enter into partnership on behalf of the firm.

Analogous law :—Sec. 5 if the English Partnership Act runs thus:

"5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner."

Sub-section (1)—Mutual agency—The Special Committee observed:

> "[This section] contains the important principle in Sec. 5 of the English Act which defines the general extent of a partner's agency, namely, that an act of a partner which (a) is done to carry on business of the kind carried on by the firm and (b) is done in the way usual in such a business, binds the firm..... The second part [in sub-section 1] introduces a convenient term intended to avoid confusion when references are made to the authority of a partner agent.....The word 'implied' is favoured by Lindley and seems to be the most suitable, as the kind of agency contemplated is one which flows from or is implied by the partnership of a partner."

Effect of mutual agency.—In Justice Story's classic work on Agency, the powers of a partner and the limitations on such power have been thus formulated, Sec. 124 runs:

> "Every partner is, in contemplation of law, the general and accredited agent of the partnership, and may, consequently, bind all the other partners by his act in all matters which are within the scope and object of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership, he may borrow money, contract debts and pay debts on account of the partnership, he may draw make, sign, endorse, accept, transfer, negotiate, and procure to be discounted, promissory notes, bills of exchange, cheques, and other negotiable papers in the name and on account of the partnership".

Sec. 125 says:

> "The restrictions of this implied authority of partners to bind the partnership are apparent.....Each partner is an agent only in and for the business of the firm and therefore his acts beyond that business will not bind the firm. Neither will his acts done in violation of that duty to the firm bind it where the other party to the transaction is cognisant of, or cooperates in, such breach of duty".[1]

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1. This language has been adopted by the Judicial Committee in *Bank of Australia v. Breillat*, (1847) 13 ER 642.

Under sub-section (1) any act of a partner's will bind the firm if it is carried on in the usual way.[1]

Essentials.—In order that a partner's acts may bind the firm, the following conditions must be satisfied:

1. The act must have been done by the partner in his capacity as partner.[2] As observed by Scruton, L.J.,[3] "In my view, you cannot rely on the apparent authority of an agent who did not profess in dealing with you to act as agent". Thus, an act done by a partner before he becomes a member of the firm will not bind the firm.[4] The cases of *Saville* v. *Robertson,*[5] and *Gouthwaite* v. *Duckworth,*[6] furnish illustrations of this principle. In both the cases, goods were ordered by a person who had agreed to become a partner, and wee in fact supplied and used for the partnership adventure. But as the order was given before the partnership was formed, no liability could be fixed on the other partners.

2. The act must have been done on behalf of the firm and not on the partner's own behalf.[7]

3. The act must relate to a matter, which is within the scope of the business of the firm. That would be the import of the words "for the purposes of the business of the firm". The case of *Karamali Abdulla* v. *Karimja Jivanji,*[8] illustrates this aspect of the matter. If the matter is out-side the business of the firm, it must be proved either.

   (i) that the particular transaction had been authorised or

   (ii) that the other partners ratified it subsequently.

4. The act must be done in the firm name.[9] [See Sec. 22 *infra*].

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1. *Alagappa Cotton Mills* v. *Indo. Burmah Trading Corporation,* AIR 1976 Mad. 79.
2. *Babu* v. *Gokuldas,* (1930) Mad. 393 : 57 MLJ 404 : 30 LW 657 : 126 IC 97; *Ramachandra* v. *Kasem,* (1925) 28 CWN 824 : 81 IC 513 : (1925) Cal. 29; *Bank of Bombay* v. *Suleman,* (1 903) 33 Bom. 1.
3. *Underwood* v. *Bank of Liverpool,* (1924) 1 KB 775; *Farquharson* v. *King,* (1902) AC 325.
4. *Heap* v. *Dobson,* (1863) 143 ER 864 : 137 RR 602; *Smith* v. *Craven,* (1831) 148 ER 1520: 35 RR 764; *Greenslade* v. *Dower,* (1828) 108 ER 860 : 31 RR 272; *Dickinson* v. *Valpy,* (1829) 109 ER 399 : 34 RR 348 (Partner solely liable to those who supplied him with the share of the capital).
5. (1792) 100 ER 1264.
6. (1810) 104 ER 164 : 149 RR 715.
7. *British Home Assurance Corporation* v. *Paterson,* (1902) 2 Ch. 404; *Underwood* v. *Bank of Liverpool,* (1924) 1 KB 775.
8. (1914) 39 Bom. 261 (PC); *Ex parte Agace,* (1792) 30 ER 145.
9. *Hambro* v. *Hull & London Fire Insurance Co.,* (1858) 157 ER 686 : 117 RR 981.

5. The act must be done to carry on the business in the usual way.[1] On this point, the observations of Lindley,[2] are worth quoting:

> "The question whether a given act can or cannot be said to be done in carrying on a business in the way in which it is usually carried on must evidently be determined by the nature of the business and by the practice of persons engaged in it. Evidence on both these points is therefore readily admissible.....An act which is common in the prosecution of one kind of business in the ordinary way may not be required for carrying on another business of a different character. Consequently no answer of any value can be given to the abstract question—can one partner bind his firm by such and such an act unless, having regard to what is usual in business it can be predicated of the act in question either that it is one without which no business can be carried on or that it is one which is not necessary for carrying on any business whatever".

Where the partnership deed expressly states that any business other than the one specified in deed could be carried on with the consent of partners, the Managing Partners cannot said to have an implied authority to carry on such business in the absence of the consent of the partners.[3]

In case of transfer of immovable property of partnership firm, the power to transfer must be given to the transferring partner expressly.[4]

Implied authority of partner—[The exceptions mentioned in sub-section (2) are dealt with separately].

Accounts—An account rendered by one partner in relation to a partnership transaction is deemed equivalent to an account rendered by the firm.[5]

Power to enter into contracts.—A partner has power to enter into contracts on behalf of the firm, if they are necessary, or are made in the course of carrying on the business of the firm in the usual way.[6] Where a contract was entered into by one of the partners of the firm with Finance Corporation for supply of dal, the contract is binding on the other partners of the firm,

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1. (Cf.) *Mahadeva Aiyar* v. *Ramakrishna Reddiar,* (1926) 50 MLJ 67 : 23 LW 199 : (1926) Mad. 114 : (1925) MWN 707 : 92 IC 765.
2. Lindley on Partnership, 10th Edn., (1935), p. 176.
3. *Kadiyala Seshagiri Rao* v. *Kanneganti Dasaiah,* AIR 2000 AP 263, 266 : 2000 (2) ALD 528 : 2000 (1) LS 352 : 2000 (1) APLJ 497.
4. *Bina Murlidhar Hemdev* v. *Kanhaiyalal Lokaram Hemder,* AIR 1999 SC 2171, 2178 : (1999) 5 SCC 222 : 1999 (5) Supreme 561 : 1999 (3) Scale 730.
5. *Fergusson* v. *Fyffe,* (1841) 8 ER 49 : 54 RR 12.
6. *Mathura Nath* v. *Sree Jukla Bageswari,* (1928) Cal. 57 : 46 CLJ 362 : 106 IC 516.

when the validity of the contract or the authority of the partner to enter into contract was not denied by the other parties nor any objection was raised as to signing of tender by the partner on behalf of the firm, nor any objection was raised as to appropriation by corporation of security deposit made by firm showing that they have ratified the contract.[1]

Power to borrow.—"The sudden exigencies of commerce render it absolutely necessary that a power to borrow should exist in the members of a trading partnership." And, this power was recognised in an early English case.[2] But it exists only where the business is of such a kind that it cannot be carried on in the usual way without such a power. That is, the partnership should be a trading partnership. In *Higgins* v. *Beauchamp,*[3] it has been pointed out that a trading business is one which involves the buying and selling of goods, and that it will be too much to say that every business which necessarily involves the expenditure of money is a trading business. In *Bank of Bengal* v. *Ramanathan Chetty,*[4] in the case of a money lending firm, authority to borrow was held to be implied. In *Asan Kani Rowther* v. *S. Chettiar,*[5] it was held that a managing partner has power of borrowing as incidental to the power to trade. In *Gordhandas* v. *Raghuvirdasji,*[6] it was ruled that in a mercantile trading firm, a partner has implied authority to draw and accept bills of exchange or hundis on behalf of the firm, and that a promissory note executed by the managing partner in the course of the business is binding on the other partner. Similarly in *Jayanti Lal* v. *Popatlal,*[7] where a partner of a firm carrying on cotton pressing business borrowed professedly on behalf of the company, but utilised the money for his private purposes, the Court held the other partners were bound unless they could show that the borrowing partner had no implied power to borrow. In *Maung Pe Thaung* v. *Toungoo Timber Co.*[8] a single Judge of the Rangoon Court held that in the case of a partnership, the business of which requires the raising of money, a partner has implied authority to borrow money and bind the other partners. In *Brooks & Co.* v. *Blackburn Benefit Society,*[9] the House of Lords held overdrawing a banking account is borrowing money.

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1. *Sanganer Dal and Flour Mill* v. *FCI,* AIR 1992 SC 481 : (1992) 1 SCC 145.
2. *Lane* v. *Williams,* (1692) 23 ER 779.
3. (1914) 3 KB 1192. **See also** *Saremal* v. *Punamchand,* (1924) 48 Bom. 176 : (1924) Bom. 260 : 25 Bom. LR 1093 : 77 IC 548.
4. (1915) 43 Cal. 527 : 18 Bom. LR 387 : 30 MLJ 231 : 3 LW 210 : (1916) 1 MWN 150 : (1915) PC 121.
5. (1907) 31 Mad. 206 : 4 MLT 66; **see also** *Chothu Bhagat Sewa Ram* v. *Balkishan Das,* (1932) 33 PLR 411.
6. (1932) 34 Bom. LR 1137 : 57 Bom. 176 : (1932) Bom. 539 : 141 IC 676.
7. (1937) Bom. 262 : 39 Bom. LR 343 : 170 IC 147.
8. (1932) 10 Ran. 204 : (1932) Ran. 118; *Mt. Dhanbai* v. *Mt. Daibai,* (1926) Sind 291 : 96 IC 927; (Cf.) *Bengal National Bank* v. *Jatindra,* (1929) 56 Cal. 556 : (1929) Cal. 714 : 33 CWN 412; *Haji Noor* v. *Macleod,* (1907) 9 Bom. LR 274; *Rala* v. *Bhagwan,* (1925) 2 Ran. 367 : 84 IC 391 : (1925) Ran. 630.
9. (1883) 9 AC 857.

Where a firm is a trading firm, it would follow that the lender is under no duty to make inquiries as to the exact limits, if any, of the borrowing partner's authority.[1]

But if money is borrowed by one partner for purposes of increasing the partnership capital, the firm will not be bound unless some actual authority or ratification can be proved.[2]

Similarly, a partner has authority to draw and accept bills on behalf of the firm, and even if such implied authority has been expressly cancelled but the cancellation is not made known to the discounting banks, the discounting banks are entitled to recover against the other partners.[3]

Power to acknowledge debts—Under the English law, one partner is presumed to be the agent of the others for making part payments.[4] An acknowledgment of debt by one partner of the firm shall be binding on all partners of firm and also sufficient to extend the period of limitation.[5] Under the Indian law, Sec. 21, clause (2) of the Limitation Act provides that partners are not chargeable by reason only of an acknowledgment by a co-partner. In construing this section with reference to old Sec. 251, the Calcutta High Court was of the view that Sec. 21 (2) simply means that mere acknowledgment or payment by one or more partners is not of itself sufficient to make the other or others chargeable, apart from the question of authority.[6] The Bombay and Lahore High Courts are of a similar view.[7] The Allahabad High Court holds that the mere fact that persons are partners does not make one partner liable under an acknowledgment by another, but that, if the acknowledgment is made in the course of the partnership business, it will be binding.[8] The Madras

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1. *Saremal* v. *Punamchand,* (1924) 48 Bom. 176 : 28 Bom. LR 1093 : 77 IC 548 : (1924) Bom. 260.
2. *Fisher* v. *Taylor,* (1843) 67 ER 91 : 62 RR 84.
3. *Moti Lal* v. *Unao Commercial Bank,* (1930) MWN 935 : 32 Bom. LR 1571 : 52 CLJ 534 : 35 CWN 1 : 59 MLJ 661 : 32 LW 898 : (1930) PC 238.
4. *Goodwin* v. *Parton,* (1880) 42 LT 568. **See** Lindley Law of Partnership, 831 (14 Ed., 1979).
5. *Oriental Bank of Commerce* v. *M/s. S.R. Kishore & Co.,* AIR 1992 Delhi 174, 180.
6. *Bengal National Bank* v. *Jatindra,* (1929) 56 Cal. 556 : 33 CWN 412 : (1929) Cal. 714.
7. *Gordhandas* v. *Bhulabhai,* (1932) 34 Bom. LR 623 : 138 IC 805 : (1932) Bom. 426 ("Only" in the section means that authority must be proved); *Dalsukhram* v. *Kalidas,* (1910) 26 Bom. 42 (In a going concern, such authority may be presumed); *Abdullali* v. *Ranchodlal,* (1917) 19 Bom. LR 86; *Kuljas Ram* v. *Wishan Singh,* (1932) Lah. 456 : 137 IC 771; *Gulsaran* v. *Brijmohan,* (1939) 41 PLR 90.
8. *Debi Dayal* v. *Baldeo,* (1928) 50 All. 982 : 26 ALJ 1036 : 111 IC 143 : (1928) All. 491; *Lalta Prasad* v. *Babu Prasad,* (1910) 32 All. 51 : 6 ALJ 953 : 4 IC 708; *Gadu Bibi* v. *Parsotam,* (1888) 10 All. 418; *Mansa Ram & Sons* v. *Janki Dass Om Prakash,* AIR 1984 All. 267 : 1984 All.WC 846.

High Court in a Full Bench case has held that where there is nothing more than an acknowledgment by one defendant, the fact that another defendant is his partner cannot affect the latter's liability, but that there must be some authority implied or inferable from the surrounding circumstances.[1]

In any event, the considerations aforesaid have no application in case of dissolution of a firm, and no partner can in the winding up acknowledge a debt,[2] or strike a balance, unless authorised.[3]

Power to bind by negotiable instruments—TRADING PARTNERSHIP—As said already, every member of an ordinary trading partnership has implied power to bind the firm by drawing, accepting or indorsing bills of exchange or by making and indorsing promissory notes in its name, and for the purposes of the firm in the ordinary course of business.

The liability of the firm on negotiable instruments made by a partner is founded on the principle of agency, and the test to be applied as to the binding character is, as has been well put, the apparent authority of the partner than the actual necessity of the firm. So, a *bona fide* holder for value, without knowledge of any infirmity, can exercise in full all his rights under the instrument.

In a Privy Council case, *Moti Lal Manucha* v. *Unao Commercial Bank*,[4] it was held that in a mercantile trading firm a partner has implied authority to draw and accept bills of exchange or hundies on behalf of the firm and that such authority will be negatived only on proof that the holder of the bill knew that it was a private affair of the partner. And in *Saremal* v. *Punamchand*,[5] the Court ruled that where a partner of a trading firm borrows money for the purpose of the business on the credit of the firm, no duty of further inquiry is case on the lender. This principle has been reaffirmed in a later case of the same court.[6]

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1. *Veeranna* v. *Veerabhadraswami*, (1918) 41 Mad. 427 : 34 MLJ 373 : (1918) MWN 285 : 7 LW 552 : 45 IC 18; *K.R.V. Firm* v. *Seetharamaswami*, (1913) 37 Mad. 146 : 25 MLJ 501: 21 IC 634 (Authority cannot be presumed); *Chegamull* v. *Govindaswami*, (1928) Mad. 972 : 112 IC 491; *Mahadev* v. *Ram Krishna*, (1926) 50 MLJ 67 : 23 LW 199 : (1925) MWN 707 : 92 IC 653 : (1926) Mad. 111. **See also** *Sheo Narain* v. *Babu Lal*, (1925) Nag. 268 : 85 IC 775.
2. *Malayandi* v. *Narayan*, (1916) 36 IC 225 (Lower Burma).
3. *Bhanan* v. *Jiwanda*, (1926) Lah. 522 (2) : 95 IC 88; (Cf.) *Ram Rattan* v. *Sobha Ram*, (1929 Lah. 512.
4. (1930) 59 MLJ 661 : (1930) PC 238 : (1930) MWN 935 : 32 Bom. LR 1271 : 34 CWN 1 : 32 LW 898; *Rala* v. *Bhagwan*, (1925) 2 Ran. 367 : 84 IC 391 : (1925) Ran. 630. **See also** *Banarsee Dass* v. *Gholam Hussain*, (1870) 20 ER 585; *Gordhandas* v. *Raghuvirdas*, (1932) 34 Bom. LR 1137 (Rule applies even to non-commercial partnerships). **See** *Nicholson* v. *Ricketts*, (1860) 121 ER 187 : 119 RR 816.
5. (1924) 48 Bom. 176 : (1924) Bom. 260 : 28 Bom. LR 1093 : 77 IC 548.
6. *Jayantilal* v. *Popatlal*, (1937) Bom. 262 : 39 Bom. LR 343 : 170 IC 147.

Where the contract is made by the partnership but the promissory note is signed by a partner in his own name, and not in the name of the partnership, nevertheless, the other partners will be liable.[1] But the partnership will not be liable for a loan by a partner in his *personal* capacity, though the partnership may have had the benefit of it.[2] It has been held that where a partner executes a promissory note in his individual capacity and not on behalf of the firm, he alone will be liable on the note.[3] But where one partner borrows money on a promissory note executed by him alone but the money is borrowed for the partnership business, and is used in such business, all the partners will be liable for the debt.[4]

NON-TRADING PARTNERSHIP.—But with regard to non-trading partnerships, the question of implied authority depends on the nature of the business of the partnership. The power to borrow has not been recognised in the case of solicitors,[5] farmers,[6] auctioneers,[7] and quarry workers.[8]

Power to receive moneys due to firm—Where a debt is owing to a firm, payment of a debt to one partner is good as against the others also.[9] But a set-off of a private debt due from a partner against a debt due to the firm is not valid.[10] Nor can a partner accept in payment of a debt due to the firm, shares in a company, even if fully paid up.[11]

It is open to a partner to release,[12] and give a valid receipt for a debt due to the firm,[13] provided there is no fraud on the other partners.[14] This power

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1. *Venkatachalapathy* v. *Ramakrishnappa*, (1930) Mad. 168 : 123 IC 358. See also *Shanmuganatha* v. *Srinivasa*, (1916) 40 Mad. 727 : 31 MLJ 138; *Maung Aung Gyaw* v. *Haji Dada*, (1918) 42 IC 98 (Even a minor may bind the firm by promise).
2. *Ramchandra* v. *Kasem Khan*, (1925) 28 CWN 824 : 81 IC 513 : (1925) Cal. 29; *Abdul Rahman* v. *Afzal Husain*, (1933) Oudh 259 : 145 IC 233.
3. *Sharanbasappa* v. *Pachappa*, (1933) 35 Bom. LR 68 : 142 IC 837 : (1933) Bom. 101.
4. *Mahendra Chandra* v. *Labanya Kumar*, (1934) 38 CWN 796 : (1934) Cal. 755.
5. *Levy* v. *Pyne*, (1842) 174 ER 586; *Hadley* v. *Bainbridge*, (1842) 114 ER 527 : 61 RR 239.
6. *Greenslade* v. *Dower*, (1828) 101 ER 860 : 31 RR 272.
7. *Wheatley* v. *Smithers*, (1906) 2 KB 321 : (1907) 2 KB 684.
8. *Thicknesse* v. *Bromilow*, (1832) 149 ER 180 : 37 RR 751.
9. *Powell* v. *Brodhurst*, (1901) 2 Ch. 160.
10. *Leverson* v. *Lane*, (1862) 143 ER 111 : 134 RR 530; *Smith* v. *Burridge*, (1812) 126 ER 499 : 13 RR 731; *Ballavidasi* v. *Hara Lal*, (1910) 9 IC 116 : 13 CLJ 234.
11. *Niemann* v. *Niemann*, (1889) 43 Ch.D. 198.
12. *Lal Singh* v. *Dharma Singh*, (1929) Lah. 832 : 109 IC 58 (Son of deceased partner cannot give discharge of a debt due to partnership).
13. *Hamilton* v. *Fordyce*, (1819) 36 ER 723 : 19 RR 125; *Hutchinson* v. *Wild*, (1872) 107 ER 1252.
14. *Arbuthnot* v. *Smith*, (1820) 4 Moore C.P. 192 : 21 RR 740. See also *Chinnamanadu* v. *Padmanabha*, (1894) 18 Mad. 471; *Sheik Ibrahim* v. *Rama*, (1911) 1 MWN 442.

extends even after dissolution.[1] And in the absence of collusion between the partner and the debtor such release will be valid and binding.[2] Similarly, a partner can settle an account between the partnership and a third person.[3] He may also strike balances in the firm account.[4] Similarly, he can assign a debt due to the firm.[5]

It has been held that the right to avoid a fraudulent release by one partner is personal to the other partners and their legal representatives have no such right.[6]

Power to pledge partnership property.—In *General Auction Estate* v. *Smith,*[7] it was held that a power to pledge partnership property is incidental to a power to borrow for partnership purposes. The implied power to pledge has been held to extend also to pledges for antecedent debts.[8]

Power to purchase and sell.—It has been long settled that every member of an ordinary trading partnership has implied power to purchase on the credit of the firm goods necessary for carrying on its business in the usual way.[9] The case of *Bond* v. *Gibson,*[10] in which one member of a partnership of harness-makers bought a number of bits on the credit of the firm, but pawned them for his private use, and the firm was held liable, is an illustration of this.

It has been held that this power to purchase on the credit of the firm is available even in case of non-trading partnerships.[11] Any partner can dispose of any of the partnership goods.[12]

Power to give guarantees—Lindley says [13] :

"Generally speaking it is not usual for persons in business to make themselves answerable for the conduct of other

1. *Annamalai* v. *Annamalai,* (1919) 10 LW 67 : 52 IC 456 (2).
2. *Diwan Chand* v. *Ram Das,* (1931) 12 Lah. 270 : (1931) Lah. 136; *Chinnaramanuja* v. *Padmanabha,* (1896) 19 Mad. 471; *Sheik Ibrahim* v. *Rama,* (1911) 1 MWN 442; *Veeraswami* v. *Ibramsay Routher,* (1909) 1 IC 200 : 19 MLJ 221; *Palaniappa* v. *Veerappa,* (1918) 41 Mad. 446 : 34 MLJ 41 : 44 IC 466; *Aspinall* v. *L&NW Ry.,* (1853) 68 ER 1299.
3. *Ram Rattan* v. *Sobha Ram,* (1929) Lah. 512.
4. *Manjunatha* v. *Devamma,* (1902) 26 Mad. 186.
5. *Ex. parte Wright,* (1906) 2 KB 209; *Mamooji* v. *Tayebali,* (1933) Sind 210 : 146 IC 730.
6. *Palaniappa* v. *Veerappa,* (1917) 41 Mad. 446.
7. (1891) 3 Ch. 432. **See also** *Butchart* v. *Dresser,* (1853) 43 ER 619 : 102 RR 269; *Ana Pena Nather Sha* v. *Annamalai Chetty,* (1911) 10 IC 776; *Asan Kani Rowther* v. *S. Chettiar,* (1907) 31 Mad. 206.
8. *Re. Patent File Co.,* (1870) 6 Ch. 83; *In re. Clough,* (1885) 31 Ch.D. 324.
9. *Hyatt* v. *Hare,* (1698) 90 ER 543.
10. (1808) 170 ER 923 : 10 RR 665.
11. (Cf.) *Gardiner* v. *Childs,* (1837) 173 ER 524.
12. *Lambert's case,* (1614) 78 ER 142.
13. Lindley on Partnership (10th Edn., 1935), p. 198. **See also** *Brettel* v. *Williams,* (1849) 154 ER 1363 : 80 RR 726; *Sandilands* v. *Marsh,* (1819) 106 ER 511; *Ex. parte Harding,* (1880) 12 Ch.D. 557.

> people.....Unless it can be shown that the giving of guarantees is necessary for carrying on the business of the firm in the ordinary way, one of the members will be held to have no implied authority to bind the firm by them."

Miscellaneous.—Among other implied powers of a partner are the power to engage and dismiss servants for the business,[1] to insure the firm's goods and also goods entrusted to the firm,[2] to engage lawyers to defend actions against the firm,[3] etc.

Clause (2)—No implied authority.—The Special Committee said that this clause has no statutory precedent but has been extracted from Lindley's treatise on Partnership, where it deals with the extent and limitations of a partner's powers, and that the selection has been made with a view to suit Indian conditions.

The provisions in Section 19 (2) are a statutory presumption of the terms of the contract between the parties, which is rebuttable. The restrictions imposed are for the benefit and in the interests of the partners. It is open to them to relax or waive the restrictions.[4]

It may be mentioned that there was a sharp cleavage of opinion in the Special Committee as to the question of retaining or scrapping this sub-section in its entirety. While those who were for retaining it argued that the rules enunciated being the result of prior decisions in England may be useful guide in India, especially in Courts which do not possess an extensive library, those who were for deleting the clause pointed out that most of the rules were due to the accidents of legal development in England and that it was not desirable to confine the discretion of Courts by set rules as to the binding or non-binding nature of particulars acts.

But, ultimately the clause was retained for the short reason that its deletion will be a simple matter for the Legislature.

[Section 19(2)] makes it clear that under there was an express authority given to a partner by all the partners, that partner cannot compromise the claim or withdraw a suit. To file a suit and to conduct the same on behalf of the firm, no express authority was necessary.[5]

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1. *Donaldson* v. *Williams,* (1833) 149 ER 432 : 38 RR 613; *Beckham* v. *Drake,* (1841) 152 ER 35 & 823 : 81 RR 301 (Main question was whether right of action for wrongful dismissal passes to assignee in bankruptcy).
2. *Hooper* v. *Lusby,* (1814) 171 ER 22; *Armitage* v. *Winterbottom,* (1840) 133 ER 276 : 30 RR 309.
3. *Tomlinson* v. *Broadsmith,* (1896) 1 QB 386.
4. *S.N. Soni* v. *Taufik Farooki,* AIR 1976 Delhi 63; *Ram Bahadur Thakur Das* v. *Thakur,* AIR 1958 All. 522.
5. *Chainraj Ramchand* v. *Narayanaswamy,* (1982) 1 MLJ 368.

(a) **To submit a dispute to arbitration.**—This clause reproduces *Stead* v. *Salt*,[1] which has been followed in India.[2] No partner would have implied authority to submit disputes to arbitration.[3] Submission to arbitration by a partner can bind the co-parceners only upon proof that they have authorised it beforehand or have subsequently adopted or ratified it.[4] It has however been held a submission to arbitration though signed only by a managing member of a partnership is valid,[5] and that the special authority to refer to arbitration may be either express or implied from the circumstances of the case.[6]

The partner actually referring the dispute to arbitration will, in any case, be bound by the subsequent award,[7] and others may, by ratification, become bound also.[8] It has also been held that when one partner has in good faith submitted the claim of a third party against the firm to arbitration, and has had to pay in accordance with the award, he is entitled to contribution from the other partners provided the award was not vitiated by any illegality.[9]

Where a dispute arising between the partners whether the firm can be dissolved is referred to an arbitrator as provided in the partnership deed clause, the arbitrator has to determine the matter not only in the light of the clauses of partnership deed but also by applying the law applicable and governing the rights and liabilities of partners.[10]

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1. (1825) 130 ER 452 : 28 RR 602.
2. *Rajendra* v. *Panna Lal*, (1932) 36 CWN 8 : (1932) Cal. 343; *Bhegwan* v. *Hiroji*, (1932) 34 Bom. LR 1112 : (1932) Bom. 576; *Jaskaran* v. *Ramchand*, (1934) PLR 417 : 148 IC 1080 : (1934) Lah. 483; *Diwan Chand* v. *Punjab National Bank*, (1932) Lah. 798 : 133 IC 558; *Ram Bharose* v. *Kallu Mal*, (1899) 22 All. 135; *Md. Akbar* v. *Dwarkanath*, (1914) 14 CWN 1106; *Chandooru Punnayya* v. *Venugopala Rice Mill*, (1918) MWN 51 : 7 LW 114; *Dattoo* v. *Vallu*, (1899) 1 Bom. LR 828; *Arunachala* v. *Louis Dreyfus*, (1928) Mad. 107; *Firm Radhakishan* v. *Firm Ahsamal*, (1926) Lah. 91 : 92 IC 705; *Firm of Khalsa Bros.* v. *Hari Ram*, (1924) Sind 29 : 83 IC 539.
3. *Krishna Kumar* v. *Knitting Mills*, AIR 1973 Delhi 17 : ILR (1972) 1 Delhi 67 ; *Alagappa Cotton Mills case*, AIR 1976 Mad. 79; *National Small Industries Corporation Ltd.* v. *Punjab Tin etc. Industries*, AIR 1979 Delhi 58 : 1979 Rajdhani LR 289 : ILR (1979) 1 Delhi 381.
4. *Ram Bahadur* v. *Thakur Das*, AIR 1958 All. 522; *Shankar Das* v. *Dominion of India*, AIR 1952 Punj. 234; *Parameshwar Lal & Co.* v. *Jai Narain*, AIR 1952 Punj. 373.
5. *Bishambar* v. *Ganga*, (1923) Lah. 212 : 71 IC 734.
6. *Chandooru Punnayya* v. *Venugopal Rice Mill*, (1918) MWN 51 : 7 LW 114.
7. *Strangford* v. *Green*, (1683) 86 ER 1041.
8. *Thomas* v. *Atherton*, (1878) 10 Ch. D. 185; *Chandooru Punnayya* v. *Venugopal Rice Mill*, (1918) MWN 51 : 7 LW 114.
9. *Venkatachalam Chetty* v. *Ramanathan Chetty*, (1920) 39 MLJ 269 : (1920) MWN 502.
10. *Vijayalakshmi Jayaram* v. *M. R. Parasuram*, AIR 1995 AP 351, 357.

The opening words providing for the recognition of a custom of the trade (in the matter of a partner's competency to refer partnership disputes to arbitration) were added by the Select Committee, as it was represented to them that it was desirable to relax the rule a little, in consideration of the custom of the trade at Calcutta on this matter.

(b) **To open a bank account**—This clause reproduces the case of *Alliance Bank* v. *Kearsley,*[1] which laid down the rule enacted in the section. Where the account is in the firm name, one partner has implied power to bind the firm by cheques drawn on the bankers of the firm in the partnership name.[2]

(c) **To compromise a claim**—In some cases arising under Sec. 251 of the Contract Act, it had been held that one partner may even release a cause of action in which all the partners are interested, provided there is no fraud.[3] It was thought that under the section a partner had more extensive powers than under the corresponding rule in English law.[4] Since the passing of the Partnership Act these cases are no longer of authority. In one Lahore case, the principle of this sub-section was applied in a case under Sec. 251.[5] In *Nagappa* v. *Bhagawanji Rasaji,*[6] where two out of seven partners each acting individually assigned a partnership decree for half its fact value, the Court construed the transaction as a compromise of a debt, and on the principle that authority to give discharge for a debt does not include power to settle the claim as the partner pleased, refused to uphold the transaction. In *Hirachand* v. *Jayagopal,*[7] it was pointed out that, since a partnership firm is not a legal entity like an incorporated company, a conveyance to the firm operates only as a conveyance to the individual partners, and so a release by one partner of property mortgaged to the firm will be ineffectual in the absence of authority. A partner cannot compromise a claim unless express authority has been given to him.[8]

(d) **To withdraw suits**—The Special Committee pointed out that this provision is contrary to the rule in *Harwood* v. *Edwards,* and that it would be unreasonable to hold that a partner cannot compromise a claim by the firm, but that he can withdraw a suit. It has been held that a partner cannot withdraw a suit.[8]

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1. (1871) 6 CP 433.
2. (Cf.) *Laws* v. *Rand,* (1857) 140 ER 812 : 11 RR 739; *Bank of New South Wales* v. *Goulburn Valley & c., Proprietary Ltd.,* (1902) AC 543.
3. (Cf.) *Mangalsen* v. *Firm of Bhagwandas,* (1925) Sind 63 : 80 IC 583; *Diwan Chand* v. *Ram Das,* (1931) 12 Lah. 270 : (1931) Lah. 136 : 133 IC 558.
4. *Nagappa* v. *Bhagwanji Rasaji,* (1936) 59 Mad. 1036 : 43 LW 769 : (1936) MWN 716 : 164 IC 239 : (1936) MWN 716 : 164 IC 239 : (1936) Mad. 593 : 71 MLJ 378.
5. *Ram Niwas Poddar* v. *Diwan Chand,* (1933) Lah. 618 : 144 IC 1. **See** *Chainraj Ram Chand* v. *Narayanaswamy,* AIR 1982 Mad. 326.
6. **See** Note 3 above.
7. (1925) 49 Bom. 245 : 26 Bom. LR 1049 : 89 IC 553 : (1925) Bom. 69. (Cf.) *Raghoonathdas* v. *Morarji,* (1892) 16 Bom. 568.
8. *Chainraj Ramchand* v. *Narayanaswamy,* AIR 1982 Mad. 326 : (1982) 1 MLJ 368; *S.N. Soni* v. *Taufiq Farooki,* AIR 1976 Delhi 63 : 1973 Rajdhani LR 103.

In view of this sub-section, it may be a question whether the cases of *Furnival* v. *Weston,*[1] and *Arton* v. *Booth,*[2] and *Phillips* v. *Clagett,*[3] upholding the release of a claim, in the absence of fraud, are applicable to this country.

(e) **To admit liability**—This sub-section follows *Hambridge* v. *De La Crouee.*[4]

(f) **To acquire immovable property**—This sub-section is in consonance with the English law as laid down in *Sharp* v. *Milligan.*[5] In *Ragoonathdas* v. *Muraraji,*[6] the above case had been followed by the Bombay High Court. But in *Chinna Ramanuja* v. *Padmanabha,*[7] the Madras High Court dissented from the Bombay ruling. The present sub-section gives effect to the Bombay ruling.

In *Raja Ram* v. *Daulat Ram,*[8] where a lease had been signed by one partner alone, but the other partner's conduct showed he had adopted the transaction, the lease was held binding on the partnership.

(g) **To transfer immovable property**—The Special Committee said that this clause is in accordance with *Harrison* v. *Jackson.*[9] But English law recognises that a partner having implied power to borrow on the credit of the firm may make a mortgage by deposit of title deeds.[10]

In *Jaffer Ali* v. *Standard Bank of South Africa,*[11] the Judicial Committee held that a managing partner has power to execute a mortgage of partnership property in order to raise money to carry on the business.

As some members of the Special Committee pointed out, the present clause would make even equitable mortgages by a partner incompetent, because an equitable mortgage would be a transfer within Sec. 58, Transfer of Property Act.[12]

(h) **To enter into partnership with strangers.**—This clause is based on *Singleton* v. *Knight.*[13]

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1. (1822) 7 Moo. 356 : 24 RR 687.
2. (1820) 4 Moo. 192 : 21 RR 740.
3. (1843) 152 ER 725.
4. (1846) 136 ER 297 : 71 RR 471. **See also** *Munster* v. *Cox,* (1885) 10 AC 680.
5. (1856) 52 ER 1242 : 111 RR 501.
6. (1892) 16 Bom. 568.
7. (1896) 19 Mad. 471.
8. (1937) Lah. 715 (Dissenting from the observations of Farran, J., in 16 Bom. 568).
9. (1797) 101 ER 935 : 4 RR 422.
10. *Re Bourne,* (1906) 2 Ch. 427; *Re. Clough,* (1885) 31 Ch.D. 324.
11. (1928) PC 135 : 107 IC 453 : 30 Bom. LR 762 : 49 CLJ 292.
12. **See also** *Imperial Bank of India* v. *Gyaw & Co.,* (1924) 51 Cal. 86 : (1923) PC 211 : 1 Ran. 637 : 45 MLJ 505 : 20 Bom. LR 1279 : 76 IC 910.
13. (1888) 13 AC 788.

(i) **To set off.**—A partner has no implied authority to set-off his own separate debt against the debt due to the firm.[1]

20. Extension and restriction of partner's implied authority.—The partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner.

Notwithstanding any such restriction, any act done by a partner on behalf of the firm which falls within his implied authority binds the firm, unless the person with whom he is dealing knows of the restriction or does not know or believe that partner to be a partner.

Analogous law :—Sec. 8 of the English Partnership Act runs thus,—

> "8. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement".

Extension or restriction of implied authority—The section provides that the partners in a firm may by contract between them extend or restrict the implied authority of any partner.[2] The guiding principle is to leave as much freedom as possible to the partners. Accordingly this section provides that partners may authorise a trusted partner to do necessary acts, which may be in excess of implied authority, or limit the implied authority of an inexperienced partner. As it is but proper that third parties ought not to be made to suffer on account of any restriction of the implied authority, the second paragraph provides that such limitations operate only where the party affected has notice of it.[3] Thus, it has been laid down by the Privy Council in *Rai Saheb Moti Lal* v. *Unao Commercial Bank,* [4] that where the implied authority of the partner to accept hundis has been cancelled, the firm, is fixed with notice of the cancellation. But a third party cannot take advantage of an act, which violates the restriction if he knows of its existence; it will be inequitable in such a case to bind the firm.[5] Similarly, where the third party does not know

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1. *Dali Chand* v. *Mathura Das,* AIR 1958 Bom. 428.
2. *Mushtaque & Co.* v. *C.I.T.,* (1972) 84 ITR 561.
3. *Utankalal* v. *Netai Chandra,* (1932) 58 CLJ 48; *Cox* v. *Hickman,* (1860) 8 HLC 268 : 125 RR 148; *Edmunds* v. *Bushell,* (1865) 1 QB 97 : 148 RR 603 (Private instructions not to accept bills); *Nicholson* v. *Ricketts,* (1860) 121 ER 187 : 119 RR 816; *Holme* v. *Hammond,* (1872) 7 Ex. 233; *Bunarsee Das* v. *Gholam Hossein,* (1870) 20 ER 585; *Saremal* v. *Punamchand,* (1924) 48 Bom. 176 : 25 Bom. LR 1093 : 77 IC 548 : (1924) Bom. 260; *Ghulam* v. *Sohna,* (1927) Lah. 385 : 101 IC 742.
4. (1930) 52 All. 851 : (1930) ALJ 1358 : 35 CWN 1 : 32 Bom. LR 1571 : 59 MLJ 661 : 32 LW 898 : (1930) MWN 935 : (1930) PC 238 : 126 IC 428.
5. *Russo-Chinese Bank* v. *Li Yam Sam,* (1910) AC 174.

or believe the partner to be a partner, no question of binding the firm can arise, because the partner has been dealt with in his personal capacity only. **[1218]**

Where the Partnership Firm received a loan through one of its partners from the plaintiff State Bank of India, the Partnership Firm cannot disown the liability unless it is proved that the partner who has an implied authority to bind the Firm and remaining partners have been restricted to exercise that implied authority.[1]

21. Partner's authority in an emergency—A partner has authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.

Analogous law :—Sec. 24(2) of the English Act runs thus:

"24 (2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him:

(a) in the ordinary and proper conduct of the business of the firm; or

(b) in or about anything necessarily done for the preservation of the business or property of the firm.

English and Indian Law—The English law does not contain any specific provision enabling a partner to bind the firm by acts done in an emergency for the preservation of the business or the property of the firm: but Sec. 24 (2) of the English Partnership Act provides for the indemnity of a partner by his co-partner for anything done for the preservation of the business of property. The indemnity is thus limited to cases where the business is in fact preserved by the partner's act. The Indian Act goes further, and adopts the principle of Sec. 189 of the Contract Act. [*Vide* Commentary on Sec. 189 *ante*]. **[1189]**

22. Mode of doing act to bind firm—In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

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1. *State Bank of India* v. *Simco Engineering Works*, AIR 2005 P&H 63.

Analogous law.—Sec. 6 of the English Partnership Act runs thus:

> "6. An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not is binding on the firm and all partners."

Firm when bound.—Ordinarily, when a person contracts for another, the fact of agency may or may not be disclosed. In the latter case, the other party to the contract has the option to hold the principal liable when he becomes disclosed. In case of a partner entering into a contract in his own name, if, in making the contract, he was acting as the agent of the firm, the other partners will be in the position of undisclosed principals and may therefore be liable on the contract, though not expressly mentioned.[1] Thus in *Induri Pattabhirami Reddi* v. *Kamisetty Balliah,*[2] where two partners signed in their own names, without qualification, a promissory note, but the promissory note was stated to be executed by the partnership, it was held that the name of the firm as the party liable was sufficiently disclosed and that the defendant partner whose name did not appear on the face of the instrument was also liable. But words, which may be construed as merely a description or as showing the designation of the person signing the instrument, will not be sufficient to make the firm liable.[3] **[1214]**

Where a partner took a lease of premises in his own name, the Supreme Court held that he cannot be regarded as having acted on behalf of the firm.[4]

The partners may co njointly transfer immovable property belonging to the firm even if any one of them was individually incompetent. Such a transfer would be subject to the provisions of Section 22 and an instrument of transfer will have to be executed where law requires such execution.[5]

If, however, the partner did not act in his character as agent (of the others [*i.e.*] *qua* partner) but as a principal on his own account, his acts cannot be imputed to the firm, and he alone is liable, though the firm may have benefited by them.[6]

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1. *Beckham* v. *Drake,* (1843) 152 ER 823 (Dormant partner held liable).
2. (1928) 55 MLJ 574 : 29 LW 494 : (1928) MWN 698 : 113 IC 380 : (1928) Mad. 1196.
3. *Atmaram* v. *Notandas, (1930) Sind* 4; *Sitaram* v. *Chimandas,* (1928) 52 Bom. 640 : 115 IC 400 : (1928) Bom. 516.
4. *Devji* v. *Magan Lal,* AIR 1965 SC 139 : 1964 (7) SCR 549.
5. *Ram Narain* v. *C.I.T.,* 73 ITR 423 : (1969) 1 ITJ 719.
6. *British Homes Assn. Corp.* v. *Paterson,* (1902) 2 Ch. 404; *Emly* v. *Lye,* (1812) 104 ER 746: 13 RR 347; *Ramchandra* v. *Kasem Khan,* (1925) 28 CWN 824.

Where, however, moneys borrowed by a partner have been expended for the firm's benefit, the lender is entitled in equity to the payment of the portion so applied.[1]

In the case of negotiable instruments, as a general rule, where the drawing, acceptance or endorsement has not been made expressly by or for the firm, but only personally by a partner, other partner will not be liable.[2] For, the general rule is that no person whose name is not on the bill is liable to be sued upon it. In the case of an instrument executed by an agent, the question to be determined will be, who is the real executant, and is the instrument so drawn in form as to make the executant liable or the principal liable [3] ? In the latter case, the principal's name must be so disclosed that on any fair interpretation of the document, his name is the real name of the person liable.[4]

But, in *Karamali Abdulla* v. *Karinji Jivanji,*[5] the Judicial Committee decided that the mere fact that a bill or note bears only the name of a particular partner and not that of a firm will not relieve the other partners from liability, if such bill or note had been given on account of or for the liability of the firm.

Under English law, the rules on this matter are these. A bill drawn, indorsed or accepted in the name of the firm is regarded as bearing the names of all the persons who actually or ostensibly compose the firm; and so all the partners,[6] dormant partners included, will be liable. As regards bills not drawn in the nature of the firm, a partner has generally no authority to use for partnership purposes any other name than that of the firm,[7] and if he does so and there is an unauthorised variation, the firm will not be liable.[8] But if the

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1. *Lakshmishankar* v. *Motiram,* (1904) 6 Bom. LR 1106; (Cf.) *Reid* v. *Rigby & Co.,* (1894) 2 QB 40; *Baroness Wenlock* v. *River Dee Co.,* (1887) 19 QBD 155; *Blackburn Bldg. Society* v. *Cunliffe Brookes,* (1882) 22 Ch.D. 61; *Bannatyne* v. *Mc Iver,* (1906) 1 KB 103.
2. *Bottomley* v. *Nutall,* (1858) 141 ER 48 : 116 RR 592; *Re. Adansonia a Fibre Co.,* (1874) 9 Ch.Ap. 635; (Cf.) *Sadasukh* v. *Sir Kishen Pershad,* (1918) 46 Cal. 663 : 36 MLJ 429 : 10 LW 143 : (1918) PC 146 : 23 CWN 937; *Subba Narayan* v. *Ramaswami,* (1906) 30 Mad. 88 : 16 MLJ 508; *Venkatachalapathi* v. *Ramakrishnayya,* (1930) Mad.168 : 123 IC 358.
3. *Koyyalamudi* v. *Koduri,* (1926) 50 MLJ 125 : 92 IC 805 : (1926) Mad. 390.
4. *Sadasukh* v. *Krishna Pershad,* (1918) 46 Cal. 663; *Punjab United Bank* v. *Mahomed,* (1934) Lah. 358; *Chapman* v. *Smethurst,* (1909) 1 KB 927.
5. (1914) 39 Bom. 261 : (1914) PC 312 : 17 Bom. LR 103 : 19 CWN 337 : 28 MLJ 515 : 9 LW 133 : 26 IC 915; (Cf.) *Shanmuganatha* v. *Srinivasa,* (1916) 40 Mad. 727.
6. *Edmunds* v. *Bushell,* (1865) 1 QB 97; *Stephens* v. *Reynolds,* (1860) 157 ER 1273 : 120 RR 699; *Swan* v. *Steele,* (1806) 103 ER 80 : 8 RR 618 (Two firms with one name); The *Yorkshire Banking Co.* v. *Beatson,* (1880) 5 CPD 109.
7. *Hambro* v. *Hull & London Fire Insurance Co.,* (1858) 157 ER 686 : 117 RR 981; *Kirk* v. *Blurton,* (1841) 152 ER 120 : 60 RR 729.
8. *Faith* v. *Richmond,* (1840) 113 ER 444 : 52 RR 367.

variation is not substantial, the firm will be bound. Thus, where a wrong name has been frequently used and has been practically authorised, the firm may be liable.[1]

With regard to promissory notes, where a partner promises for himself and not for himself and co-partners, the promisor alone is liable, though it may be a partnership debt.[2] Conversely, though a promise is made in the firm name to pay that for which only the partner is liable, the latter only is liable.[3]

Where the Managing Partner of a partnership firm has received money by executing a promissory note for the sake of the firm duly affixing the seal of the firm and intending to bind the firm, all the partners of the firm are bound by the promissory note.[4]

Where a partnership deed provided for raising capital for business of the firm from partners at certain rates of interest and failing that one partner was authorised to raise loan from outsider on a promissory note, it was held in a suit on the promissory note that all the partners of the firm were liable to repay the loan in view of the express authority given to the partner and Section 22.[5]

"Any other manner", etc.—Where a partner executes a deed for himself and his partner in the presence of the latter, it will be operative against the non-executant also.[6] Similarly, a contract for a lease, though signed by one partner only, will bind the others where there has been part performance by all.[7] In *City of London Gas Light & Coke Co.* v. *Nicholls*,[8] where gas was supplied to a place of business which had been leased in the name of one partner, the Court held the partnership was liable. In *Re. Barnard, Edwards* v. *Barnard*,[9] where a bill was drawn on a firm and accepted by a partner in the name of the firm and in his own name, it was held that the partner was not separately bound.

In India, among the Nattukottai Chettys, it is usual for the agents to sign with the firm *vilasam* prefixed. In such a case, it has been held that the operative portion of the signature is that of the firm or *vilasam*.[10]

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1. *Williamson* v. *Johnson*, (1823) 107 ER 55 : 25 RR 336.
2. *Murray* v. *Somerville*, (1809) 170 ER 1094 (n); *Siffkin* v. *Walker*, (1809) 170 ER 1165 : 11 RR 715.
3. *Shipton* v. *Thornton*, (1838) 112 ER 1231 : 48 RR 507.
4. *Vattu Malli Narayan Rao* v. *Medrarapu Krishna Rao*, AIR 2003 AP 46, 48 : 2002 (5) ALD 588 : 2002 (3) LS 189.
5. *Jaisukhlal* v. *Shanker Theatre (Firm)*, 1982 MPLJ 86.
6. *Ball* v. *Dunsterville*, (1791) 100 ER 1038 : 2 RR 394; *Burn* v. *Burn*, (1798) 30 ER 1162.
7. *Sharp* v. *Milligan*, (1856) 52 ER 1242 : 111 RR 501.
8. (1826) 172 ER 165.
9. (1886) 32 Ch.D. 447.
10. *Maya Madan & Bros.* v. *Arunachalam Chettiar*, (1926) MWN 671 : (1926) Mad. 1106 : 97 IC 981.

A record showing the division of assets of a dissolved firm falls within Section 22 and does not require registration.[1]

23. Effect of admissions by a partner.—An admission on representation made by a partner concerning the affairs of the firm is evidence against the firm, if it is made in the ordinary course of business.

Analogous law—Sec. 15 of the English Act runs thus:

> "15. An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm".

Admission by partner—As to what is an admission, see Secs. 17 and 18, Evidence Act. An admission regarding the partnership affairs made by the partner *in the ordinary course of business* is evidence against the firm.[2] The rule has no application where the representation refers to the extent of the partner's authority to bind the firm.[3] The admission, though relevant is not conclusive against the firm.[4] But, in some cases, such an admission may be conclusive by way of estoppel.[5]

24. Effect of notice to acting partner.—Notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Analogous law—Sec. 16 of the English Act runs thus:

> "16. Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice of the firm, except in the case of a fraud on the firm committed by or with the consent of that partner".

Notice to acting partner—As a general rule, notice to an agent of matters relating to the agency is tantamount to notice to the principal.[6] And

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1. *Madiammal* v. *Glory Chandrakantha*, (1976) 2 MLJ 353 : 89 LW 657.
2. *Smith* v. *Bedouin*, (1896) AC 70; *Fergusson* v. *Fyffe*, (1841) 8 ER 49 : 54 RR 12; *Catt* v. *Howard*, (1820) 171 ER 747 : 23 RR 751 (Admission made before becoming a partner of the firm).
3. *Ex parte Agace*, (1792) 30 ER 135 : 2 RR 49; *Jacobs* v. *Morris*, (1902) 1 Ch. 816.
4. *Hollis* v. *Burton*, (1892) 3 Ch. 226; *Wickham* v. *Wickham*, (1855) 69 ER 870 : 116 RR 328.
5. *Re. Coasters Ltd.*, (1911) 1 Ch. 86.
6. *John* v. *Dodwell & Co.*, (1918) AC 563.

as partnership is one species of the law of agency, it would follow that as a rule, notice to one partner is notice to the firm.[1] Lindley says [2]:

> "When it is said that notice to one partner is notice to all what is meant is (1) that a firm cannot, in its character of principal, set up the ignorance of some of its members against the knowledge of others of whose acts it claims the benefit or by whose acts it is bound, (2) that when it is necessary to prove that a firm had notice, all that need be done is to show that notice was given to one of its members who *habitually acts* in the partnership business. The expression means no more than this; and although every person has notice of what he himself does, it would be absurd to hold that a firm has notice of everything done by each of its members".

Whether notice to a partner before he became a member of the firm operates as notice to the firm is doubtful.[3] But it has been held that where a partnership bill is dishonoured after a dissolution of partnership, notice of dishonour to the continuing partner is sufficient notice to the retiring partner.[4]

It follows from the section itself that notice to a partner as to a matter outside the scope of the business of the firm will not fix the firm with notice.[5]

Where a partner is acting in fraud of his partners, there can be no doubt that notice to him is not notice to the firm. Thus, in *Bignold* v. *Waterhouse,*[6] where a partner of a firm of carriers, acting in fraud of his co-partners, agreed to carry valuable parcels free of charge, the other partners were held not liable for the loss of the parcel. In such a case, the fact that the clerks of the firm were aware of the fraud committed by one partner does not affect the other partners.[7]

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1. *Alderson* v. *Pope,* (1808) 170 ER 1001 (n); *Posthouse* v. *Parker,* (1807) 170 ER 884 : 10 RR 637; (Cf.) *Chabildas* v. *Dayal Mowji,* (1907) 33 IA 179 : 31 Bom. 566 : 9 Bom. LR 1062 : 6 CLJ 674 : 17 MLJ 465 : 11 CWN 1109.
2. Lindley on Partnership, 14th Edn. page 260.
3. **See** remarks of Jessel, MR, in *Williamson* v. *Barbour,* (1877) 9 Ch.D. 529; (Cf.) *Dresser* v. *Norwood,* (1864) 144 ER 188. **See also**, cases under S. 229, Contract Act.
4. *Goldfarb* v. *Bartlett,* (1920) 1 KB 639.
5. *Texes Co.* v. *Bombay Banking Co.,* (1919) 44 Bom. LR 139 : 30 CLJ 446 : 24 CWN 469 : 11 LW 320 : (1920) MWN 70 : 54 IC 121 : (1919) PC 20.
6. (1813) 105 ER 95; *Williamson* v. *Barbour,* (1877) 9 Ch.D. 529; *Houghton* v. *Nothard* Lowe & C., (1928) AC 1 pp. 14-15.
7. *Lacey* v. *Hill,* (1876) 4 Ch. D. 537 on appeal, (1877) 3 AC 94. **See** *Ravi Steelways* v. *M/s. Industrial Gases (Bihar) Ltd.,* AIR 1983 Pat. 248.

On the same principle, where one partner happens to be a trustee, and he employs trust-funds in the partnership business, his guilty knowledge is not imputable to the firm.[1] **[1068]**

25. Liability of a partner for acts of the firm.—Every partner is liable, jointly with all the other partners and also severally for all acts of the firm done while he is a partner.

Analogous law :—Secs. 9, 12 and 17(2) of the English Act reads:

> "9. Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.
>
> 12. Every partner is liable jointly with his co-partners and also severally for every thing for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.
>
> 17 (2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement".

Principle of the section—[See Sec. 43 of the Contract Act and commentary thereon]. Under the Indian law, all joint liability is joint and several. Secs. 249 and 250 of the Contract Act, which dealt with partners' liability, did not in terms provide that the liability is joint and several. But this principle had been applied to partnership liabilities in some cases.[2] The present section gives definite expression to this principle.

The partners are jointly and severally liable for the acts of one of the partners of the firm. Where one of the partners acting on behalf of the partnership firm incurred any liability during the course of carrying on the business of the firm, all the partners would be liable to discharge the liability.[3]

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1. *Mara* v. *Browne*, (1896) 1 Ch. 199.
2. **See** *Lukmidas* v. *Purushotham*, (1882) 6 Bom. 700; *Motilal Bechardas* v. *Ghelabhai Hariram*, (1892) 17 Bom. 6; *Hemendro Coomar Mullick* v. *Rajendralal Moonshee*, (1878) 3 Cal. 353; *Muhammad Askari* v. *Radhe Ram*, (1900) 22 All. 307; *Narayana* v. *Lakshmana*, (1897) 21 Mad. 256.
3. *Harikishan Shivhare* v. *State of M.P.*, AIR 1996 MP 37, 38.

Acknowledgment of debt by continuing partner for the loan received as a partner of the new firm after dissolution without public notice, will not bind the retired partner.[1]

Difference between English and Indian Law.—Sec. 9 of the English Act provides that partners are jointly liable on obligations *ex contractu*, and Sec. 12 declares that partners are liable both jointly and severally on obligations *ex delicto*. But this distinction between contractual and tortious liability was not recognised in India. Therefore under the present section, partners are jointly and severally liable, whether the liability arises out of contract or tort.

Joint and several liability—Effect.—The creditor of a firm may sue any one of the partners or all of them and failure to implead all of them is no defence to a suit against some only.[2] Any internal arrangements between the partners as to the liquidation of a certain liability will not be binding on the creditor.[3] **[1214]** Under Sec. 25, the liability of every partner is both joint and several and there cannot be any distinction between continuing partner and retired partner. A partner continues to be liable for the act of the firm done while he was a partner and his liability does not cease merely because he ceased to be a partner subsequently.[4]

A creditor of the partnership firm can proceed against any one or more of the partners to recover the debt due to him and each partner shall be liable as if the debt of the firm has been incurred in his personal capacity.[5]

Decree against some of several joint promisors.—See commentary on Sec. 43, Contract Act:

Where a decree is passed against a firm and its partners making the decretal amount jointly and severally payable by them, the executing Court is bound to execute the decree as it is made and where the partner is sought to be proceeded against by attachment of his property he cannot insist that the property of the firm should first be proceeded against.[6]

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1. *Vinayak Keshav Paranjape* v. *Dena Bank*, AIR 1998 Bom. 356 : 1998 (4) Bom CR 186 : 1998 Bank J 665 : 1998 (3) Civil Court C 696 : 1998 (3) Mah. LJ 395 : 1998 (4) All. Mah LR 8 : 1998 (3) Bom LR 518.
2. *Appa Dada* v. *Ramakrishna*, (1930) 53 Bom. 652 : 121 IC 581 : 31 Bom. LR 1187 : (1930) Bom. 5; *Muhammad Ismail Khan* v. *Said-ud-din*, (1927) 9 Lah. 217 : (1927) Lah. 819 : 104 IC 700; *Chandmal* v. *Ban Behari*, (1924) 50 Cal. 718 : 74 IC 1021 : (1924) Cal. 209.
3. *Sarma* v. *Phanindranath*, (1931) 35 CWN 593; *Veerappa* v. *Arunachalam Chetty*, (1924) 47 MLJ 168 : 20 LW 368 : (1924) MWN 559.
4. *Third I.T.O., Salem* v. *Arungiri Chettiar*, AIR 1996 SC 2160, 2163 : (1996) 9 SCC 33 : 1996 (220) ITR 232 : 1996 (86) Taxman 330.
5. *Ashutosh* v. *State of Rajasthan*, AIR 2005 SC 3434 : (2005) 7 SCC 308 : 2005 (6) Supreme 201 : 2005 (4) Bank. Cas 13.
6. *Nilakanth* v. *Raj and Company*, AIR 1982 Bom. 388 : (1982) Mah. LJ 285.

Right to contribution—Contract :—As has been observed already the right to contribution arises from the equity existing in favour of a person jointly bound with others who, however, has had to perform or pay more than his just share.[1] This general principle prescribing equality of burden and benefit is enough to create a right of contribution where it is not possible to found it on a contract. It would therefore follow that even without a contract to that effect, a partner who has had to discharge the obligation of the firm is entitled to contribution to the extent that he has released the partners from a common burden.[2] The provision for contribution enacted in Sec. 43 (2) of the Contract Act is, it is submitted, applicable to partners also. [*Vide* Sec. 3, Partnership Act].

Where a decree has been passed against a Partnership Firm and one partner has paid the entire decree amount, is entitled to recover half of the amount paid by him from the other remaining partner.[3]

Contribution cannot be claimed where the act in respect of which it is sought is prohibited by the terms of the agreement.[4] But if the partnership is not itself illegal and if the person seeking contribution has not been guilty of a breach of the law, he will be entitled to contribution.[5]

Liability for torts—The rule laid down in *Merry Weather* v. *Nixan* that there is no contribution between wrongdoers has been abrogated in England by statute.[6] In India the applicability of the rules has been held doubtful.[7] The Court has to be satisfied not only that the plaintiff is a tort feasor but must also see whether there is anything in the circumstances, which would deprive the plaintiff of his right according to general equity.[8]

How right to contribution worked out—The mode of enforcing this right of contribution presents some difficulty, as it is likely to conflict

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1. *Bhagwati* v. *Miyan Murat,* (1931) 10 Pat. 528 : (1931) Pat. 528 : (1931) Pat. 394 : 134 IC 139.
2. *Laban Sardar* v. *Choyen Mullick,* (1915) 19 CWN 768 : 29 IC 811; *Sedgwick* v. *Daniell,* (1857) ER 132 : 115 RR 561; *Beecham* v. *Smith,* (1858) 120 ER 574 : 113 RR 720.
3. *Sulaikha Clay Mines* v. *M/s. Alpha Clays,* AIR 2005 Ker. 3.
4. *Thornton* v. *Proctor,* (1792) 145 ER 810 : 3 RR 558; (Cf.) *Thomas* v. *Atherton,* (1878) 10 Ch.D. 185; *Adamson* v. *Jarvis,* (1827) 130 ER 693 : 29 RR 503.
5. *Campbell* v. *Campbell,* (1837) 7 ER 1030.
6. (Cf.) *Palmer* v. *Wick,* (1894) AC 318 (324).
7. *Sivapanda* v. *Jujusti,* (1901) 25 Mad. 599 : 12 MLJ 13; *Shakul Hameed* v. *Syed Ibrahim,* (1902) 26 Mad. 373; *Narayanamurti* v. *Komalichandrayya,* (1927) 53 MLJ 174 : (1927) Mad. 790 : 26 LW 67 : (1927) MWN 888; *Sheo Ratan* v. *Karan,* (1924) 46 All. 860 : 84 IC 269 : (1924) All. 857.
8. *Sheo Ratan* v. *Karan,* (1924) 46 All. 860 : (1924) All. 857 : 84 IC 269.

with the general well established rule that as between partners, there can be no suit for partial accounts. Contribution can certainly be had at the time of taking accounts on the dissolution of the partnership. But, will it be open to a partner to maintain a suit for contribution in respect of an item of the partnership debts, without asking for dissolution of the partnership and a general account? The answer is furnished by *Kari Venkata Reddi* v. *Kollu Narasayya*[1]:

> ".....If the account sought is in respect of a matter which, though arising out of the partnership business, or connected with it, does not involve the taking of general accounts, the Court will as a rule give the relief asked for and will nowadays refuse to interfere only in those cases in which a partial account will work injustice to the other partner".

As observed by Pandurang Rao, J., in a Madras case,[2] it is only when the claim for contribution is based on the contract of partnership or is intimately bound up with the relation of partnership that it would be excluded by the general doctrine, there can be no claim for contribution (without a suit for general account). In an earlier Madras case, *Thirunavukkarrasu* v. *Muthukrishnan,*[3] it has been held that in exceptional cases, one partner can sue another upon an individual debt when for example, one partner gave to his co-partner a note which bound him only and not the firm, and the demand in respect of which it was given was isolated from the general account of the partnership. On the analogy of these rulings, it may be said that a right to contribution in respect of a particular debt may be enforced.

Thus in *Venkatachalam* v. *Ramanatha,*[4] a partner was allowed to recover from the others the money paid by him under an award. In *Ellappa* v. *Swaminatha,*[5] where a joint and several decree had been passed against a partnership, the plaintiff who had paid up the decretal amount in full was held entitled to contribution without a suit for a general account. In *Guda Kulita* v. *Joyram,*[6] it was held that a suit for contribution by a partner against some of his co-partners, on account of money paid by him for the satisfaction of a debt contracted by him jointly with the said co-partners, is maintainable

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1. (1908) 32 Mad. 76; (Cf.) *Krishnaswami* v. *Jayalakshmi,* (1931) 54 Mad. 671 : (1931) MWN 497 : 33 LW 307 : 130 IC 766 : (1931) Mad. 300 : 60 MLJ 315; *Harji Mal* v. *Kriparam,* (1922) 2 Lah. 351 : 66 IC 478 : (1922) Lah. 195; *Ramaswami* v. *Muthukaruppan,* (1925) 48 MLJ 444 : (1925) Mad. 737 : (1925) MWN 497 : 88 IC 153.
2. *Kannayya* v. *Muthu Reddi,* (1939) Mad. 508.
3. (1931) MWN 467.
4. (1920) 39 MLJ 269 : (1920) MWN 502 : 52 IC 53 : 11 LW 228.
5. Mad. 755 : 38 LW 316 : 145 IC 858; **see also** *Subbarayudu* v. *Adinarayudu,* (1894) 18 Mad. 134.
6. (1898) 26 Cal. 262—N.

in cases where the liability satisfied by the plaintiff is not a joint liability of the entire partnership and also where the co-partners have expressly promised to contribute their share of a debt after a decree had been passed upon the bond.

In *Lala Ram* v. *Sheo Prasad,*[1] the Court said that failure to get a settlement of accounts was no bar to a suit for contribution; and in *Sadhu Narayana* v. *Ramasami,*[2] the right to contribution was affirmed in a case where a suit for general account was barred. That the right was transferable was recognised in *Damodara* v. *Subraya,*[3] but it was also held that the assignee could not maintain an action for contribution while the partnership was yet undissolved. The scope and limitation of the right to contribution has also been discussed in the case of *Arunachalam* v. *N. Rattam Beer Vovu Rowther.* [4]

26. Liability of the firm for wrongful acts of a partner.— Where, by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the partner.

Analogous law.—Sec. 10 of the English Partnership Act runs thus:

> "10. Where, by any wrongful act or omission of any partner's acting in the ordinary course of the business of the firm, or with the authority of his co-partners loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act".

Liability of firm for partner's torts—This liability is, of course, based on the principle of agency. For responsibility to attach to a principal in respect of the agent's tortious acts, it is necessary that there should be previous authority or subsequent ratification or that the act should have been committed by the agent in the course, and as part of his employment. In the last case, it is not necessary that the principal should have derived any benefit by the tortious act,[5] and the principal may be liable for the act of his agents even where the act has been expressly forbidden.[6] **[1223]**

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1. (1913) 11 ALJ 657 : 10 IC 176.
2. (1909) 32 Mad. 203. **See also** *Venkataratnam* v. *Venkataratnam,* (1912) MWN 384 : 15 IC 218; *Subbarayudu* v. *Adinarayudu,* (1895) 18 Mad. 134; *Durga Prossonna* v. *Raghunath,* (1897) 26 Cal. 254.
3. (1917) 33 MLJ 509 : 6 LW 742.
4. (1928) MWN 394 : 27 LW 597 : 101 IC 484 : (1928) Mad. 588.
5. *Lloyd* v. *Grace Smith,* (1912) AC 716. **See also** cases under S. 238, Contract Act.
6. *Collman* v. *Mills,* (1897) 1 QB 396.

These principles of liability are applicable to the case of partners also. Thus the firm has been held liable for the negligent driving of a partnership vehicle by one member of the firm.[1] Similarly a firm of solicitors has been held liable for negligent advice given by one member of the firm.[2] So too, the firm was held liable in respect of a sale of stolen goods by the partner.[3]

Again, firm is liable for frauds committed by one of its members while acting in the ordinary course of the business of the firm, and the innocent partners could not escape liability on the ground that they never authorised the commission of the fraud. So also, a firm may be compelled to restore property or refund money obtained by it by the misrepresentation of one of its members.[4]

It has however been held in one Bombay case that a malicious prosecution by the managing member of a firm does not render the other members of the firm liable in damages, unless it is shown that the firm was in some way or other concerned in the prosecution and had instigated it.[5]

In case when the telephone subscriber is a partnership firm, all the partners constituting such firm are the owners of telephone and subscriber and every partner has rights and liabilities of a subscriber. When such partner is in default in payment of telephone dues because the partnership firm has failed to pay those bills, the telephone rented to such subscriber partner even in his individual capacity is liable to disconnection.[6]

27. Liability of firm for misapplication by partners.— Where —

(a) a partner acting within his apparent authority receives money or property from a third party and misapplies it ; or

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1. *Moreton* v. *Hardern,* (1825) 107 ER 1042; (Cf.) *Mellors* v. *Shaw,* (1861) 121 ER 778 : 124 RR 621.
2. *Blyth* v. *Fladgate,* (1891) 1 Ch. 337.
3. *Mathuranath* v. *Sree Jukla Bageswari,* (1927) 46 CLJ 362 : (1933) Cal. 57; *Hurruckchand* v. *Gobind Lal,* (1906) 10 CWN 1053; (Cf.) *Hamlyn* v. *Houston,* (1903) 1 KB 81 (Obtaining information through bribery); *Janvier* v. *Sweeney,* (1919) 2 KB 316.
4. *Rapp* v. *Latham,* (1819) 106 ER 555 : 21 RR 495; *Lovell* v. *Hicks,* (1837) 160 ER 482 : 47 RR 335.
5. *Ahmedbhai* v. *Framji Edulji,* (1908) 28 Bom. 226 : 5 Bom. LR 940; *Arbuckle* v. *Taylor,* (1815) 3 ER 1023.
6. *Indravadan Pranlal Shah* v. *General Manager, Ahmedabad Telephones,* AIR 1990 Guj. 85.

(b) a firm in the course of its business receives money or property from a third party, and the money or property is misapplied by any of the partners while it is in the custody of the firm,

the firm is liable to make good the loss.

Analogous law :—Sec. 11 of the English Partnership Act reads,—

"11. In the following cases, namely :—

(a) Where are partners acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(b) Where a firm in the course of its business received money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss".

Firm's liability for misapplication of money—Lindley,[1] thus elaborates the corresponding section of the English Partnership Act:

1. Where one partner acting within the scope of his authority as evidenced by the business of the firm, obtains money and misapplies it, the firm is answerable for it. Thus in *Willett* v. *Chambers,*[2] a solicitor was held responsible for sums, which had been received by his partner for investment on a specified mortgage and misapplied by him. But the firm will not be liable when the money misapplied was received by the defaulting partner in carrying out a contract entered into with him individually.

2. Where a firm in the course of its business receives money belonging to others, and one of the partners misapplies that while it is in the custody of the firm, the firm is answerable. In *Devaynes* v. *Noble, Baring's case,*[3] a firm was made liable for its customer's stock standing in the name of one partner and wrongfully sold out by the partner. What are called the *Fauntleroy forgery cases,*[4] are also illustrations. In *Moore* v. *Knight,*[5] money was received for

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1. Lindley on Partnership, (1979) 14th Edn., p. 289.
2. (1778) 98 ER 1377. **See also** *Rhodes* v. *Moules,* (1895) 1 Ch. 236 (Misappropriation of share warrants); *Brydges* v. *Branfill,* (1842) 59 ER 1174 : 56 RR 71.
3. (1816) 35 ER 767 : 15 RR 151. **See also** *Sadler* v. *Lee,* (1843) 49 ER 850 : 63 RR 95; *Blair* v. *Bromley,* (1846) 67 ER 554 : 30 RR 420.
4. *Stone* v. *Marsh,* (1827) 108 ER 554.
5. (1891) 1 Ch. 547.

investment by a firm of solicitors, and embezzled by one of them. Accounts however were submitted to the client as if the investment had been made. It was held that the firm was liable.

3. If a partner, in the course of some transaction unconnected with the business of the firm or not within the scope of such business, obtains money and then misapplies it, the firm is not liable. Thus in *Harman* v. *Johnson,*[1] where one of a firm of a solicitors was entrusted with money for investment on mortgage as opportunity occurred, and he misapplied it, the firm was held not liable because it was not part of the business of solicitors to act as scrivener.

4. A fraud committed by a partner whilst acting on his own separate account is not imputable to the firm, although had he not been connected with the firm, he might not have been in a position to commit the fraud.[2]

Clause (a)—It will be noticed that under this sub-clause, both the receipt and the misapplication are by the same partner. The money is received by him as the real or ostensible agent of the firm and the firm is, in the circumstances, deemed to have received it. **[1224-1225]**

Clause (b)—Under this clause, the firm receives the money in the course of its business; and while it is in its custody, a member misapplies it. The firm having undertaken responsibility, cannot shirk it on the ground that one of its members misappropriated it.

28. Holding out.— (1) Any one who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to anyone who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.

(2) Where after a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.

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1. (1853) 118 ER 691 : 95 RR 421; **see also** *Cleather* v. *Twisden,* (1884) 28 Ch.D. 340; *Plumer* v. *Gregory,* (1874) 18 Eq. 621.
2. (Cf.) *Tendring Hundred Water Works Co.* v. *Jones,* (1903) 2 Ch. 615; *Terrill* v. *Parker,* (1915) 32 TLR 48; *Ex. parte Eyre,* (1841) 41 ER 618 : 65 RR 375; *Bishop* v. *Countess of Jersey,* (1854) 61 ER 673 : 100 RR 51; *Coomer* v. *Bromley,* (1852) 64 ER 1230 : 90 RR 131.

Analogous law—Sec. 14 of the English Act runs thus:

> "14 (1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.
>
> (2) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executor's or administrator's estate or effects liable for any partnership debts contracted after his death".

Also a person who by his words spoken written or by his conduct represents himself or permits others to represent him as partner in a firm is liable as partner of the firm to any one who was induced on the basis of such representation to give credit to the firm.[1]

Holding out—Basis of the doctrine—This doctrine is a branch of the law of estoppel.[2] Estoppel is a rule of evidence, and is dealt with in Sec. 115 of the Evidence Act. Where persons hold themselves out as partners in a particular business and so induce others to give credit to the partnership, such persons will be estopped from denying that they are partners when the persons who acted on their representation look to them for payment.[3] Where a person by his words spoken written or by his conduct caused a belief in another that he is a partner in a firm and induced him to give credit to the firm, is liable for all actions of firm on the principle of holding out.[4] **[1177]**

Essentials—(i) There must be a representation made or suffered to be made by the person 'holding out', (ii) It must have been relied on by the other person. It is immaterial whether the person making the representation does or does not know that it has reached the person so giving credit, (iii) Credit must have been given to the partnership on the faith of the representation.

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1. *Oriental Bank of Commerce* v. *M/s. S.R. Kishore & Co.*, AIR 1992 Delhi 174.
2. *Ex parte Central Bank of London*, (1892) 2 QB 633; *Waugh* v. *Carver*, (1793) 126 ER 525 : 14 RR 845; *Mollwo March* v. *Court of Wards*, (1872) 17 ER 495; *Farguharson* v. *King*, (1902) AC 325.
3. *Dickinson* v. *Valpy*, (1829) 109 ER 399 : 34 RR 348.
4. *Oriental Bank of Commerce* v. *M/s. S.R. Kishore & Co.*, AIR 1992 Delhi 174, 180.

(i) A person cannot be liable on the ground of having held himself out, unless he did so before the contract on which he is charged with liability was entered into.[1]

Unless the act of holding out has been done or knowingly suffered by the person charged, whatever may have been done cannot be imputed to him.[1] As Tindal, C.J., observed [2]:

> "The holding one's self out to the world as a partner as contra distinguished from the actual relation of partnership imports at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership, and is altogether incompatible with the want of knowledge that his name has been so used".

The representation must be clear and unambiguous.[3] So it has been held that the mere use of a name, without more, would not lead any member of the public or any dealer to presume that the person whose name is so used, is a partner in the firm.[4] Representation to amount to "holding up' may be express or by conduct. Even an oral representation as to being a partner or signing receipts for despatch of cargo could suffice.[5] Where the representation is made by a third party, there should be sufficient proof of the supposed partner's knowledge and assent thereto; but where such assent is proved, it is immaterial that such assent was procured by misrepresentation.[6]

(ii) Where the representation is not known to and relied on by the person charging the supposed partner, there is no question of misleading and so no estoppel will arise.[7] But a person who holds himself out will nonetheless be liable even though the person seeking to make him liable knows that he does not share the profits or losses of the firm.[8]

It is hardly necessary to add that the rule of liability by holding out can be invoked only by the persons to whom the representations were made and who have acted on the faith of them.[9]

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1. *Baird* v. *Planque,* (1858) 175 ER 756.
2. (Cf.) *Fox* v. *Clifton,* (1830) 130 ER 1479 : 31 RR 536.
3. *Edmundson* v. *Thompson,* (1861) 175 ER 1188 : 136 RR 870.
4. *Nem Chand* v. *Gur Dayal,* (1925) Oudh 451 : 88 IC 584; *Maurice Mayahas* v. *Morley,* (1925) Cal. 937 : 29 CWN 496 : 87 IC 508.
5. *Snowwhite Food Products (P) Ltd.* v. *Sohan Lal Bagla,* AIR 1964 Cal. 209.
6. *Collingwood* v. *Berkeley,* (1863) 143 ER 739 : 137 RR 440.
7. *Newsome* v. *Coles,* (1811) 170 ER 1271 : 12 RR 756.
8. *Kirkwood* v. *Cheetham,* (1862) 175 ER 1290; *Brown* v. *Leonard,* (1816) 2 Chitty 120 : 23 RR 744.
9. *Harnamdas* v. *Mayadas,* (1925) Sind 310 : 87 IC 905; (Cf.) *Martyn* v. *Gray,* (1863) 143 ER 667 : 135 RR 913; *Corter* v. *Whalley,* (1830) 109 ER 691 : 35 RR 199.

Mode of representation—It may be words spoken or written or by conduct. In *Dickinson* v. *Valpy,*[1] it was said that:

> "The defendant [person holding himself out] would be bound by an indirect representation to the plaintiff arising from his conduct as much as if he had stated to him directly and in express terms that he was a partner and the plaintiff had acted on that statement."

Where a person knowing that his name is being used so as to give the public an idea that he is a partner keeps quiet, his silence will amount to a representation.[2] Even the want of knowledge of the possible effects of his acts and conduct will not absolve a person from liability, if his acts and conduct were such as would induce a reasonable man to believe that he was a partner and to act upon such belief.[2]

Clause (2)—Deceased partner—Lindley says [3]:

> "If a partner dies and the surviving partners continue the old business in the old name, this will not have the effect of rendering the estate of the deceased partner liable even to old customers or correspondents of the firm, for acts done by the survivors after the death of their late co-partner. The doctrine of holding out has never been applied to such a case, and the executor of the deceased incurs no liability by the continued use of the old name. Even if the executor is the surviving partner using the old name that will not make any difference".

29. Rights of transferee of a partner's interest.—(1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

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1. (1829) 109 ER 399 : 34 RR 348.
2. *Porter* v. *Incell,* (1915) 10 CWN 313; *Barton* v. *Read,* (1932) 1 Ch. 375; (Cf.) *Saratchandra* v. *Gopalchander,* (1894) 29 Cal. 296.
3. Lindley on Partnership, 10th Edn. (1935), p. 78. **See** the following case *Webster* v. *Webster,* (1791) 36 ER 949 : 18 RR 258; *Farhall* v. *Farhall,* (1871) 7 Ch. 123; *Owen* v. *Delamere,* (1872) 15 Eq. 134; *Radha Kishen* v. *Gangabai,* (1928) Sind 121 : 110 IC 730.

(2) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

Analogous law—Sec. 31 of the English Act runs thus:

> "31 (1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner is entitled as between himself and the other partners and for the purpose of ascertaining that share, to an account as from the date of the dissolution.
>
> (2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution".

Rights of assignee of partner's interest.—In the old Contract Act, there was no section corresponding to this. The section is based on Sec. 31 of the English Act and gives to the assignee of a partner's share certain limited rights. The assignment is valid as between the immediate parties;[1] but the assignee cannot during the continuance of the firm interfere in the conduct of the business, or ask for accounts; he is entitled only to receive the assignor's share of profits.[2] He must accept the accounts of profits agreed to by the partners.[3]

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1. *Juggut Chunder* v. *Radha Nath*, (1884) 10 Cal. 669; *Domaty Nursiah* v. *Raman Chetty*, (1899) 27 Cal. 93 (Other partners can sue assignor and assignee together for dissolution).
2. *Glyn* v. *Hood*, (1859) 65 ER 941 : 125 RR 457; *Geo Peth* v. *Moos*, (1931) 10 Pat. 792 : 133 IC 40 : (1932) Pat. 15; *Suganchand* v. *Lukhe*, (1938) Nag. 182 : 173 IC 871.
3. *Wheatham* v. *Davey*, (1885) 30 Ch. D. 574; *Cassells* v. *Stewart*, (1881) 6 AC 64; *Smith* v. *Parkes*, (1852) 51 ER 720; *Addanki Narayanappa* v. *Bhaskara Krishnappa*, AIR 1966 SC 1300 : (1966) 2 SCJ 490 ; *Reddi Veerraju* v. *Lakshminarasamma*, AIR 1971 AP 266 : (1971) 1 An. WR 73.

The assignee would have no right to interfere in the management of the business so long as the business is continuing, but he would be entitled only to the actual profits.[1] The transferee does not become a partner of the firm; the transferor continues to be a partner along with the other partners. There is no dissolution of the partnership by such transfer.[2] On dissolution, he is entitled to the transferor's share of assets and to an account as from the date of dissolution.[3] **[1211]**

The petitioners purchasing shares of two retired partners of a partnership firm are entitle to share in profits but have no right to interfere with the mutual rights and obligation of the original partners and the possession of the cinema theatre of the reconstituted firm by the partners is lawful.[4]

Where a partner has assigned 50% of his share in a partnership firm to a trust no sub-partnership can said to arise on account of such assignment since the assignee acquires no right or interest in the main partnership except that part of profits referable to the assignment and to the assets when the partnership firm is dissolved.[5]

A sub-partner will come within the scope of Section 29.[6] The transferee of a partner will include a sub-partner for the purposes of the section.[7]

"A sub-partnership is, as it were, a partnership within a partnership; presupposes the existence of a partnership to which it is itself subordinate. An agreement to share profits only constitutes partnership between the parties to the agreement. If therefore, several persons are partners and one of them agrees to share the profits derived by him with a stranger, this agreement does not make the stranger a partner in the original firm. The result of such an agreement is to constitute what is called a sub-partnership, that is to say, it makes the parties to it partners *inter se,* but it in no way affects the other members of the principal firm".[8] Subject to any *bona fide* settlement of accounts of the partners in the principal firm which naturally will bind a sub-partner,

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1. *Reddi Veerraju* v. *Lakshminarasamma,* AIR 1971 AP 266 : (1971) 1 An. WR 73; *Mathura Singh* v. *Arjun Singh,* AIR 1979 P&H 40.
2. *P. Ananda Rao* v. *G. Raja Rao,* AIR 1976 AP 256 : (1976) 1 An. WR 338.
3. *Public Trustee* v. *Eldon,* (1926) 1 Ch. 776.
4. *Vemuri Lakshmi Nageswara Rao* v. *Joint Collector and Additional District Magistrate, Machilipatnam,* 2006 (3) ALD 317 : 2006 (4) ALT 28 : 2006 (2) LS 167.
5. *I.T. Commr.* v. *Sunil Kinariwala,* AIR 2003 SC 668, 673.
6. *Palariappa Chettiar* v. *Vaidyanatha Iyer,* (1969) 82 LW 63.
7. *Venkataratnam* v. *Venkataratnam,* AIR 1944 Mad. 394.
8. *Murlidhar* v. *Income-tax Commissioner,* AIR 1967 SC 383 : (1966) 2 SCJ 735 : (1967) 2 An. LT 83.

the latter after dissolution of the firm, will be entitled to have an account taken to ascertain his transferor's share, since otherwise it would not be possible to determine the amount due to him.[1]

In *Goa Peth* v. *N.H. Moss,*[2] the transferee's rights were laid down in the terms of the section on the analogy of Sec. 31 of the English Act, and it was pointed out that while the legal power of a partner to transfer his interest is unquestioned, the transferee does not become a tenant in common or a partner, except where the other partners consent to his introduction.[3] In *Dhanji* v. *Gulabchand,*[4] the Court laid down the legal position of the assignee in similar terms, and also made it clear that even after assignment, it was only the assignor, that could sue for dissolution. Further, the Court dissented from the view expressed in an early Calcutta case, *Juggut Chunder* v. *Radha Nath,*[5] that an assignment of a share in a partnership causes a dissolution of the partnership. In view of the present section, the last mentioned case is no longer good law. A transfer of a partner's share may however be a good ground for dissolution.[6] [See Sec. 44 (e) *infra*].

The section applies to cases of involuntary assignment also, (*e.g.*) Court sale of a partner's interest.[7] A receiver appointed by Court is in the same position, and is therefore not competent to sue the other partners for an account before dissolution.[8] **[1211]**

The assignee takes subject to any equities that may arise between the assignor and the other partners even subsequent to the assignment (*e.g.*) right of lien over the share of the assignor.[9] But his rights are not affected by any sale of, of agreement for valuing and dealing with the assignor's share which

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1. *Gulab Singh* v. *Gattu Lal,* 1970 MPLJ 387.
2. (1931) 10 Pat. 792 : 133 IC 40 : (1932) Pat. 15. **See also** *Chidambaram Chetty* v. *Karuthan Chetty,* (1916) 4 LW 10 : 34 IC 543 : (1916) 2 MWN 18 : (1916) 39 MLJ 511; *Muthiah* v. *Veerappa,* (1929) 52 Mad. 509 : 29 LW 636 : 56 MLJ 776.
3. *Jeffreys* v. *Smith,* (1826) 38 ER 535 : 27 RR 49; *Mathra Singh* v. *Arjan Singh,* AIR 1979 P&H 40 : (1978) 80 Punj.LR 766.
4. (1925) 27 Bom. LR 409 : 87 IC 812 : (1925) Bom. 347.
5. (1884) 10 Cal. 669.
6. **See** Halsbury's Laws of England (Vol. 24), p. 462; *Heath* v. *Sansom,* (1832) 110 ER 420 : 38 RR 237.
7. *Dhanaraju* v. *Motilal,* (1929) 52 Mad. 563 : 29 LW 823 : 116 IC 343 : (1929) Mad. 641; *Parvatheesam* v. *Bappanna,* (1890) 13 Mad. 447; *Jagat Chunder* v. *Iswar Chunder,* (1893) 20 Cal. 693 (Share of a partner is saleable property under C.P.C.); *Deendayal* v. *Jugdeep,* (1877) 4 IA 247 : 3 Cal. 198.
8. *Goa Peth* v. *N.H. Moos,* (1931) 10 Pat. 792 : 133 IC 40 : (1932) Pat. 15.
9. *Bergmann* v. *Macmillan,* (1881) 17 Ch.D. 423; *Cavander* v. *Bulteel,* (1873) 9 Ch. Ap. 79; *Lindsay* v. *Gibbs,* (1889) 44 ER 1435 : 121 RR 295; *Garwood* v. *Paynter,* (1903) 1 Ch. 236 (Increased remuneration to partners for working the business, subsequent to assignment).

may have been entered into between the partners, subsequent to the assignment and with notice of it,[1] or any settlement made behind his back after dissolution.[2] He is bound, however, to indemnify the assignor against the partnership debts.[3]

30. Minors admitted to the benefits of partnership.—(1) A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of partnership.

(2) Such a minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm.

(3) Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act.

(4) Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules contained in Section 48:

Provided that all the partners acting together or any partner entitled to dissolve the firm upon notice to other partners may elect in such suit to dissolve the firm, and thereupon the Court shall proceed with the suit as one for dissolution and for settling accounts between the partners, and the amount of the share of the minor shall be determined along with the shares of the partners.

(5) At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, such person may give public

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1. *Watts* v. *Driscoll,* (1901) 1 Ch. 295; (Cf.) *Bonnin* v. *Neame,* (1910) 1 Ch. 732 (Assignee not bound by any account taken under arbitration clause in partnership deed).
2. *Muthia Chetty* v. *Veerappa Chetty,* (1929) 52 Mad. 509 : 56 MLJ 776 : 29 LW 636; Lindley on Partnership (10th Edn.) p. 437; *Stevenson* v. *Aktiengeselschaft,* (1918) AC 239.
3. *Dodson* v. *Downey,* (1901) 2 Ch. 620; (Cf.) *Hardoon* v. *Belilios,* (1901) AC 118 (Beneficial owner and registered owner of shares).

notice that he has elected to become or that he has elected not to become a partner in the firm, and such notice shall determine his position as regards the firm:

Provided that, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months.

(6) Where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on the persons asserting that fact.

(7) Where such person becomes a partner,—

(a) his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and

(b) his share in the property and profits of the firm shall be the share to which he was entitled as a minor.

(8) Where such person elects not to become a partner,—

(a) his rights and liabilities shall continue to be those of a minor under this section up to the date, on which he gives public notice,

(b) his share shall not be liable for any acts of the firm done after the date of the notice, and

(c) he shall be entitled to sue the partners for his share of the property and profits in accordance with sub-section (4).

(9) Nothing in sub-sections (7) and (8) shall affect the provisions of Section 28.

Minor as a partner—Comparison with previous law and English law.—Under the English law, there is nothing precluding an infant

from entering into a contract of partnership,[1] though, generally, he is not, during infancy liable for the debts of the firm and may disaffirm the transactions if he pleases on attaining majority. **[1170]**

In India, under Sec. 11 of the Contract Act, a minor's contract is void. A minor could not therefore be a partner. A partnership constituted with a minor as a member makes the partnership void.[2] Any agreement making a minor a full partner will not be regarded as valid for purposes of registration under the Income-tax Act.[3] A guardian cannot enter into an agreement of partnership on behalf of a minor so as to cloths the minor with all the rights and obligations of a partners.[4] Nor can there be a partnership between two minors.[5] But under Secs. 247 and 248 of the Contract Act, a minor may be admitted to the benefits of a partnership and he would become personally liable for the obligations of the firm in case of his not repudiating the partnership within a reasonable time after majority. But the sections were defective in that they did not specifically provide that the minor will be invested with the responsibilities of a partner on his attaining majority, if he does not repudiate within a reasonable time. Another defect in the sections was that they did not specify the rights and remedies of a minor sharer. The present section is intended to remedy those defects.

Clause (1)—Minor admitted to the benefits of partnership.— Even under the old Contract Act, it was felt that there was some anomaly in saying that a minor's contract of partnership is void under Sec. 11, but that under Sec. 247, he may be entitled to the benefits of partnership. The alternative explanations suggested for this apparent anomaly were the forgetfulness of the draftsman of the Act or an adoption of the view of an infant's contract prevalent in England before the Infants' Relief Act. The present Act has in a way, perpetuated the anomaly; but any difficulties that may raise in practice have been anticipated by specific mention of the rights as such, of a minor who has been admitted to the benefits of partnership and by making it clear that admission does not give the minor any right of management.[6]

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1. *Lovell* v. *Beauchamp,* (1894) AC 607.
2. *Sri Ramamohan Motor Services* v. *C.I.T.,* AIR 1973 SC 1445 : (1974) 3 SCC 116 : 1973 (3) SCR 959 : 1973 (89) ITR 274.
3. *C.I.T.* v. *Dwarakadas Khetan & Co.,* AIR 1961 SC 80 : (1961) 2 SCR 821. **See also** *C.I.T.* v. *Mathura Prasad Annoolal,* 1978 All. LJ 69.
4. *C.I.T.* v. *Shah Mohandas Sadhuram,* AIR 1966 SC 15 : 1965 (3) SCR 771 : 1965 (57) ITR 415; *Nageswara Rao Brothers* v. *C.I.T.,* (1971) 79 ITR 306.
5. *Shriram* v. *Gourishanker,* AIR 1961 Bom. 136.
6. A case like *Maung Aung* v. *Haji Dada,* (1917) 42 IC 98 (Decision being that a minor may bind his co-partners by promissory note on behalf of the partnership) will not probably arise under the present Act.

The word 'admitted' makes it clear that a minor cannot create a partnership.[1] There must be a partnership already subsisting, to which he is admitted.[2] Under Section 30 a minor may be admitted with the consent of the adult partners to the benefits of the partnership and any document, which goes beyond the section, cannot be regarded as valid for purposes of registration.[3] There must be at least two adult partners before a minor could be admitted to the benefits of the partnership and any document, which goes beyond the section, cannot be regarded as valid for purposes of registration. There must be at least two adult partners before a minor could be admitted to the benefits of the partnership.[4] Where a business is owned by a sole proprietor, Section 30 has no application.[5] On admission by the benefits the minor becomes entitled to share in the profits and may also become liable for losses though not personally.[6]

The minor cannot be thrust upon the partners: he can get the benefits of partnership only by the express consent of all the partners. As to what is meant by being admitted to the benefits of partnership, it was pointed out in *Palaniappa* v. *Official Assignee,*[7] that admission to the benefits must be by some definite act such as, by allotment of a share or distribution of profits or something of an analogous character. There must be some positive conduct from which the Court can infer that the adult members intended to admit the minor member to the benefits of the partnership.[8] By being admitted to the benefits the minor incurs no personal liability for any of the obligations of the firm.[9] It is not by his acquiescence after majority that he can be said to have accepted the position of a partner.[10] Thus in *Lachmi Narain* v. *Beni Ram,*[11] where one of two partners died leaving a minor son but the business was carried on

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1. *A.A. Khan* v. *Amer Karim,* AIR 1952 Mys. 131.
2. *Devi Ditta* v. *Than Mal,* (1933) 142 IC 203 : 34 PLR 346; *Mohammed Rafiq* v. *K. Qumar,* (1922) Lah. 441 : 67 IC 95; *Jivan Ram* v. *Sita Ram,* (1929) 118 IC 141; *Mangu Lal* v. *Munni Lal,* (1933) All. 311 : 144 IC 76.
3. *Alankar Bhawani* v. *C.I.T.,* (1970) 1 ITJ 408 : (1963) 73 ITR 758.
4. *Chhotulal* v. *Rajmal,* AIR 1951 Nag. 448; *A.A. Khan* v. *Amer Karim,* AIR 1952 Mys. 131.
5. *Lachmi Narain* v. *Beni Ram,* AIR 1931 All. 327 : 130 IC 704.
6. *C.I.T.* v. *Mathura Prasad Annoolal,* 1978 All. LJ 64 : 1979 ITR 372.
7. (1917) MWN 150 : 36 IC 787.
8. *Venkatarama Iyer* v. *Balayya Yesuthasan,* (1936) Mad. 595 : 165 IC 478 : (1936) MWN 468: 44 LW 725.
9. *Sanyasi Charan Mandal* v. *Krishnodhan,* (1922) 49 Cal. 560; (1922) PC 237 : 26 CWN 954 : 35 CLJ 498 : 43 MLJ 41 : (1922) MWN 364 : 24 Bom. LR 700 : 49 IA 108; **See also** *Khorasani* v. *Acha,* (1928) 6 Ran. 198; *Inspector Singh* v. *Kharall Singh,* (1928) 50 All. 777 (Guardian cannot bind minor by a contract of partnership); *Jaffer Ali* v. *Standard Bank of South Africa,* (1928) PC 135 : 107 IC 453 : 30 Bom. LR 762.
10. *Venkatasuryanarayana* v. *Ramayya,* (1921) MWN 100 : 40 MLJ 153 : (1921) Mad. 98 : 62 IC 802; *Lal Singh* v. *Dh anna,* (1928) Lah. 832 : 109 IC 50.
11. (1931) 53 All. 479 : (1931) ALJ 81 : 130 IC 704 : (1931) All. 327; *Lutchmanen* v. *Siva Prakasa,* (1899) 26 Cal. 349.

under the old name and style with the partnership funds, it was held that the minor could not enter into a contract with the surviving partner and was consequently not a partner.

The question whether a minor has been admitted to the benefits of a partnership is one of fact, to be pleaded and proved at the trial.[1]

"The law to which he is subject"—In *Kashiba* v. *Shripat,*[2] it was pointed out in reference to Sec. 11 of the Contract Act which uses the same language, that it means the law of domicile of the parties, and not the personal law of the parties.

Clause (2)—Right to assets and profits and inspection of accounts—As said in *Sanyasi Charan's case,* the share of the minor is no more than his right to participate in the property of the firm after its obligations have been fulfilled. It may also be noticed that the clause gives a right to inspect and copy the "accounts" as distinguished from the "books" referred in Sec. 12. **[1038]**

Clause (3)—Liability of minor.—The minor is liable only to the extent of his share, in the partnership and is not personally liable for partnership debts.[3] Therefore the minor's separate property cannot be proceeded against for realisation of a partnership debt.[4] And as pointed out by the Judicial Committee, to render the share of the minor liable, for the firm's debts, the essential pre-requisite is to show that the minor was "admitted to the benefits of partnership" in terms of the section.[5]

In an action against the firm wherein a minor has been admitted to the benefits of partnership, the claim must be laid only as against the firm other than the minor, and execution may issue against the firm property. Though the minor cannot be adjudged insolvent, the firm may be.[6]

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1. *Sanyasi Charan* v. *Krishnodhan,* (1922) 49 Cal. 560 : (1922) PC 237.
2. (1894) 19 Bom. 697.
3. *Lovell* v. *Beauchamp,* (1894) AC 607; *Haramohan* v. *Sudarsan,* (1922) 25 CWN 847. The liability is the same where the manager of a joint Hindu family carries on ancestral trade; **see** *Joy Kisto* v. *Nittyanand,* (1878) 3 Cal. 738; *Rampartab* v. *Foolibai,* (1896) 20 Bom. 767; *Subbaraya* v. *Thangavelu,* (1924) Mad. 33; *Nanakchand Baij Nath* v. *Parmeshri Das,* (1934) 35 PLR 539.
4. *Official Assignee* v. *Palaniappa,* (1918) 41 Mad. 824 : 35 MLJ 473 : 8 LW 530 : (1918) MWN 721 : 49 IC 220; *Jaffar Ali* v. *Standard Bank of South Africa,* (1928) PC 135 : 107 IC 435 : 47 CLJ 292 : 30 Bom. LR 762.
5. *Babu* v. *Official Assignee,* (1934) 57 Mad. 931 : 36 Bom. LR 858 : 38 CWN 1018 : 60 CLJ 50 : (1934) ALJ 600 : 150 IC 1 : 1934 MWN 717 : 40 LW 80 : (1934) PC 18 : 67 MLJ 167.
6. *Sanyasi Charan* v. *Asutosh Ghosh,* (1915) 42 Cal. 225 : 26 IC 836; *Re. Sital Prasad,* (1914) 20 CWN 1065; *In re. Shaw Wallace & Co.,* (1927) Sind 18 : 97 IC 446; *Jagmohan* v. *Girish Babu,* (1920) 42 All. 515.

Clause (4)—Extent of minor's right to sue for share—The Special Committee said:

> "This clause lays down the minor's ultimate remedy for enforcing his rights which will take the form of a suit for account and payment of his share. The clause also safeguards the partners against being saddled with a debt which the business cannot meet by allowing them to convert the suit into one for dissolution and for accounts between all the parties".[1]

Clause (5)—Option to repudiate or continue—This sub-clause makes it clear that the minor has, on attaining majority, an option of becoming a partner or of severing his connection with it. This option he must exercise by giving notice of his election. The period within which such notice is to be given is six months after majority or knowledge of admission to the benefits of partnership. Omission to give such notice makes him a partner automatically at the end of the six months. As to effect of his becoming a partner see Cl. (7).

What admission to benefit signifies and what a guardian can do for the minor to ensure full benefit of the admission have been considered in *C.I.T.* v. *Shah Mohandas Sadhuram*[2] by the Supreme Court. It was observed, "first it is clear from Section 30 (2) that a minor cannot be held liable for losses. Secondly section 30 (3) enables a minor to sever his connection with the firm and if he does so the amount of his share has to be determined in accordance with the rules contained in Section 48 which visualises capital having been contributed by partners. There is no difficulty in holding that the severance may be effected on behalf of a minor by his guardian. Therefore sub-section (4) contemplates that capital may have been contributed on behalf of a minor and that a guardian may on behalf of a minor sever his connection with the firm. If the guardian is entitled to sever the minor's connection with the firm, he must be held to be entitled to refuse to accept the benefits of partnership or agree to accept the benefits of partnership for a further period on terms, which are in accordance with law. Sub-section (5) proceeds on the basis that the minor may or may not know that he has been admitted to the benefits of partnership. The subsection enables him to elect, on attaining majority, either to remain a partner or not to become a partner in the firm. Thus it contemplates that a guardian may have accepted the benefits of a partnership on behalf of a minor without his knowledge. If a guardian can accept benefits of partnership on behalf of a minor he must have the power to scrutinise the terms on which such benefits are received by the minor. He must also have the power to accept

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1. See *Tulsidas* v. *Gangaram*, (1925) Sind 272 : 86 IC 944.
2. AIR 1966 SC 15, 17 : 1965 (3) SCR 771 : 1965 (57) ITR 415.

the conditions on which the benefits of partnership are being conferred. It appears to us that the guardian can do all that is necessary to effectuate the conferment and receipt of the benefits of partnership."

A minor who was admitted to the benefits of a partnership cannot be adjudicated insolvent on the basis of debt or debts of the firm after the partnership was dissolved on the ground that he attained majority subsequent to the said dissolution, but did not exercise his option to become a partner or cease to be one of the said firm. Where the partnership was dissolved before the minor became a major the partnership had become non-existent when the minor became a major and it is legally impossible to hold that he became a partner of the dissolved firm by reason of his inaction in the matter of exercising his option after he became a major within the time prescribed under Section 30 (5). A minor after attaining majority cannot elect to become a partner of a firm, which ceased to exist. Section 30 therefore does not apply to him. He is not a partner of the firm and, therefore does not apply to him. He is not a partner of the firm and, therefore, he cannot be adjudicated insolvent for the acts of insolvency committed by the major partners of the firm.[1]

Clause (6)—Burden of proof—This clause simply deals with a rule of evidence, and throws the burden of proof on the party asserting that he had no knowledge of admission to the partnership till a particular date.

Clause (7)—Liability of becoming partner —Where the minor has on attaining majority elected to become a partner, he will be entitled to profits as computed at the end of the year and cannot claim profits found to have arisen on calculations made on the day of his attaining majority.[2] He becomes personally liable for all the acts of the firm done since the date of his *admission*. This constitutes a wide departure from English Law, under which it would appear that the personal liability attaches only to obligations incurred by the firm after the minor attaining majority.[3]

Thus, the present section appears to recognise that the minor can impliedly ratify acts of the firm done during his minority.

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1. *Shivagouda Ravji Patil* v. *Chandrakant Neel Kanth Sadalge,* AIR 1965 SC 212 : (1965) 1 SCJ 630.
2. *Bhogilal* v. *Income-tax Commissioner,* AIR 1956 Bom. 411 : ILR (1956) Bom. 93. Cf. *Imadali Jayabal* v. *C.I.T.,* (1972) Mah. LJ 285.
3. (Cf.) *Goode* v. *Harrison,* (1821) 106 ER 1147 : 24 RR 307. **See also** *Palaniappa* v. *Official Assignee,* (1917) MWN 150; *Harmohan* v. *Sudarsan,* (1921) 25 CWN 847.

CHAPTER V

INCOMING AND OUTGOING PARTNERS

31. Introduction of a partner.—(1) Subject to contract between the partners and to the provisions of Section 30, no person shall be introduced as a partner into a firm without the consent of all the existing partners.

(2) Subject to the provisions of Section 30, a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner.

Analogous law.—Secs. 17 (1) and 24 (7) of the English Act read:

> "17 (1) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.
>
> 24 (7) No person may be introduced as a partner without the consent of all the existing partners".

Introduction.—"This chapter collects together and sets out in a convenient form all rules relating to the coming in of a partner and the going out of a partner in so far as they do not relate to the dissolution of the firm or to the consequences of dissolution.....They relate chiefly to.....a "change in the firm" (*i.e.*) a change in the constitution of the firm which has not resulted in the dissolution of the firm". (Report of Special Committee).

Clause (1)—Introduction of new partner—Subject to contract between the partners, and to the right of a minor to exercise his option under Sec. 30, the consent of all the partners is necessary for the introduction of a new partner. This would follow from the fact that partnership is a relation based on mutual confidence. But it is possible that this consent may be provided for at the inception of the partnership or subsequently. For example, a clause in the articles of partnership that the senior partner may have the rights of introducing a new partner at any time will be valid and binding on the partners.[1] **[1195]**

In *Commissioner of Income-Tax* v. *Seth Govindram Sugar Mills,*[2] the Supreme Court observed that Section 31 "only recognises the validity of a contract

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1. *Re. Franklin & c. Arbitration,* (1929) 1 Ch. 238; *Lovegrove* v. *Nelson,* (1834) 40 ER 1; *In re. Ambalal Sarabhai,* (1923) 25 Bom. LR 1225; (Cf.) *Anant Ram* v. *Channu Lal,* (1903) 25 All. 378 : 1903 AWN 75; *Bachubai* v. *Shamji,* (1885) 9 Bom. 536.
2. AIR 1966 SC 24 : (1965) 2 SCJ 289.

between the partners to introduce a third party without the consent of all subsisting partners; it presupposes the subsistence of a partnership; it does not apply to a partnership of two partners which is dissolved by the death of one of them, for in that event there is no partnership at all for any new partner to be introduced into it without the consent of the other". A deceased partner's heir cannot become a partner with the surviving partner except with his consent.[1]

The nominee of such a partner will be entitled to come into the partnership, subject to his satisfying any reasonable conditions that may have been laid down.[2] But it may be noticed that it is only an option vested in the nominee and that he could not be compelled to join the partnership.[3]

Clause (2)—Incoming partner's liability—Generally speaking, an incoming partner's liability is only with respect to transactions subsequent to his becoming a partner.[4] As pointed out by Lindley.[5] When a new member is admitted, he becomes one of the firm for the future, but not as from the past, and his present connection with the firm is no evidence that he ever expressly or impliedly authorised what may have been done prior to his admission. But as pointed out in *Sarma* v. *Phanindra Nath,*[6] it is not an inflexible rule that the liability of the newcomer is thus limited. The question to be considered will be whether the firm as newly constituted has assumed the liability for the debt, or whether the creditor has agreed to accept the new firm as his debtor; sometimes it may be a tripartite arrangement among the creditors, the old partners and the newcomer.[7] In the case of *Russa Engineering Works* v. *Kanara Transport Co.,*[8] it was held that an agreement by an incoming partner to be liable for antecedent firm debts will not be enforceable by a creditor who was not a party to the arrangement. The principle of *Res inter alios acta* will apply. Conversely, the creditor is under no duty to recognise the new firm and may hold the old partners liable if he chooses.[9] The courts however lean in favour

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1. *Re. Franklin & c. Arbitration,* (1929) 1 Ch. 238; *Lovegrove* v. *Nelson,* (1834) 40 ER 1; *In re. Ambalal Sarabhai,* (1923) 25 Bom. LR 1225; (Cf.) *Anant Ram* v. *Channu Lal,* (1903) 25 All. 378 : 1903 AWN 75; *Bachubai* v. *Shamji,* (1885) 9 Bom. 536.
2. *Byrne* v. *Reid,* (1902) 2 Ch. 735.
3. *Madgwick* v. *Wimble,* (1843) 49 ER 917; *Piggott* v. *Bagley,* (1825) 148 ER 539; *Holland* v. *King,* (1848) 136 ER 1433.
4. *Saville* v. *Robertson,* (1792) 100 ER1264; *Gabriel* v. *Evill,* (1842) 152 ER 125.
5. 10th Edn., p. 266.
6. (1931) 35 CWN 593.
7. *Madho Prasad* v. *Gouri Datt,* (1939) Pat. 323 (337) (New partner simply acknowledging debt of old firm along with old partners—No liability in absence of novation or distinct promise to pay).
8. (1926) 49 Mad. 930 : 51 MLJ 506 : (1926) Mad. 1138. **See also** *Head* v. *Head,* (1893) 3 Ch. 426; (Cf.) *Wilsford* v. *Wood,* (1794) 170 ER 321.
9. *British Home Assurance Co.* v. *Paterson,* (1902) 2 Ch. 404.

of agreements by the incoming partner to make himself liable in respect of the debts of the firm before he joined it, and will readily infer it even from slight circumstances.[1] If one enters an existing firm without specifying the terms upon which he becomes a member, it will be presumed, as laid down in *Russa Engineering Works* v. *Kanara Transport Co.*,[2] that he accepts the terms of the original partnership articles. **[1196]**

Where, a partnership on the joining of a new partner acknowledged the liability of the pre-existing debts of the original partnership before reconstitution by issuing letters and acceptance of the new firm by the creditors and the respondent bank as the debtor, the newly admitted partner cannot escape the liability of the pre-existing debts.[3]

But there can be no doubt that an incoming partner is liable for new debts under a continuing contract entered into by the firm previous to his admission.[4]

32. Retirement of a partner.—(1) A partner may retire—

(a) with the consent of all the other partners,

(b) in accordance with an express agreement by the partners, or

(c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties

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1. *Ex parte Jackson*, (1790) 30 ER 165 : 1 RR 91; *Ex parte Whitemore*, (1839) 3 Deac. 365; *Rolfe* v. *Flower*, (1865) 1 PC 27 : 146 RR 96; *Jagarnath* v. *Cresswell*, (1913) 40 Cal. 814.
2. (1926) 49 Mad. 930 : 24 LW 546 : (1926) Mad. 1138 : 51 MLJ 506.
3. *B.M. Devaiah* v. *Canara Bank*, 2003 (2) Civil LJ 372 (Kant) : (2003) 4 ILD 46 (Kant).
4. *Dyke* v. *Brewer*, (1849) 175 ER 348 (Instalmental Contract).

for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement:

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.

Analogous law :—Secs. 26 (1), 17 (3), 17 (2) and 36 (3) of the English Partnership Act run thus—

> "26 (1) Where no fixed term has been agreed upon the duration of the partnership, any partner may determine the partnership, at any time on giving notice of his intention so to do to all the partners".
>
> "17 (2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement".
>
> "17 (3) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted".
>
> 36 (3) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the death, bankruptcy or retirement respectively".

Sub-section (1)—Retirement—This section deals with cases where, under the agreement between the partners, the retirement of a partner does not cause dissolution; ordinarily retirement may cause this result. The word 'retire' in Section 32 is confined to cases where a partner withdraws from a firm and the remaining partners continue to carry on business without dissolution of the partnership between them.[1] The retirement of a partner from the firm does not have the legal effect of dissolving it.[2] Under the old Sec.

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1. *C.I.T.* v. *A.W. Figgis & Co.*, AIR 1953 SC 455, 456; *Raj Kishore* v. *Jwala Prasad*, 1976 MPLJ 479.
2. *Sudarshanam* v. *Viswanadhana Bros.*, AIR 1955 AP 62.

253 (7) of the Contract Act, if from any cause whatsoever, any member of the partnership ceases to be so, the partnership is dissolved as between all the other members.

Where a partner retired from the partnership by executing the deed of retirement and received Rs. 13 lakhs under the said deed and subsequently challenged the legality and validity of the deed on the ground that it was executed under coercion, the plea cannot be accepted as he could have challenged its validity immediately thereafter.[1]

In general, there must be a communication by a formal notice or other overt act, of an unambiguous intention to cease to be a member of the partnership.[2] **[1196]**

A document releasing the interests of the petitioners as partners in favour of other partners, who continued the partnership, cannot be construed as conveyance. [3]

Sub-section (2)—Discharge from liability—This sub-section is an instance of novation. In *Scarf* v. *Jardine*,[4] novation is thus described.

> "There being a contract in existence, some new contract is substituted for it either between the same parties or between different parties, the consideration mutually being the discharge of the old contract. A common instance of it in partnership cases is where, upon the dissolution of a partnership, the persons who are going to continue in business agree, and undertake as between themselves and the retiring partner that they will assume and discharge the whole liabilities of the business, actually taking over the assets; and if in that case, they give notice of that arrangement to a creditor, and ask for his accession to it, there becomes a contract between the creditor who accedes and the new firm to the effect that he will accept their liability instead of the old liability, and on the other hand, that they promise to pay him for that consideration".

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1. *Broadway Centre* v. *Gopaldas Bagri*, AIR 2002 Cal. 78 : 2002 Cal WN 605 : 2002 Civil Court C 472 : 2002 (4) Rec Civ R 733.
2. *Ananda Prasad* v. *Bhagwant*, (1933) All. 926; *Jiwan Singh* v. *Lakshmi Chand*, (1935) Lah. 132 (Partner cannot be expelled from a partnership at will by the other partners for reasons of their own); *Kusum Bhimrao* v. *Jawahar Chand*, AIR 1982 Bom. 245 : 1981 Mah.LR (Bom) 242 : (1980) 2 Rent CR 302; **see** *Vishnu Chandra* v. *Chandrika Prasad*, AIR 1983 SC 523 (Retirement of a Partner-effect 1981 All. LJ 967 reversed).
3. *T.T. Meenakshi Achi* v. *Dist. Registrar, Coimbatore*, AIR 1994 Mad. 317, 322 : (1994) 2 Mad. LJ 1 : (1994) 1 LW 317 : 1994 Writ. LR 476.
4. (1882) 7 AC 345; *Commercial Bank of Tasmania* v. *Jones*, (1893) AC 313; *Nadimulla* v. *Channappa*, (1903) 5 Bom. LR 617.

Where the arrangement is not with the concurrence of the creditor, the creditor's rights against the retiring partner are unaffected.[1]

Whether novation has taken place is a question of fact.[2] As the section itself says, a novation could be implied from the course of dealing. Thus where after the death of one partner, the creditor accepts a fresh promissory note from the survivors in renewal of a prior note and filed a suit thereon, it was held that the representatives of the deceased partner were not liable.[3] **[1068]**

Retirement of a partner from the partnership firm does not terminate his liability towards a third party or creditor if the liability had been incurred before the partner in question retired.[4]

Where the plaintiff on the basis of a pro note executed by the partners of a firm, sued an outgoing partner who was a partner at the time of incurring the liability by the firm, the outgoing partner is liable for the debt incurred by the firm.[5]

The liability of a retiring partner as against a third party continuous unless there is an agreement discharging such retiring partner.[6]

Sub-section (3)—Liability continues till giving of public notice—In *Bhai Shankar* v. *Lakshmi Dyeing Works,*[7] where a person entered into a transaction with a firm after the retirement of one of the partners, but before notice of dissolution, and had never been aware of the retired partner's membership of the firm, it was held that no liability could attach to the retiring member. A retired partner cannot be made liable by the third parties for partnership debts on the ground of failure to give public notice under Sec. 72 when the third parties did not know of his being a partner and transacted with the firm after the retirement of such partner.[8] In a case under Sec. 264 of

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1. *Sarma* v. *Phanindranath,* (1931) 35 CWN 593. **See also** *Veerappa* v. *Arunachalam,* (1924) PC 192 : 29 CWN 438 : 86 IC 259 : 20 LW 368 : (1924) MWN 559 : 47 MLJ 168.
2. *Sarma* v. *Phanindranath,* (1931) 35 CWN 593; *Bedford* v. *Deakin,* (1818) 106 ER 344 (No novation where rights against retiring partner reserved); *Hart* v. *Alexander,* (1837) 150 ER 848; *Kirwan* v. *Kirwan,* (1836) 47 ER 233; *Blew* v. *Wyatt,* (1817) 172 ER 1026 : 38 ER 826 (Agreement to discharge, the retired partner must be shown); *Re Head,* (1893) 3 Ch. 426.
3. *Markandrai* v. *Virendra Rai,* (1917) 19 Bom. LR 837 : 42 IC 815; (Cf.) *Harris* v. *Farwell,* (1851) 51 ER 447; *Benson* v. *Hadfield,* (1844) 67 ER 549.
4. *Kolor Syama Raju* v. *Sri Venkateshwara Mahal,* 2006 (6) ALD 278.
5. *M.A. Parthasarathy* v. *Bank of Baroda,* AIR 2007 (NOC) 311 (Karn) : 2007 (1) AIR Kar R 340.
6. *Syndicate Bank* v. *R.S.R. Engineering Works,* (2003) 6 SCC 265 : 2003 (4) Supreme 84 : 2003 (4) JT 578.
7. (1930) Bom. 449 : 32 Bom. LR 1031; *Gandhi* v. *Gitanjali,* (1972) 1 MLJ 234.
8. *M/s. Glorious Plastics Ltd.* v. *Laghate Enterprises,* AIR 1993 Bom. 224 : 1993 (1) Bom.CR 179.

the Contract Act, however, the Calcutta High Court has held that the rights of third parties to sue a retiring partner upon post-dissolution transactions does not depend on the question whether they knew that he was a partner prior to dissolution.[1] The retiring partner, therefore, continues to be liable so long as no public notice of retirement is given. An acknowledgement by one partner will therefore bind the retiring partner.[2] **[1225]** Mere publication of public notice of retirement by the retiring partner in the local news papers in the absence of communication of public notice to the Registrar of firm and its publication in the official Gazette, shall not be sufficient to absolve the partnership liability of the retired partner.[3]

The Privy Council,[4] observed that where no public notice of retirement of a partner is given and the retiring partner pleads non-liability on the ground that the plaintiff was apprised of the retirement before the suit liability was contracted, the burden is heavy on the retiring partner to prove and establish the plaintiff's knowledge. The persons who had ceased to be partners would be liable to third parties for the acts done by the other partners subsequent to the dissolution of the firm where the third parties had actual notice of the dissolution when the acts were done.[5]

Under the old Contract Act, individual notices were necessary to old customers in case of dissolution, and where such notice was not given, it had been consistently held that the retiring partner was liable.[6] Under the present Act, public notice is enough both in the case of old customers and new. Public notice is intended to bring home the act of retirement and sufficient notice would be sufficient either by personal notice or public notice.[7]

A suit for the recovery of the loan borrowed by a partnership firm is maintainable against the retired partners also who were partners at the time

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1. *Pramatha Chandra* v. *Bhagwandas,* (1931) 59 Cal. 40 : 35 CWN 705; (Cf.) *Chundee* v. *Eduljee,* (1881) 8 Cal. 678.
2. *Bengal National Bank* v. *Jatindra Nath,* (1929) 56 Cal. 566 : 33 CWN 412 : (1929) Cal. 74; *Ratanji* v. *Prem Shankar,* (1938) All. 619 : (1938) ALJ 907; (Cf.) *Mahadeva Aiyer* v. *Ramakrishna Reddiar,* (1925) 50 MLJ 867 : 23 LW 199 : (1925) MWN 707 : (1926) Mad. 114; *Ghanshyam Vijay Oil Mills* v. *Thackar Ranchhoddas Ratanshi,* AIR 1984 NOC 17 (Guj.).
3. *C. Assiamma* v. *State Bank of Mysore,* AIR 1990 Ker. 157.
4. *Kala Ram* v. *Punjab National Bank,* (1935) 39 CWN 412 : 37 Bom. LR 387 : 61 CLJ 212: (1935) OWN 194 : 153 IC 662 : (1935) MWN 102 : 41 LW 164 : (1935) PC 14 : 68 MLJ 206. (Case under old S. 264).
5. *Natwarlal Ambalal & Co.* v. *Chatuerbhai,* (1977) 18 Guj. LR 127.
6. (Cf.) *Jwala Dutt* v. *Bansilal,* (1929) 53 Bom. 414 : 31 Bom. LR 687 : (1929) 53 Bom. 414: 31 Bom. LR 687 : (1929) ALJ 579 : 33 CWN 585 : (1929) MWN 440 : 115 IC 707 : 29 LW 884 : (1929) PC 132 : 56 MLJ 739 (PC); *Bhai Shankar* v. *Lakshmi Dyeing Works,* (1930) Bom. 449; *Jagat Chandra* v. *Gunny Hajee,* (1926) Cal. 214; *Ezekiel* v. *Russa Engineering Works,* (1924) 1 Ran. 47 : (1924) Ran. 133.
7. *Central United Bank* v. *Venkatarama,* AIR 1963 Mad. 302.

of borrowing unless the continuing partners agreed to takeover their liability or a public notice under Sec. 32 (3) has been issued relieving the retired partners of their liability. [1]

The liability created under Section 32 (3) on a retired partner would not extend to his being liable to be adjudicated as an insolvent.[2]

Where the partnership is at will and some of the partners retiring with the consent of other partners, claimed for the amounts due to them, in the absence of documents and accounts being produced an adverse inference can be drawn against the firm and the claim of the retiring partners can be accepted as correct and binding. [3]

Public notice—As to what constitutes 'public notice' see Sec. 72, *infra.*

However, where the partnership is at will and a partner wants to exercise the right of retiring, Sec. 32 (1) (c) requires a notice in writing to be served to all other partners of his intention to retire. But where the other partners have knowledge of such retirement, serving notice would be meaningless and a waste of time and stationery. [3]

Dormant Partner—As Patterson, J., observed in *Heath* v. *Sansom,*[4] a dormant partner may retire without giving notice to the world and the proviso to sub-section (3) expresses this. Under the old Sec. 264, there was some conflict of opinion as to its application to dormant partners. This conflict is now set at rest.

33. Expulsion of a partner.—(1) A partner may not be expelled from a firm by any majority of the partners, save in the exercise in good faith of powers conferred by contract between the partners.

(2) The provision s of sub-sections (2), (3) and (4) of Section 32 shall apply to an expelled partner as if he were a retired partner.

Analogous law.—Sec. 25 of the English Partnership Act runs thus:

> "25. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners".

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1. *Syndicate Bank* v. *M/s. R.S.R. Engineering Works,* (2003) 6 SCC 265 : 2003 (4) Supreme 84 : 2003 (3) Civil LJ 593 (SC) : (2003) 6 ILD 434 (SC).
2. *Veerappa Chettiar* v. *Kalidoss Chettiar & Sons,* (1973) 1 MLJ 238.
3. *Vaiyapuri Mudaliar & Sons* v. *Sri. Arunodhaya Textiles, Erode,* AIR 1996 Mad. 19, 26 : 1996 Bank J 352 : 1996 (3) Bank.LJ 155.
4. (1832) 110 ER 420. **See also** *Green* v. *Howell,* (1910) 1 Ch. 495.

Sub-section (1)—Expulsion of a partner—This section enunciates on the lines of Sec. 25 of the English Act, that the power of expulsion of a partner must be exercised *bona fide* by the majority of the partners and must have been conferred by the instrument of partnership itself. The English decision on which the rule is based is, *Blisset* v. *Daniel.*[1]

The contract may confer the power in any terms. Thus, the power may be exercisable at the pleasure of one partner.[2] But clauses conferring power of expulsion are construed strictly; and so, where the articles provide for the exercise of the power under certain conditions, they must be strictly fulfilled.[3] A power to expel contained in the articles cannot be exercised where the term has expired, but the partnership is continued on the old footing.[4] **[1194]**

Where the notice of expulsion is invalid, it is inoperative and so the injured party cannot sue for damages for wrongful expulsion.[5]

Under the old Contract Act, it had been held that expulsion does not necessarily work a dissolution of the partnership.[6] The present section makes this quite clear.

It has been held that where expulsion of a partner is applied for in a Court, the partner sought to be expelled must have an opportunity to explain and defend himself.[7] Under the old Contract Act, it would seem that expulsion can be only through Court.[8]

The rule enunciated in the above section applies to all partnerships, whether at will or for a term.[8]

Sub-section (2)—Position of expelled partner—"This sub-section places an expelled partner on precisely the same footing as a retired partner as regards his liabilities for existing and future debts of the firm". (Report of Special Committee).

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1. (1853) 68 ER 1022 : 90 RR 454. **See also** *Carmichael* v. *Evans,* (1904) 1 Ch. 486; *Andrews* v. *Mitchell,* (1905) AC 78.
2. *Russell* v. *Russell,* (1880) 14 Ch.D. 471; *Stewart* v. *Gladstone,* (1878) 10 Ch. D. 626.
3. *Smith* v. *Mules,* (1852) 68 ER 633 : 89 RR 573.
4. *Neilson* v. *Mossend Iron Co.,* (1886) 11 AC 298.
5. *Wood* v. *Wood,* (1874) 9 Ex. 190.
6. *Dwarkadas* v. *Chuni Lal,* (1909) 12 CWN 455.
7. *Nem Das* v. *Kunj Behari,* (1928) Oudh 424 : 110 IC 500; *Wood* v. *Wood,* (1874) 9 Ex. 190; *Barnes* v. *Young,* (1898) 1 Ch. 414 (Warning must be given before expulsion); **but see** *Green* v. *Howell,* (1910) 1 Ch. 495.
8. *Jivan Singh* v. *Lakhmichand,* (1935) Lah. 132.

34. Insolvency of a partner.—(1) Where a Partner in a firm is adjudicated an insolvent he ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is thereby dissolved.

(2) Where under a contract between the partners, the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made.

Analogous law :—Secs. 33(1) and 36 (3) of the English Partnership Act run thus:

> "33 (1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner".
>
> "36 (3) The estate of a partner who dies, or who becomes bankrupt or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy or retirement respectively".

Previous law compared—Under the Contract Act, Sec. 254 (2), the adjudication of a partner was only a ground for dissolution through Court.[1] Under the present Act, in the absence of an agreement to the contrary, the adjudication of a partner by itself causes a dissolution. See Sec. 42(d) *infra.*

Sub-section (1)—Effect of insolvency—English and Indian law.—The Special Committee said:

> "This (sub-section) states the principle that the insolvency of a partner severs his connection with the firm. The English act antedates the dissolution back to the act of bankruptcy, but it is considered that this would be impracticable in India . . . Hence the definite date of the order to adjudication has been selected as the date on which the insolvent ceases to be a partner."

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1. *Official Assignee* v. *Nathumall,* (1930) 59 MLJ 501 : 31 LW 339 : 124 IC 144 : (1930) Mad. 458; *Ma Thwe* v. *Munshi Ram,* (1931) Ran. 191 : 131 IC 62; *Firm of Nichal Singh* v. *Firm of Vishenji,* (1926) Sind 71; *Devji* v. *Tricumji,* (1933) Pat. 239.

Sub-section (2)—Liability of insolvent partner.—The Special Committee said:

> "This clause contains two rules: (i) It lays down that the estate of the insolvent is not liable for any act of the firm done after the date of adjudication. This rule is taken from sub-section (3) of Sec. 36 of the English Act, and it is justified by the general consideration that the adjudication of the insolvent is a notorious event and no further notice thereof is required either to old or new customers of the firm. (ii) It also contains the complementary rule that the firm is not bound by the acts of the insolvent done after the date of adjudication. This is based on *Thomson* v. *Frere*".[1]

Right of assignee in bankruptcy—On the insolvency of a partner, his estate vests in the Official Assignee or Receiver who will be entitled to realise the assets and profits of the insolvent. He can continue or commence any proceeding in his name and that of the other partners.[2] But it appears he cannot take possession of the goods of the partnership without the consent of the partners.[3]

35. Liability of estate of deceased partner.—Where under a contract between the partners the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any act of the firm done after his death.

Analogous law—Sec. 36(3) of the English Partnership Act—See under Sec. 34.

Liability of deceased partner's estate—This section applies only to cases where the firm continues in spite of the death of a partner. The liability in cases where death effects dissolution is dealt with under Secs. 45 and 47.

The section enacts that the estate of the deceased partner is not liable for acts of the firm subsequent to his death.[4] As to acts of the firm before the death of the partner, there can be no doubt that the estate is liable; and there is

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1. (1809) 103 ER 834 : 10 RR 341.
2. *Ex parte Wilson,* (1838) 2 Deac. 387.
3. *Official Assignee* v. *Nathumall.* (1930) 59 MLJ 501.
4. *Bagel* v. *Miller,* (1903) 2 KB 212; *Seshi* v. *Vairavan,* (1918) 42 Mad. 15 : 8 LW 503 : (1918) MWN 806 : 35 MLJ 669 : 47 IC 958 (Goods ordered during life time of deceased partner—Supplied after death of partner—Estate of deceased not liable); *Mulchand* v. *Manekchand,* (1906) 8 Bom. LR 8; *Md. Said* v. *Punjab National Bank,* (1937) Lah. 869 : 170 IC 686 (Case under S. 261, Contract Act); *Friend* v. *Young,* (1897) 2 Ch. 421 (Want of notice of death immaterial).

nothing to prevent the creditor proceeding against the estate, without suing the surviving partners.[1]

Under this section, the question as to whether a liability is one, which arose subsequent to the death of the partner, may present some difficulty. The decision will depend on the terms of the particular contract out of which the liability is alleged to arise.[2]

36. Rights of outgoing partner to carry on competing business.—(1) An outgoing partner may carry on a business competing with that of the firm and he may advertise such business, but, subject to contract to the contrary, he may not—

(a) use the firm-name,

(b) represent himself as carrying on the business of the firm, or

(c) solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

Agreement in restraint of trade

(2) A partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits; and, notwithstanding anything contained in Section 27 of the Indian Contract Act, 1872 (9 of 1872) such agreement shall be valid if the restrictions imposed are reasonable.

Analogous law—Sec. 27 exception (2) [now repealed] of the Indian Contract Act.

Object and principle of the section.—As the Special Committee remarks, this section deals with restrictions imposed on outgoing partners

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1. *In re. Hodgson, Beckett* v. *Ramsdale,* (1887) 31 Ch.D. 177; *Matheson* v. *Ludwig,* (1896) 2 Ch.D. 836.
2. *Bagel* v. *Miller,* (1903) 2 KB 212; *Seshi* v. *Vairavan,* (1918) 42 Mad. 15 : 8 LW 503 : (1918) MWN 806 : 35 MLJ 669 : 47 IC 958 (Goods ordered during life time of deceased partner—Supplied after death of partner—Estate of deceased not liable); *Mulchand* v. *Manekchand,* (1906) 8 Bom. LR 8; *Md. Said* v. *Punjab National Bank,* (1937) Lah. 869 : 170 IC 686 (Case under S. 261, Contract Act); *Friend* v. *Young,* (1897) 2 Ch. 421 (Want of notice of death immaterial).

with a view to prevent unfair competition with the firm. Where, for example, a partner retires, he gets payment of his share of the assets, inclusive of the goodwill.[1] He is therefore in the position of one who has sold his share of the assets, including the goodwill. It would, in such circumstances, be in the fitness of things that the out-going partner should be restrained from unfair competition with the business which he has sold off. In the words of the Special Committee Report.

> "The rules contained (in this clause) are a statement of the chief judicial rulings on the subject of the sale of goodwill; narrowed to the particular application where a partner sells or is deemed to sell his share of the goodwill to his fellow partners. Sub-clause (2) modifies the rule contained in the opening passage of sub-clause (1).....It is derived from the second exception to Sec. 27 of the Contract Act".

The term, outgoing partner, will include, according to the Special Committee, not only a retiring partner, but an expelled partner also.

Sub-section (1)—Clause (a)—Use of firm name—The right to use the firm name may be acquired by express agreement with the other partners.[2]

Sub-section (2)—Restraining out-going partner from competing—[With regard to the law as to contracts in restraint of trade see Commentary on 27 of the Contract Act of the commentary]. The Exceptions 2 and 3 to Section 27 have been repealed and the subject-matter of Exception 2 has been brought in here, as being more appropriate.

For the restraint to operate, it must not be unrestricted in point of space or duration. The period or the local limits must be specified; and even where there is such specification, the Court must find that the restriction is reasonable.[3] The latter part of the sub-section must not be construed as meaning that the agreement in restraint of trade will operate only when it bears the *imprimatur* of a Court's approval, but that the mere fact that the agreement specifies the period or the local limits is not conclusive as to its binding character. **[1198]**

37. Right of outgoing partner in certain cases to share subsequent profits.—Where any member of a firm has died or

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1. **See** *Trego* v. *Hunt*, (1896) AC 7.
2. (Cf.) *Bachubai* v. *Shamji*, (1885) 9 Bom. 536.
3. *Williams* v. *Williams*, (1818) 36 ER 612 : 17 RR 49; *Hadsley* v. *Dayer Smith*, (1914) AC 979.

otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six percent per annum on the amount of his share in the property of the firm :

Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

Analogous law—Sec. 42 of the English Partnership Act—Substantially the same as the section except that the rate of interest is five per cent.

Scope—The section lays down *inter alia* the substantive law relating to the liability of the surviving partners in utilising the assets of the firm without settling accounts with the legal representatives of a deceased partner for continuing the business as their own.[1] Where some unexpected profits and or cash incentives, which were not contemplated at the time of dissolution, accrued subsequently, the retired partners are not entitled to have a share in it, since the question of incentive having been as value less at the time of dissolution.[2] Where the surviving partners do not carry on that business but a different though similar business the section is inapplicable.[3] If the core facts are established relief can be given under the section though the plaintiff has not asked for it.[4]

Where the partnership at will carried on by two partners, one of the partner retired from the partnership business leaving his capital and the remaining partner continued to carry the business and sold it at profit the retired partner is entitled to share equally in the post dissolution capital profit.[5]

1. *Laxmidas Dayabhai* v. *Nanabhai Chunilal,* AIR 1964 SC 11, 19 : 1964 (2) SCR 567.
2. *P.D. Yudhistar* v. *M/s. P. Mittulal Lalah & Sons,* AIR 1993 Mad. 36.
3. *Mohanasundaram* v. *Neelambal,* AIR 1955 Mad. 442.
4. *Ramnarayan* v. *Kashinath,* AIR 1954 Pat. 53.
5. *Popat* v. *Shonchhatra,* (1997) 3 All. ER 800 (CA).

A retired partner selling his share in the partnership firm is entitled to claim only interest on the value of his share sold by him as a debt on the partnership firm but cannot have a right to claim any further share in the profits of the firm.[1]

"Contract to the contrary"—This is well illustrated in the leading English case of *Vyse* v. *Foster,*[2] in which the agreement provided that on the death of a partner, the amount of his share should be ascertained and be paid out with interest, by instalments, and in a suit for the share of assets and profits subsequent to the death of a partner, it was held that the plaintiff was not entitled to profits, but only to interest.

"Attributable to the use of his share"—In England, this principle has been consistently applied both and after the Act.[3] Where the profits are not solely attributable to the use of the share, the Court may order an inquiry and apportion of the profits.[4] In an early English case *Willett* v. *Blanford,*[5] it was said, "The nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the late partnership and the deceased partner at the time of his death, and the conduct of the parties after his death, may materially affect the rights of the parties".

In India, questions of this kind have arisen in relation to Sec. 241 of the Contract Act and Sec. 88 of the Trusts Act.

The share of a partner on his retirement is in the nature of pure debt with effect from the date on which he ceased to be a partner and the relevant date for the purpose of ascertaining the value of the share is the date on which he ceased to be a partner.[6]

In *Lachmi Narain* v. *Beni Ram,*[7] it was held that where one of two partners dies, and the survivor retains the partnership capital in his hands and employs it in trade, he is bound to render an account of the profits of the partnership to the legal representative of the deceased partner from the date of death to the

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1. *Pamuru Vishnu Vinodh Reddy* v. *Chillakuru Chandrasekhara Reddy,* AIR 2003 SC 1614 : (2003) 3 SCC 445 : (2003) 3 ILD 757 (SC) : 2003 (2) Civil LJ 648 (SC).
2. (1874) 7 HL 318; (Cf.) *Flockton* v. *Bunning,* (1868) 8 Ch. 323, per Wood and Selwyn, LJJ.
3. *Simpson* v. *Chapman,* (1853) 43 ER 466 : 102 RR 61; *Wedderburn* v. *Wedderburn,* (1852) 52 ER 1039; *Yates* v. *Finn,* (1880) 13 Ch.D. 839; *Page* v. *Ratcliffe,* (1896) 75 LT 371 (Case after the Act).
4. *Featherstonhaugh* v. *Turner,* (1858) 53 ER 693 : 119 RR 462 and see Note (2) above.
5. (1841) 66 RR 1027 : 59 RR 61.
6. *Chillakuru Chandrasekhara Reddy* v. *Pamuru Vishnu Vinod Reddy,* AIR 1995 AP 49, 53.
7. (1931) 53 All. 479 : (1931) ALJ 81 : 130 IC 704 : (1931) All. 327; (Cf.) *Babu* v. *Official Assignee, Madras,* (1934) MWN 717 (PC) (Surviving partner holds a fiduciary position); *Jamsetji* v. *Hirji,* (1909) 37 Bom. 158; *Hajee Siddick* v. *Hushum,* (1916) 2 MWN 341 : 4 LW 521 : 37 IC 728.

date of final decree. In *Ramakrishna* v. *Muthuswami,*[1] where the claim was rested on illustration (f) to Sec. 88 of the Trusts Act, the principle of Sec. 42 of the English Partnership Act was adopted and the plaintiff was held entitled to a share of profits since the date of dissolution. It was further held in that case following *Manley* v. *Sartori,*[2] that it is enough if a portion of the assets is used in making the subsequent profits, for the partner has a share in every portion of the partnership assets.

Where a 'partnership at will' was dissolved and the assets of the outgoing partner was put to use in the conduct of the business of the partnership from the date of dissolution till the conclusion of the winding up of partnership, by strict construction of Sec. 42 (1) of Partnership Act 1890, an outgoing partner has an interest in net or surplus assets of the partnership after satisfy the partnership liabilities.[3]

In an earlier decision of the Privy Council in *Bhagwandas* v. *Rivett-Carnac,*[4] the mode of accounting in cases where the share of a retired or deceased partner was not paid out, had been indicated. In *Hedayetulla* v. *Mohamed Kamil,*[5] another judgment of the Judicial Committee, it was held that the representatives of the deceased partner were entitled to the same share, as the partner would have taken if the partnership had not been dissolved. There is however another decision of the Privy Council *Ahmed Musaji* v. *Hashim Ebrahim,*[6] *which* does not seem to fall in line with the above cases. Lord Summer said in this case that:

> "It is well settled that in certain cases, when on the dissolution of a firm one of the partners retains assets of the firm in his hands, without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for these assets *with interest* thereon, and this, apart from fraud or misconduct."

But this dictum has been explained in the Madras case above referred to, on the ground that the plaintiff in the case did not set out any alternative claim for profit but had contended itself with a claim for interest on the share of assets.

It would therefore follow that the plaintiff in such cases has an option to claim either profits or interest.

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1. (1929) 52 Mad. 672 : 56 MLJ 657 : 29 LW 560 : 121 IC 609 : (1929) Mad. 456.
2. (1927) 1 Ch. 157.
3. *Sandhu* v. *Gill,* [2005] 1 All ER 990 (ChD).
4. (1898) 23 Bom. 544 (PC).
5. (1924) 19 LW 425 : 29 CWN 161 : 22 ALJ 382 : (1924) MWN 660 : (1924) PC 93 : 81 IC 525 (PC).
6. (1915) 42 IA 914 : 42 Cal. 914 : 29 MLJ 70 : (1915) PC 116 : 17 Bom. LR 432 : 19 CWN 449 : 2 LW 377.

Where there was no agreement that the continuing partner shall takeover the share of a deceased partner at a proper valuation and he took it over at an under-value, the only remedy for the legal representatives of the deceased partner is to have the accounts settled on the lines indicated in Section 37.[1]

A suit by the legal representatives of a deceased partner for rendition of accounts against the surviving partners up to the date of the death of the deceased, unless accounts have been settled earlier is governed by Article 5 of the Limitation Act, 1963.[2]

Where the amount due to the legal representatives is ascertained interest thereon will be allowed from the date of ascertainment; it is however open to the Court to allow it from the date of plaint if the debtor-partner was guilty of misconduct.[3]

ASSIGNEE.—That the assignee of a partner's share stands on the same footing has been decided in *Muthiah Chetty* v. *Veerappa Chetty.*[4]

Option when exercisable—The option to claim profits or interest on the share of assets need not be exercised till the share of profits is actually ascertained on going through the accounts.[5] **[1198-1199]**

38. Revocation of continuing guarantee by change in firm.—A continuing guarantee given to a firm, or to a third party in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions from the date of any change in the constitution of the firm.

Analogous law.—Sec. 18 of the English Partnership Act runs thus—

> "18. A continuing guarantee or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any charge in the constitution of the firm to which, or of the firm in respect of the transaction of which, the guarantee or obligation was given".

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1. *Sivagnathammal* v. *Nallaperumal,* AIR 1935 Mad. 165 : (1934) 64 MLJ 880 : 155 IC 785.
2. *Nagarajan* v. *Robert Hot,* AIR 1954 Punj. 278; *Peerar Sahib* v. *Pedda Jamaluddin Sahib,* AIR 1958 AP 48.
3. *Thulasi Ammal* v. *Ramachandra,* AIR 1955 Mad. 171 : (1955) 1 MLJ 84.
4. (1929) 52 Mad. 509 : 56 MLJ 776 : 29 LW 636 : (1929) Mad. 627 : 121 IC 498.
5. *Mansha Ram* v. *Tej Bhan,* AIR 1958 Punj. 5; **see also** *Ramakrishna* v. *Muthuswami,* AIR 1929 Mad. 456 : (1929) ILR 52 Mad. 672 : 56 MLJ 657.

Revocation of continuing guarantee.—A continuing guarantee is one given on account of personal confidence, and so, where the *personnel* of a firm is changed, the risk of the surety is altered, and therefore the guarantee is revoked.[1] The contract to the contrary must be clear.[2] **[1233]**

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1. *Promatha Chandra* v. *Bhagwandas*, (1931) 59 Cal. 40 : 35 CWN 705; *Neel Comul* v. *Biprodas*, (1901) 28 Cal. 597; *Maharaj Kishan* v. *Hargobind*, (1914) 27 IC 69.
2. *Backhouse* v. *Hall*, (1865) 122 ER 1283 : 141 RR 495.

CHAPTER VI

DISSOLUTION OF A FIRM

39. Dissolution of a firm.—The dissolution of partnership between all the partners of a firm is called the "dissolution of the firm".

Dissolution of firm—This expression is used to denote the fact that there is a complete breakdown of the relation of partnership among the partners. The use of the word 'partnership' was somewhat vague, and so the present expression was used. **[1233]**

Mere stoppage of business will not result in dissolution of partnership.[1]

The jurisdiction of the court does not depend on the volition of the defendant. The territorial jurisdiction of the court is not ousted because partnership immovable property is situated outside its jurisdiction.[2]

On the dissolution of a partnership firm, the partners of the dissolved firm shall continue to have an interest in the assets acquired out of the funds of the dissolved firm and they shall also have a right to file a suit for rendition of the accounts of a partnership firm subsequently established out of the funds of the dissolved firm even though they are not partners of the newly established firm.[3]

Where a bank accounts of a Partnership Firm were freezed at the instance of the respondent who was a minority share holder with 29% shares in the Partnership Firm and the rest of the partners holding 71% shares decided to continue the firm, the dissolution and freezer of bank accounts is unjustified.[4]

40. Dissolution by agreement.—A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

Scope—This section covers the case where all the partners agree subsequent to the formation of the partnership,[5] that the firm should be dissolved and also the case where the dissolution occurs in pursuance of a contract previously made (*e.g.*) in the original partnership articles. **[1237]**

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1. *Palaniappa Chettiar* v. *Vaidyanatha Iyer,* (1969) 82 LW 73.
2. *Romi Jaiswal* v. *Smt. Satya Bhama Jaiswal,* AIR 1999 Cal. 112 : 1999 (3) ICC 294.
3. *Rishi Ram Gupta* v. *Hari Ram Gupta,* AIR 2002 NOC 187 (Delhi).
4. *Best Enterprises* v. *Elanchizian,* AIR 2006 Mad. 275
5. *Charry* v. *Poohoomal,* (1926) 50 Bom. 665 : (1926) Bom. 585 : 28 Bom. LR 1275 : 99 IC 495.

Under Section 40 all partnerships including a partnership at will may be dissolved with the consent of the partners or in accordance with a contract between them as per the partnership deed.[1]

Where two partners have mutually agreed for the dissolution of a partnership at will between them and a cheque issued to the complainant partner by the other partner in settlement of the value of his share and consequently prosecuted for dishonour of cheque under Sec. 138 of the Negotiable Instruments Act, 1881, the dissolution of partnership at will cannot be challenged.[2]

Where a partnership comprising of father and son was dissolved on account of the death of the father, the widow of deceased partner and son who inherited to his interest are competent to enter into a partnership in regard to the business.[3]

From the partnership deed where the intention of the partners is distinctly clear that the partnership is not to be dissolved either on the retirement or death of the partner, the partnership *prima facie* is not at will.[4]

One or more partners of a partnership firm accepting the repudiatory breach of the other partners can dissolve the partnership.[5]

As partnership is formed by a consentient act on the part of the several partners, the same consensus will suffice to dissolve it. The agreement may be express or implied from a course of conduct.[6] But the mere fact of refusal to supply capital or the stoppage of the business will not terminate the partnership.[7] Nor the mere shifting of the business to another place in the absence of agreement among the partners,[8] nor the transfer of a running business.[9] Nor will the mere failure of the company dissolve it. Merely leaving

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1. *Nabakishore Naik* v. *Laxminarain Khuntira,* 1972 (1) CWR 456.
2. *Abdul Hameed* v. *State of Rajasthan,* 2003 (2) Civil LJ 584 (Raj).
3. *Mohan Lal Daulat Ram* v. *I.T. Commissioner, Bombay,* AIR 1991 SC 479 : 1991 Supp. (1) SCC 552.
4. *Ramesh Kumar* v. *Lata Devi,* AIR 2007 MP 153.
5. *Mullins* v. *Laughton,* (2003) 4 All. ER 94.
6. *Pearce* v. *Lindsay,* (1860) 46 ER 591 : 125 RR 546 (Dissolution inferred from quarrel between the partners, though no formal notice given).
7. (Cf.) *Haramohan* v. *Sudarsan,* (1921) Cal. 538 : 66 IC 811 : 25 CWN 847; *Chunni Lal* v. *Sheo Charan,* (1925) 89 IC 122; *Din Muhammad* v. *Kanshi Ram,* (1930) Lah. 378; *Srinivasalu* v. *Ramakrishna,* (1933) Mad. 353 : 37 LW 288 : (1933) MWN 689 : 144 IC 573; *Vasant Seshrao* v. *Deir Prasad,* 1969 Mah. LJ 577 : 72 Bom. LR 333; *Kali Ram* v. *Ram Rattan,* (1977) 79 Punj. LR 162 (Delhi).
8. *K.R. Mallesha* v. *Ramnath,* AIR 1974 AP 53; *Radha Soami Satsangh Sabha* v. *Pawan Electric Refrigerating Co.,* AIR 1967 All. 9 : 1967 All. LJ 173.
9. *Gurdayal* v. *Suknandan,* (1929) All. 236 : 117 IC 824; *Gordhandas* v. *Bhulabhai,* (1932) 34 Bom. LR 623.

the management to one co-partner will not amount to a dissolution.[1] But suspension of business coupled with other circumstances may lead to the inference that the partnership had been dissolved.[2]

41. Compulsory Dissolution.—A firm is dissolved—

(a) by the adjudication of all the partners or of all the partners but one as insolvent, or

(b) by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership:

Provided that, where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings.

Analogous law—Sec. 34 of the English Partnership Act—Same as Clause (b).

Compulsory dissolution—Clause (a)—Insolvency—It is possible that a firm as such may be adjudicated as insolvent for its own acts of insolvency.[3] And the insolvency of a firm is the insolvency of each of its partners.[4] See also commentary on Sec. 35 *supra.*

Clause (b)—Subsequently Illegality—One familiar class of such cases is partnership with an alien enemy; see as to the subject matter in Vol. I. The leading cases on the point in England are *Ertel Bieber & Co.* v. *Rio Tinto & Co.*[5] and *Rodrigues* v. *Speyer Bros.*[6]

Proviso—This is simply an application of the principle of severability, which underlies Secs. 24 and 58 of the Contract Act. The Special Committee Report says that it incorporates a suggestion made by Lindley in his treatise on Partnership.

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1. *Maung Tha* v. *Mah Thin,* (1901) 28 Cal. 53 : 5 CWN 114 (PC).
2. *Baijnath* v. *Chhote Lal,* (1928) 26 ALJ 243 : 107 IC 673 : (1928) All. 58; *Srinivasalu* v. *Ramakrishna,* (1933) Mad. 353 : 144 IC 573 : 37 LW 288. **See** *I.T. Commr., W.B.* v. *Pigot Champan & Co.,* AIR 1982 SC 1085 (Dissolution of old firm and constitution of new firm. It has to be determined on the basis of documents executed by and nature of partnership).
3. *Lovell* v. *Beauchamp,* (1894) AC 607.
4. *Dharam Das* v. *Hukumchand,* (1932) Sind 62; (Cf.) English Bankruptcy Rules, 1915, Rules 285 & 288 (Referred to by Lindley 10th Edn., (1935) p. 748). **See also** *Stonehouse* v. *De Silva,* (1813) 170 ER 1424.
5. (1918) AC 360.
6. (1919) AC 59. **See also** *Janson* v. *Driefontein Consolidated Mines Ltd.,* (1902) AC 484.

42. Dissolution on the happening of certain contingencies.—Subject to contract between the partners a firm is dissolved—

(a) if constituted for a fixed term, by the expiry of that term;

(b) if constituted to carry out one or more adventures or undertakings, by the completion thereof;

(c) by the death of a partner; and

(d) by the adjudication of a partner as an insolvent.

Analogous law—Sec. 32 (a) and (b) and Sec. 33 (1) of the English Partnership Act run thus—

"32. Subject to any agreement between partners, the partnership is dissolved—

(a) if entered into for a fixed term, by the expiration of that term;

(b) if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking."

"33 (1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner".

Contract to the contrary.—The section operates only in the absence of a contract to the contrary, and in *Sayyed Abdul Hawk* v. *Vaikuntam,*[1] it has been held that the contracts to the contrary need not be express. The burden of proving a contract to the contrary is on the party asserting it.[2] In one Madras case, where the partnership articles fixed the term at 60 years and provided that the interests of the partners shall be assignable only among themselves or their legal heirs, it was held that these two clauses did not justify an inference of a contract to the contrary, such that the death of one of the partners will not dissolve the partnership.[3]

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1. (1927) 52 MLJ 318 : 25 LW 388 : (1927) MWN 574 : 100 IC 616 : (1927) Mad. 491; *Kodandapani* v. *Sree Manavedan Raja,* (1934) 57 Mad. 378 : 66 MLJ 625 : (1934) Mad. 162 : 39 LW 164. **See also** *Metupalayam Industrial Estates (P) Ltd.* v. *Mohamed Ismail Rowther,* (1976) 1 MLJ 446.
2. *Ram Niwas* v. *Diwan Chand,* (1933) Lah. 618 : 144 IC 1. **But see** *Secretary of State* v. *Jagat Mohini,* (1901) 28 Cal. 540.
3. *Kodandapaniv. Sree Manavedan Raja,* (1934) 57 Mad. 378 : 66 MLJ 625 : 39 LW 164 : (1934) MWN 22 : 151 IC 81 : (1934) Mad. 162.

Clause (a)—Expiry of term.—A partnership constituted for a fixed term stands dissolved by the expiry of that term, unless it could be shown that the parties by express or implied agreement consented to continue the business.[1] In *Firm of Harimal* v. *Kriparam,*[2] it was held that where a partnership has been entered into for a fixed term, the Courts should not permit a partner to drive the others to a dissolution. **[1238]** Inasmuch as the several clauses of Section 42 are independently operative, though the duration of a term is specified nevertheless it will be dissolved, for instance, by the death of a partner in the absence of a contract to the contrary.[3]

CONTINUATION BEYOND TERM.—Sec. 17 (b) enacts that a partnership continued after the term fixed is a partnership at will and that it will be governed by the original stipulations as to the rights and duties of the partners, except those which would be inconsistent with a partnership at will.[4]

Clause (b)—Completion of particular undertaking—A partnership firm constituted for a particular work is not automatically dissolved on completion of the work. It may continue for a limited purpose incidental to the main purpose.[5] Where, the partnership is for a specific adventure and also for any other that the partners may determine upon, there is no presumption of dissolution on the completion of the specific adventure.[6] Under clause (b) a term or *terminus ad quem* is ascribed to the partnership though the latter was not set to run for a specific period.[7] A partnership constituted only for the purpose of exploiting a salt licence was held to be dissolved on the termination of the licence,[8] likewise a partnership to work a managing agency on the termination of such agency.[9] Where a partnership firm sold the running business to a company the firm was held to be dissolved from the date of sale;[10] whether a partnership was for one or more adventure has to be ascertained from the totality of the circumstances of the particular case to determine when it became dissolved on completion of the undertaking or undertakings.[11] **[1238]**

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1. *Shiam Lal* v. *Shiam Lal,* (1935) ALJ 1251 : 159 IC 433 : (1935) All. 1008.
2. (1922) 2 Lah. 351 : 66 IC 473 : (1922) Lah. 195.
3. **See** *Shanta Ram* v. *Bhawani,* AIR 1974 Karn. 110 : (1974) 1 Karn. LJ 5.
4. *Neilson* v. *Mossend Iron Co.,* (1886) 11 AC 298.
5. *Dayalal* v. *Harjivandas,* (1982) 2 GLR 306.
6. *Mani Singh* v. *Dial Singh,* (1917) 42 IC 459.
7. **See** *Krishnan Neelakantan* v. *Krishnan Kochukannan,* AIR 1967 Ker : ILR (1967) 1 Ker. 1. 96; *Mangarao* v. *Kishan Rao,* AIR 1965 AP 98; *D.T. Mali* v. *H.V. Mali,* AIR 1982 NOC 20 : (1982) 2 Guj. LR 305.
8. *Ramnarayan* v. *Kashinath,* AIR 1954 Pat. 53.
9. *Karumuthu Chettiar* v. *Muthappa Chettiar,* AIR 1961 SC 1225 : (1962) 1 SCJ 31.
10. *Artex Manufacturing Co. Ltd.* v. *C.I.T.,* (1981) Tax LR 1181.
11. *Gherulal Parkash* v. *Mahadeodas Maiya,* AIR 1959 SC 781 : (1959) SCJ 878 : (1959) 2 An. WR (SC) 81 : (1959) 2 MLJ (SC) 81.

Clause (c)—Death of partner.—Whether a partnership is for a term or for a single adventure, the death of a partner dissolves the partnership unless there be an agreement to the contrary.[1] The reason is obvious; for partners cannot be expected to acquiesce in new partners being thrust upon them by the accident of death of one partner.[2] The legal representative of the deceased is not entitled to come in as a partner, as of right:[3] but the subsequent conduct of the parties may show that the original intention of the parties was that death should not dissolve the partnership but that it should be continued, with the representative of the deceased as a partner.[4] Where a partnership consisted of a large numbers of partners, and there was no evidence that the business was treated as dissolved on the death of some of them, it was held that there was an implied contract to the contrary.[5] But where all that was in evidence was that the deceased partner had executed a deed of trust and appointed trustees for carrying on the business and the other partner had simply attested the deed, it was held that there was no contract to the contrary sufficient to exclude the operation of Sec. 253 (10) of the Contract Act.[6] **[1239]**

Unless the partnership deed provides that the partnership will continue in the event of a death of a partner, the partnership firm is said to be dissolved on the death of partner.[7]

Whether a partnership is one at will or for a fixed period, the death of a partner will extinguish it in the absence of a contract to the contrary.[8]

Where a partnership is continued after the death of one partner, it is technically a new partnership and not the old. Where the surviving partner carries on the business, he does so on his own account and for his sole benefit; and any sums payable periodically to the executors of the deceased are virtually in the nature of purchase-money for the interest of the deceased partner.[9] By a

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1. *Sayyad Abdul Hawk* v. *Vaikuntam,* (1927) 52 MLJ 318 : 25 LW 388 : (1927) MWN574 : 100 IC 616 : (1927) Mad. 491; *Haji Heedayatulla* v. *Mahomed Kamil,* (1924) 19 LW 425 : 22 ALJ 382 : 81 IC 525 : 29 CWN 161 : (1924) PC 93; *Gillespie* v. *Hamilton,* (1818) 56 ER 501; *Crawshay* v. *Maule,* (1818) 56 ER 479 : 18 RR 126; *Vulliamy* v. *Noble,* (1817) 36 ER 228 : 17 RR 143; *Shantaram* v. *Sripada Bhawani,* AIR 1974 Karn. 110 : 1974 (1) Kant.LJ 5.
2. *Maharaj Kishen* v. *Har Gobind,* (1914) 101 PR.
3. *Palaniappa* v. *Veerappa,* (1917) 41 Mad. 446 : 34 MLJ 41 : 441 IC 466.
4. *Gokul Krishna Das* v. *Sashimukh Dasi,* (1911) 16 CWN 299 : 15 CLJ 204 : 13 IC 23; *Raghumull* v. *Lachmandas,* (1916) 20 CWN 708; *Tanumal* v. *Ganga Ram,* (1925) Sind 103 : 94 IC 547; *Abdul Jaffar* v. *Venugopala,* (1924) Mad. 708 : 80 IC 378 : 46 MLJ 503; *Haramohan* v. *Sudarsan,* (1921) 25 CWN 847 : 66 IC 811 : (1921) Cal. 538; *Bansi Ram* v. *Jagan Nath,* (1935) Lah. 209 : 153 IC 969; *Punjab and Sind Bank* v. *Kishen Singh,* (1935) 16 Lah. 881 : 156 IC 795 (2) : (1935) Lah. 350.
5. *Mt. Basanti Bibi* v. *Babu Lal,* (1931) All. 225 : 124 IC 19. **See also** *Bachubai* v. *Shamji,* (1885) 9 Bom. 536 (Provision in partnership articles that in case of death or retirement of one of them his nominee should be admitted enforced).
6. *Mahomed Kamil* v. *Haji Hedayatullah,* (1922) 48 Cal. 906 : 26 CWN 463 : 64 IC 861 : (1922) Cal. 122. **See also** *Kodandapaniv. Sree Manavedan Raja,* (1934) 66 MLJ 625.
7. *D.V.D. Monte* v. *N. Venkatesh,* AIR 2008 (NOC) 262 (Mad).
8. *Shree Bhagwan* v. *Durga Devi,* 1974 MPLJ 689; *Abdul Azeez* v. *Kader Mohideen,* AIR 1963 Mad. 428; *Ramakrishnaiah & Sons* v. *C.I.T.,* ILR (1977) 2 Cut. 408 : (1978) 111 ITR 296.
9. *Watson* v. *Haggitt,* (1928) AC 127 : (1928) PC 115 : 56 MLJ 91 : 29 LW 581 : 47 CLJ 295 : 107 IC 459.

legal fiction, even after reconstitution, the original firm can sue in the firm name for recovering its claims accord before reconstitution.[1]

Where after dissolution owing to the death of partners, the business is carried on by some one, it is new business though carried on in the old name.[2]

Clause (c) can more appropriately apply only to a partnership with more than two partners than where the firm consists of only two partners.[3]

In the absence of a provision expressly made or clearly implied, the normal rule that the share of a partner in the assets devolves on his legal representatives will apply to the goodwill as to the other assets.[4]

Hindu joint family firm.—In the case of a Hindu joint family firm, the death of one member does not dissolve the partnership.[5] Where a joint family is a partner, the partnership is not dissolved on the death of the manager.[6] But where the manager joins a firm, the joint family does not *ipso facto* become a member of the firm.[7] In such a case his death will dissolve the partnership.[8] As observed already, a Hindu joint family-trading firm is governed more by the principles of Hindu Law, than by the Contract Act or the Partnership Act and has been specifically exempted from the operation of the Partnership Act, by Sec. 5.

Mohammedan trading family—It may also be mentioned that Mohammedan Law does not recognise any such thing, as a family trading firm and therefore any partnership between two Mohammedan brothers will be governed by the terms of the contract between them. As a rule the death of a partner dissolves the firm.[9]

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1. *Madalsa Devi* v. *M. Ramnarain P. Ltd.*, AIR 1965 SC 17; *Bhagwanji Morarji Gokuldas* v. *Alembic Chemical Works Co. Ltd.*, AIR 1948 PC 100; *Union of India* v. *Bilas Singh & Co.*, AIR 1984 Cal. 261 : (1984) 1 Cal.LJ 254.
2. *Gossain Ganga Dutt* v. *Dabee Das*, (1864) 25 WR 118.
3. *Commissioner of Income-Tax* v. *Seth Govindram Sugar Mills*, AIR 1966 SC 24, 27 : (1965) 2 SCJ 289 : *P. Ananda Rao* v. *Raja Rao*, AIR 1976 AP 256 : (1976) 1 An. WR 338 : *Dorairaj* v. *Karuppiah Ambalam*, AIR 1970 Mad. 119 : (1969) 1 MLJ 348.
4. *Khushal Khengar* v. *Mrs. Korshed*, (1970) 1 SCC 415 : AIR 1970 SC 1147.
5. *Raghumull* v. *Lachmondas*, (1916) 20 CWN 708; *Lutchmanen* v. *Siva Prakasa*, (1899) 26 Cal. 349; *Vadi Lal* v. *Sha Khushal*, (1901) 27 Bom. 157.
6. *Gauri Shankar* v. *Keshab Deo*, (1929) All. 148 : 114 IC 881 : (1929) ALJ 204; *Mewa Ram* v. *Ram Gopal*, (1926) 48 All. 735.
7. **See** *Pichappa Chettiar* v. *Chockalingam*, (1934) 40 LW 256 : (1934) MWN 828 : 36 Bom. LR 976 : (1934) ALJ 895 : 36 PLR 225 : 11 OWN 984 : 38 CWN 1185 : 60 CLJ 116 : 15 PLT 655 : 150 IC 802 : (1934) PC 192 : 67 MLJ 366 (PC).
8. *Swarth Ram* v. *Ram Bullabh*, (1925) 47 All. 784; *Ramanathan* v. *Egappa*, (1916) 30 MLJ 241.
9. *Solema Bibi* v. *Hafiz Mahomed*, (1927) 54 Cal. 687 : 104 IC 833 : (1927) Cal. 836; *Abdul Khader* v. *Chidambaram Chetty*, (1908) 32 Mad. 276 : 3 IC 876.

Christian trading family—Similarly a Christian family living together and trading will not constitute a partnership unless there be a contract.[1]

Clause (d)—Adjudication of partner—Under the old Contract Act the adjudication of a partner as insolvent did not by itself dissolve the partnership but afforded only a ground for dissolution through Court.[2] Under the terms of the section, it is otherwise, though it would be open to the partners to make a contract to the contrary. **[1242]**

43. Dissolution by notice of partnership at will—(1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.

(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

Analogous law—Sec. 32 (e) of the English Act runs thus:

> "32.Subject to any agreement between the partners the partnership is dissolved—
>
> "(c) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.
>
> "In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice or the date of dissolution, or if no date is so mentioned, as from the date of the communication of the notice".

Dissolution of partnership at will—In this case, a notice by one partner to all the other partners intimating his intention to dissolve the firm is sufficient to dissolve it.[3] (The notice is a statutory notice and must fulfil all

1. *Mahomed Aiyar Rowther* v. *Gnana Ammal,* (1934) 66 MLJ 671 : 39 LW 551 : (1934) Mad. 327.
2. *Lakhmichand* v. *Vazirchand,* (1932) 26 SLR 158; *Ma Thwe* v. *Munshi Ram,* (1931) Ran. 191 : 131 IC 62; *Sanyasicharan* v. *Ashutosh,* (1915) 42 Cal. 235; *Nichalsing* v. *Vishenji,* (1928) Sind 71; *Agarwal Jorawarmal* v. *Kasam,* (1937) Nag. 314 (If insolvence before Partnership Act, the matter will be governed by the Contract Act).
3. *Pulini Behari* v. *Mahendra,* (1921) Cal. 722 : 67 IC 10; *Bhagwati* v. *Babu Lal,* (1921) All. 411 : 19 ALJ 525 : 63 IC 548; *Mellersh* v. *Keen,* (1859) 54 ER 92 : 122 RR 390 (Lunacy of partner to whom notice is addressed is no bar); *Sharyau Armando Pereira* v. *Vishnu Yeshwant Sawant,* AIR 1981 Goa 57; *Rajagopalachariar* v. *Venkatachalam,* (1983) 1 MLJ 417.

the requirements embodied in sub-sections (1) and (2).)[1] The notice must disclose unambiguous, precise and final intention of the partner to dissolve the partnership.[2] The notification of intention to dissolve the firm and that it stands dissolved would be enough for the purpose;[3] likewise the service of the writ and plaint in a suit for dissolution upon all the defendants.[4] The date from which the dissolution takes effect is the date, if any fixed in the notice of dissolution and if the notice does not specify any date, then the date when the notice is communicated to the other members.[5] Even if no notice is given a partnership-at-will is automatically dissolved from the date when a partner files a suit for its dissolution.[6] A partnership firm at will stands dissolved from the particular date mentioned in the notice by any partner to all other partners and in the absence of any such mention dissolution takes place from date of receipt of the notice by other partners.[7] The date from which the partnership would be dissolved can in no case be prior to the date of issue of notice of dissolution.[8] The latter part of the rule may give rise to difficulty where the other partners receive the notice on different dates. The right to dissolution is a legal right under the Act and under the contract, and any private arrangement between the partners will not affect the right.[9] Although to dissolve the partnership at will by one partner giving a notice in writing communicating his intention to dissolve is necessary under Sec. 43, but this provision does not control the other provisions of Chapter VI of Partnership Act. It is therefore possible to dissolve the partnership at will without giving a notice in writing resort being had to other provisions.[10]

Where no notice is given but a suit is brought for dissolution, the filing of the suit operates as notice.[11] But in an Oudh case it has been held that where the assistance of the court by means of a decree for dissolution is sought, the

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1. *Tilakram Ghosh* v. *Gitarani Sadhkhan,* AIR 1989 Cal. 254.
2. *Dulin Municipal Anateur Transport Co.* v. *Raychand,* AIR 1952 Bom. 337 : ILR (1952) Bom. 795 : *Chainkaran* v. *Dixit,* AIR 1956 Nag. 46.
3. *Budheswar Barua* v. *Jatindra Nath Barua,* AIR 1976 Gau. 12.
4. *Banarsi Das* v. *Seth Kanshi Ram,* AIR 1963 SC 1165 : 1964 (1) SCR 316.
5. *Kushi Ram Behari Lal & Co.* v. *State of Punjab,* 1971 Re. LR 253.
6. *Manohar Lal* v. *Moti Lal,* (1974) 76 Punj LR 251. Cf. however *Kashi Ram's case,* supra,
7. *P. Venkateswarlu* v. *C. Lakshmi Narasimha Rao,* AIR 2002 AP 62, 64 : 2001 (3) ALD 565 : 2001 (2) LS 88 : 2001 (3) ALT 449.
8. *Thangarajan* v. *Perumal Chettiar,* (1979) 2 MLJ 469 : 92 LW 649.
9. *Ram Singh* v. *Ram Chand,* (1924) 5 Lah. 23 : 28 CWN 566 : 26 Bom. LR 196 : 22 ALJ 14 : 19 LW 4 : (1924) MWN 76 : 79 IC 944 : (1924) PC 2 : 46 MLJ 158 (PC).
10. *Sri Kishan Gupta* v. *Ram Babu Guptha,* AIR 1990 All. 171 : (1990) 16 All. LR 482.
11. *Mani Bhusan* v. *Amulya Chandra,* ILR (1937) 2 Cal. 120 : 41 CWN 522; *Sathappa Chetty* v. *Subramania Chetty,* (1927) 53 MLJ 245 : 31 CWN 857 : 25 ALJ 687 : (1927) PC 70; *Shepherd* v. *Allen,* (1864) 55 ER 492 : 140 RR 269.

suit must follow the notice, and that where the notice is found to have been given after the filing of the suit, no relief can be given.[1]

In case of partnership-at-will where all the partners entered into an agreement deciding to dissolve the partnership, the sole partner who dissented the decision can not disown his obligation to contribute towards the liabilities of the firm on the ground of breach of repudiatory agreement by others seeking the dissolution.[2]

A notice once given cannot be withdrawn without consent.[3] It has been held that in the case of a partnership at will, the intention to dissolve may be inferred from the circumstances, as by one partner abandoning his interest in the business. In the face of the specific and unambiguous language of the section, it is submitted that the above ruling may require reconsideration.[4] **[1244]**

In the event of the dissolution of partnership, no partner can continue to carry on the partnership business except in case of winding up.[5]

But where it is explicitly clear from the partnership deed that the partnership is not at will the notice given by one partner holding 25% shares would not result in the dissolution of partnership.[6]

In a partnership-at-will it is open to a partner even if there is no dispute between the parties whatsoever to dissolve the firm by virtue of Section 43. His right cannot be taken away by an arbitration clause in the partnership deed.[7]

When a partnership is at will, any partner has right to get the firm dissolved by giving notice in writing. A partner thus is not prevented from approaching the civil court seeking appropriate remedy. Under Sec. 43 and Sec. 44 several grounds are provided for seeking dissolution before the court and the partner is free to approach a competent civil court. Where a partnership deed envisages choosing of arbitrators in case of disputes that may arise in dealings of the partnership business, any party to the partnership deed is not prevented from approaching the civil court. But what is necessary to be examined is whether in given circumstances a particular party has

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1. *Tajammul* v. *Ahmed Ali,* (1937) Oudh 438 : 167 IC 839.
2. *Hurst* v. *Bryk,* (2000) 2 All ER HL 193.
3. *Jones* v. *Loyd,* (1874) 18 Eq. 265, *Glossop* v. *Glossop,* (1907) 2 Ch. 370.
4. *Official Receiver Lahore* v. *Din Mahomed,* (1934) Lah. 557 : 35 PLR 557. **See also** *Vazirbhai Sultan Bhai* v. *Gadmal Nathumal,* AIR 1940 Bom. 263.
5. *Ashok Kumar* v. *Ashwani Kapoor,* AIR 2005 Del 323 : 2005 (3) R.A.J. 370 (Del).
6. *Anant Purushottam Athavale* v. *Govind Purushottam Athavale,* AIR 2005 Bom 301.
7. *Manibhai Shanker Bhai Patel* v. *Swashray Construction Co.,* (1982) 23 Guj. LR 312.

prima facie made out a case seeking recourse to civil suit for appropriate relief or not.[1] The fact that the partnership at will was dissolved owing to misunderstanding and bad relationship between the partners and one of the partners continued the business provides justification for the appointment of Receiver.[2]

For the exercise of jurisdiction in a suit for dissolution of partnership and accounts it is immaterial that the land or property should belong to partnership.[3]

44. Dissolution by the Court.—At the suit of a partner, the Court may dissolve a firm on any of the following grounds, namely:

(a) that a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner;

(b) that a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner;

(c) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business;

(d) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him;

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1. *A Chinna Ramanatham Naidu* v. *B. Subbarami Reddy,* AIR 1994 AP (NOC) 26.
2. *Devi Textiles* v. *Suganthi,* AIR 2000 Mad. 62, 65.
3. *Smt. Smriti Jaiswal & Anr.,* v. *Romi Jaiswal & Anr.,* AIR 1999 Cal. 123 (DB) : 1999 (3) ICC 268.

(e) that a partner, other than the partner suing, has in any way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under the provisions of Rule 49 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908), or has allowed it to be sold in the recovery of arrears of land-revenue or of any dues recoverable as arrears of land-revenue due by the partner;

(f) that the business of the firm cannot be carried on save at a loss; or

(g) on any other ground which renders it just and equitable that the firm should be dissolved.

Analogous law—Sec. 35 of the English Partnership Act—Substantially the same except that Clause (e) is not found in the English section.

Dissolution through Court—The previous sections referred to dissolution without the interference of Court. This deals with dissolution by order of Court. The power to dissolve the firm is vested in the court and is not a matter for a private forum set up under an arbitration clause.[1] In *Rehmatunnissa Begum* v. *Price,*[2] the Judicial Committee pointed out that a partner's claim to a decree for dissolution rests in its origin, not on contract, but on his inherent right to invoke the court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract. An Allahabad ruling, however, would appear to suggest that it is possible for partners by adequate provisions in the deed of partnership to contract against the right to sue for dissolution.[3] The right of dissolution under Section 44 will not be available where the partnership deed provides for the withdrawal of a partner who considered his rights to have been prejudiced or desired to sell his rights. A claim for dissolution because the firm would not purchase his share is not maintainable.[4] **[1245]**

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1. *Bankey Behari Lal* v. *Hirendra Lal Adhikari,* 1977 (1) CWR 264.
2. (1918) 42 Bom. 380 : 20 Bom. LR 714 : 22 CWN 601 : 16 ALJ 513 : 45 IC 568 : 8 LW 53 : 35 MLJ 262. **See also** *Cowasjee* v. *Lallubhai,* (1876) 1 Bom. 468.
3. *Dropadi* v. *Bankey Lal,* (1939) ALJ 440.
4. *Gur Dayal Prasad* v. *Raghunath Prasad,* AIR 1976 All. 141.

In a partnership-at-will there is no question of grant of denial of relief depending on discretion of Court on consideration of any just or equitable principles or on the plaintiff's providing any of the grounds set out in Section 44.[1]

When a partnership is at will, any partner has right to get the firm dissolved by giving notice in writing. A partner thus is not prevented from approaching the civil court seeking appropriate remedy. Under Sec. 43 and Sec. 44 several grounds are provided for seeking dissolution before the court and the partner is free to approach a competent civil court. Where a partnership deed envisages choosing of arbitrators in case of disputes that may arise in dealings of the partnership business, any party to the partnership deed is not prevented from approaching the civil court. But what is necessary to be examined is whether in given circumstances a particular party has prima facie made out a case seeking recourse to civil suit for appropriate relief or not.[2]

An Arbitrator has no power to decide the dispute relating to dissolution: Where a suit was filed by a partner seeking dissolution of partnership firm and rendition of accounts and other partners sought for stay of the suit under clause 22 of the partnership deed, which provided to refer all the disputes for the decision of the arbitrator, the court cannot refer the dispute as to dissolution of partnership to an arbitrator under clause 22 as he has no power to decide the dispute relating to dissolution.[3]

Clause (a)—Insanity of partner—Though the lunacy of a partner does not of itself dissolve the partnership, confirmed lunacy will be, as pointed out in *Jagat Chandra* v. *Gunny Hajee,*[4] a ground for dissolution at the instance of the other partners. The Court has to be satisfied that the insanity will be permanent.[5] As Story observes, temporary illness or infirmity is not sufficient. The hope of recovery must be remote, and the impracticability of resuming the partnership duties until after a period of indefinite and doubtful duration must be apparent and decisive. The Court interferes not only for the purpose of protecting the lunatic, but for relieving the other partners from a difficult situation.[6] Where the other partners do not come forward to ask for dissolution, then it will be considered that they are willing to wait and see whether their

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1. *Sat Pal* v. *R.K. Ahuja,* AIR 1973 P&H 197 : 75 Punj. LR 454.
2. *A Chinna Ramanatham Naidu* v. *B. Subbarami Reddy,* AIR 1994 AP (NOC) 26.
3. *Tetali China Krishna Reddy* v. *Konala Nagalakshmi,* 2007 (1) R.A.J. 485 (AP) : 2006 (4) ALT 609 : 2006 (4) ALT 609.
4. (1926) 53 Cal. 214 : 30 CWN 11 : 91 IC 824 : (1926) Cal. 27.
5. *Kirby* v. *Carr,* (1838) 160 ER 666 : 51 RR 356; *Jones* v. *Noy,* (1833) 39 ER 892 : 39 RR 160.
6. *Jones* v. *Lloyd,* (1874) 18 Eq. 265.

partner's incapacity is merely temporary.[1] In such a case, therefore, the lunatic partner will be entitled to his share of profits till an actual dissolution.

DORMANT PARTNER.—As the reason for granting dissolution is the permanent incapacity of the lunatic to perform his contract, and as a dormant partner does not generally perform any duties, the Court will order dissolution on the ground of the lunacy of a dormant partner only in very special circumstances.[2]

DATE OF DISSOLUTION.—Except in the case of a partnership at will, the dissolution ordered on the ground of lunacy dates only from the date of judgment.[3] However, if the articles of partnership authorise dissolution, and the partnership has been dissolved under the articles the dissolution must date from the time at which the partnership was so dissolved and not from the date of judgment.[4]

COSTS.—Generally, in dissolving a partnership on the ground of insanity, the Court directs costs to be paid out of the partnership assets.[5]

Clause (b)—Permanent incapacity.—In *Whitwell* v. *Arthur,*[6] the action was brought for dissolution of a partnership on the ground that a partner was by reason of a paralytic attack, incapacitated from performing his duties as a partner. On the facts, however, it was found that the incapacity was only temporary, and so the action was withdrawn. But there is no doubt about the general principle. **[1247]**

Clause (c)—Conduct injurious to the business.—In *Essel* v. *Hayward,*[7] where one partner had become liable to a prosecution for fraudulent breach of trust, his co-partner was held entitled to dissolution.

It is not essential that the conduct complained of, should be directly connected with the partnership business. Thus, gambling may be a ground for dissolution.[8] Again, a conviction for having travelled without a railway ticket,[9] adultery of one partner with his co-partner's wife,[10] have been held to be sufficient grounds.

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1. *Jones* v. *Noy,* (1833) 39 ER 892 : 39 RR 160.
2. Lindley on Partnership, 10th Edn. (1935), p. 670.
3. *Besch* v. *Frolich,* (1842) 41 ER 597 : 65 RR 363.
4. *Robertson* v. *Lockie,* (1846) 60 ER 627 : 74 RR 80.
5. *Jones* v. *Welch,* (1855) 69 ER 668 : 103 RR 339.
6. (1865) 55 ER 848 : 147 RR 73.
7. (1860) 54 ER 849 : 132 RR 222.
8. *Pearce* v. *Foster,* (1886) 17 QBD 536.
9. *Carmichael* v. *Evans,* (1904) 1 Ch. 486.
10. *Abbot* v. *Crump,* (1870) 5 Ben. LR 109; (Cf.) *Snow* v. *Milford,* (1868) 18 LT 142.

Where the question of continuing the business of the Partnership Firm arises in view of serious disputes between the appellants and the respondents regarding the conduct of partnership business, these disputes are to be referred to the arbitrator who will decide whether the partnership can be dissolved or Section 44 (c) applies for continuing the business of the firm.[1]

Clause (d)—Breach of agreement and destruction of mutual confidence.—The Court will not interfere unless the misconduct is of such a nature as to destroy the mutual confidence which was the original foundation of the partnership[2] and which must subsist between partners if they are to continue as partners.

Thus where a partner makes up a false balance sheet or keeps erroneous account,[3] or quarrel continuously,[4] or is guilty of conduct which leads to misunderstanding, it has been held that the other partner are entitled to dissolution. The English case of *Harrison* v. *Tennant*,[5] is a strong illustration of the application of this broad principle. In *Krishnamachariar* v. *Sankara Sah*,[6] the Privy Council pointed out that the refusal or neglect of one partner to perform the duties undertaken by him will be good ground for dissolution. Refusal to account and carrying away the account books of the firm would justify an order of dissolution.[7]

But dissolution will not be ordered on the ground of mere incompatibility of temper or occasional squabbles between partners.[8]

From the very wording of the section itself, it is clear that the party who is guilty of misconduct cannot himself apply for dissolution on the ground of the disharmony created by himself.[9] **[1248]**

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1. *Smiline Rushida* v. *N. Ramesh*, AIR 2006 Mad 369.
2. *Mackenzie* v. *Himalayan Assurance Co.*, (1926) Cal. 745 : 30 CWN 440 : 94 IC 381; *Tulsi Ram* v. *Dina Nath*, (1926) Lah. 145 : 89 IC 333.
3. *Ram Singh* v. *Ram Chand*, (1920) 1 Lah. 6 : 57 IC 185; *Cheesman* v. *Price*, (1865) 55 ER 849 : 147 RR 74; *Clifford* v. *Timms*, (1908) AC 12 (Puffing advertisement by partner of dentist's firm is sufficient misconduct).
4. *Baxter* v. *West*, (1860) 62 ER 344 : 127 RR 64; *Hasham Ismail* v. *Nariman*, (1924) Bom. 57 : 81 IC 463.
5. (1856) 52 ER 945 (Solicitors' firm); *Attwood* v. *Maude*, (1863) 3 Ch. 369; (Cf.) *Yenidie Tobacco Co. Ltd.*, (1916) 2 Ch. 426.
6. (1921) 39 MLJ 257 : 12 LW 777 : 25 CWN 314 : 57 IC 713 : 22 Bom. LR 1343 : (1921) PC 91; *Chunni Lal* v. *Sheo Charan*, (1925) 47 All. 756 which seems to decide the contrary, cannot be good law.
7. *Venkataswami* v. *Venkataswami*, AIR 1954 Mad.9.
8. *Smith* v. *Jeyes*, (1841) 49 ER 433 : 55 RR 149; *Wray* v. *Hutcheson*, (1833) 39 ER 931; *Anderson* v. *Anderson*, (1857) 53 ER 609 (Court will not interfere in case of minor infractions of partnership articles); *Goodman* v. *Whitcomb*, (1820) 37 ER 492 : 21 RR 244; *Miya Bhai* v. *Marian Bee Bee*, (1938) Ran. 478.
9. *Harrison* v. *Tennant*, (1856) 21 Beav 482; *Fairthorne* v. *Weston*, (1844) 67 ER 432; 64 RR 342; *Kurri Venkata Reddi* v. *Kollu Narasiah*, (1908) 32 Mad. 76 : 1 IC 384 : 19 MLJ 10. **But see** *Santa Singh* v. *Ram Chand*, (1935) 157 IC 999 (Case under S. 254(5) of the Contract Act, where it has been held that it cannot be construed as disabling a guilty partner from suing). **See also** *Manilal* v. *Keshavje*, AIR 1952 Pat. 33.

Clause (e)—Attachment of share.—The corresponding English rule gives an option to the others to dissolve the partnership where a partner has allowed his share to be charged for a separate debt of his. The present sub-section adds two more grounds (*i.e.*) private transfer and sale *in invitum*. It has been held in *Dwarka Das* v. *Jadab Chandra,*[1] that consent given to an attachment of a deceased partner's assets for the latter's personal debts amounts to a declaration of cessation of partnership. The purchaser in execution of the interest of a partner acquires the interest sold, with a right to have an account taken in order to ascertain the value of the interest.[2] **[1249]**

Clause (f)—Business working at a loss—The Judicial Committee pointed out in *Cowasjee* v. *Lallubhai,*[3] that, expectation of profits being implied in every partnership, if a partnership business cannot go on except at a loss, the partnership will have to be dissolved. This view has been reaffirmed by the Judicial Committee in *Rehmatunnissa* v. *Price.*[4] On the same ground, the Court granted dissolution in *Jennings* v. *Baddeley.*[5] **[1250]**

Loss of about a thousand rupees within a period of six months where the capital invested was a lakh of rupees was held not a ground for dissolution.[6]

Clause (g)—Dissolution just and equitable.—In construing the corresponding section of the English Act which runs in similar terms, it has been suggested that the clause ought not to be limited in its application to cases *ejusdem generis* with those mentioned in the previous parts of the section.[7] Lindley says [8]:

> "Any case in which it is no longer reasonably practicable to attain the object with a view to which the partnership was entered into or to carry out the partnership contract according to its terms, will, it is apprehended, be within this section". **[1251]**

The "just and equitable" clause cannot be construed as permitting interference only where the substratum of the partnership is undermined or where there is a complete deadlock.[9] The Court may take into account even

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1. (1924) 51 Cal. 761 : 28 CWN 704 : (1924) Cal. 801 : 78 IC 731.
2. *Deendayal* v. *Jugdeep Narain,* (1877) 3 Cal. 198.
3. (1876) 1 Bom. 468 (PC).
4. (1917) 42 Bom. 380 : 20 Bom. LR 714 : 22 CWN 601 : 27 CLJ 367 : 35 MLJ 262 : 8 LW 53 : (1917) PC 116 (PC); *Hasham Ismail* v. *Nariman,* (1924) Bom. 57 : 81 IC 463; (Cf.) *National Bolivia Navigation Co.* v. *Wilson,* (1880) 5 AC 177.
5. (1856) 69 ER 1029 : 102 RR 42; *Wilson* v. *Church,* (1879) 5 AC 176.
6. *Chandrika Prasad Agarwal* v. *Vishnu Chandra,* 1981 All. LJ 967.
7. *Yenidji Tobacco Co. Ltd.,* (1916) 2 Ch. 426.
8. Lindley on Partnership, (10th Edn., 1935) p. 678.
9. *Yenidji Tobacco Co. Ltd.,* (1916) 2 Ch. 426.

factors subsequent to the filing of the suit to afford relief where equitable considerations call for it.[1]

Limitation—Art. 120 of the Limitation Act of 1908 applied to a suit for dissolution of a continuing partnership.[2] But a suit for an account and share of the profit of a dissolved partnership would be governed by Art. 106.[3] In this connection, mention may be made of a pronouncement of the Judicial Committee that it is quite open to the partners to come together and agree to an account among themselves even after three years from the date of dissolution, and that such a settlement is supported by consideration.[4]

A suit filed before the Court praying the Court to declare the business of the firm dissolved and for accounts and realisation of movable properties, the suit would not be barred on the ground that certain immoveable properties of firm are beyond the jurisdiction of the Court in which the suit is filed.[5]

45. Liability for acts of partners done after dissolution.—(1) Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution:

Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner.

(2) Notices under sub-section (1) may be given by any partner.

Analogous law.—Sec. 36(1) and (3) of the English Partnership Act runs thus—

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1. *Manilal* v. *Keshavje,* AIR 1952 Pat. 33; *Suraj Bahadur* v. *Mahadeo,* AIR 1963 Raj. 241.
2. *Srinivasalu* v. *Ramakrishna,* (1933) MWN 689 : 37 LW 288 : 144 IC 573 : (1933) Mad. 353(2); *Narayanaswamy* v. *Gangadhar,* (1939) 37 MLJ 353.
3. **See** Note 7, supra. **See also** *Kodandapani*v. *Sree Manavedan Raja,* (1934) MWN 22 : 66 MLJ 625 : 39 LW 164 : (1934) Mad. 162.
4. *Rochi Ram* v. *Faizullah,* (1933) PC 120 : 37 CWN 580 : 57 CLJ 273 : (1933) ALJ 545 : 142 IC 549 : (1933) MWN 406 : 37 LW 746 : 35 Bom. LR 745 : 64 MLJ 596.
5. *Md. Hassen Hashmi* v. *Kaberi Roy,* AIR 1993 Cal. 70, 75 : 1993 (1) Civ.LJ 843 : (1993) 2 Bank Cas 357 : 1993 (2) Cal.LT 3.

"36 (1) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

(3) The estate of a partner who dies, or who becomes bankrupt, or of a partner, who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively".

Liability for acts of partners after dissolution.—This section simply gives effect to the principle that in the notice of dissolution all the partners are liable to persons dealing with the firm, after its dissolution. In *Pramatha Chandra* v. *Bhagwandas,*[1] the Calcutta High Court held, approving of an earlier Bombay ruling,[2] that if a firm is dissolved and no notice is given and people continue to trade with the firm under the firm name, they are not to be affected by a secret dissolution and that the right to sue a retiring partner does not depend on the question of knowledge of such person having been a partner. The basis of these decisions was that old Sec. 264 applied also to dormant partners withdrawing from a firm. It may be a question whether the application of the section to such cases is warranted but in view of the present section, there can be no doubt that these decisions cannot be supported. In *Bhai Shankar* v. *Lakshmi Dyeing Works,*[3] the Bombay High Court has held that where a person dealt with a firm after the actual retirement of a partner but before publication of notice of retirement, and such person did not know at the time of the transaction that the person who had retired was a partner, no liability was cast on the retired partner. In case of dissolution of a firm persons who have ceased to be partners would not be liable to a third party for the acts done by the other partners subsequent to the dissolution if such third party had actual notice of dissolution at the time the acts were done despite omission to give public notice of the dissolution as contemplated by Section 45 (1).[4]

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1. (1931) 59 Cal. 40 : 35 CWN 705; (Cf.) *Harbhajan* v. *Sri Gopal,* (1933) 14 Lah. 188 : (1933) Lah. 417 : 143 IC 589.
2. *Geovani Gorio* v. *Vallabhdas,* (1915) 17 Bom. LR 762 : 30 IC 864.
3. (1930) Bom. 449 : 32 Bom. LR 1031 : 121 IC 588. **See also** *Jwala Dutt* v. *Bansi Lal,* (1929) 53 Bom. 414 : (1929) PC 132 : 33 CWN 585 : (1929) ALJ 579 : 56 MLJ 739 : 31 Bom. LR 687 : 29 LW 884 : (1929) MWN 440 (PC); *Jagat Chandra* v. *Gunny Hajee,* (1925) 53 Cal. 214 : 30 CWN 11 : 91 IC 829 : (1926) Cal. 271; *Mahadeva Iyer* v. *Ramakrishna Reddiar,* (1925) 50 MLJ 67 : (1926) Mad. 114 : 23 LW 199 : (1925) MWN 707 : 92 IC 653; *Ezekiel* v. *Russa Engineering Works,* (1923) 1 Ran. 47 (old customers—individual notice necessary); *Enayatulla* v. *Roy,* (1926) 25 LW 765 : (1927) Mad. 661 : 104 IC 120; *Chenchuvenkatanagiah* v. *Padmanathan,* (1927) MWN 770 : (1928) Mad. 125 : 106 IC 904 (Even new customer will not be affected by the dissolution in the absence of public notice).
4. *Natwarlal Ambalal & Co.* v. *Chaturbhai,* (1977) 18 Guj. LR 127.

So, it has been held that an acknowledgment of partnership debt by a salaried partner of a joint family firm after its dissolution but before general notice is binding on all the partners.[1]

A dissenting partner to an agreement of dissolution of partnership signed by all remaining partners is not discharged from contributing to the liabilities of the dissolved partnership on the ground that he treated the agreement as repudiatory breach of the partnership deed and accepted the repudiation when the liabilities were incurred by the partners before the termination of partnership.[2]

Unregistered partnerships.—If the firm is not registered, Section 45 applies and the retiring member continues to be liable to the third parties unless such third party has actual or constructive notice of such retirement, expulsion, dissolution or eviction by a minor after attaining majority. A member of an unregistered firm must prove by evidence that the third party has a due notice personal or actual or constructive of his retirement, expulsion of dissolution. Mere public notice issued in the newspapers is not sufficient. That privilege is confined to a partner of a registered firm and hence the publication of the notice in a newspaper of the dissolution of the firm does not constitute notice to the plaintiff.[3]

Proviso.—The proviso to the section, following the English law makes three exceptions to the general rule (i) Death of a partner, (ii) Bankruptcy of a partner, (iii) Dormant partner.

DEATH OF A PARTNER.—Under the proviso, no notice of death is necessary to terminate the liability of the deceased partner for debts contracted by the firm after his death.[4] So where goods were ordered by a firm but a partner therein died before the goods were supplied, the estate of the deceased was held not liable though the plaintiff was unaware of the death of the partner.[5] The position was different under the corresponding Section 264 of the Contract Act.[6] The Madras case *Seshi Ammal* v. *Vairavan,*[7] is also in point.

DORMANT PARTNER'S LIABILITY.—As a rule, the dormant partner may retire without giving notice, for the obvious reason that he was

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1. *Krishnabai* v. *Varjivandas,* (1930) 23 Bom. LR 201 : (1930) Bom. 236 : 125 IC 442; *Bengal National Bank* v. *Jatindranath,* (1930) 56 Cal. 556 : 33 CWN 412 : (1929) Cal. 714 (Acknowledgment in the usual course of the business is binding).
2. *Hurst* v. *Bryk & Ors.,* 1997 (2) All. E.R. (CA)
3. (Cf.) *Crawshay* v. *Maule,* (1818) 37 ER 479; *Vulliamy* v. *Noble,* (1817) 36 ER 228.
4. *Surya Rao* v. *M/s. Gadde Venkata Reddy Firm,* 1987 (2) ALT 94 (NRC).
5. *Friend* v. *Young,* (1897) 2 Ch. 421; *Bagel* v. *Miller,* (1903) 2 KB 212.
6. *Babu* v. *Dayambi,* (1935) Bom. 357 : 37 Bom. LR 516 : 158 IC 159.

not known to third parties dealing with the firm and so no question of giving credit on his account could arise. Therefore, where the party dealing with the firm and so no question of giving credit on his account could arise. Therefore, where the party dealing with the firm after the dissolution of the old partnership had no knowledge whatever of the dormant partner's previous connection with the partnership, he could not get any relief as against the dormant partner.[1]

"**Public notice**".—The old Contract Act made a distinction between old and new customers in the matter of notice, but the present section has swept the distinction away. It is enough if public notice is given and no individual notice to old customers is necessary. See Sec. 72, *infra.*

In a Lahore ruling on this matter arising under old Sec. 264 it was held that if the business of an old firm is continued by one partner in the name of the firm, and he contracts a loan while the firm is doing business, the mere fact that a partner has retired from it will not, in the absence of public notice of dissolution, absolve him from liability to the lender.[2]

In another case of the same Court, it was pointed out that the section embodies a rule of estoppel by conduct, and that therefore it is incumbent on a person invoking this section to prove that the absence of public notice made him alter his position for the worse.[3]

In a case before the Judicial Committee, where admittedly no public notice was given, their Lordships held on the evidence that the plaintiff had in fact, notice of the dissolution of the firm by reason of the defendant's retirement and that the case fell within the terms of the exception at the end of the old Sec. 264.[4]

46. Right of partners to have business wound up after dissolution.—On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus

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1. *Jwala Dutt* v. *Bansi Lal,* (1927) Bom. 560 : 29 Bom. LR 1224 : 104 IC 520; *Bhai Shankar* v. *Lakshmi DyeingWorks,* (1930) Bom. 449 : 32 Bom. LR 1031 : 121 IC 588; *In re. David Sassoon & Co.,* (1927) Sind 155; *Rustomji* v. *Seth Purushothamdas,* (1902) 25 Bom. 606; *Ramasami* v. *Kadar Bibi,* (1886) 9 Mad. 492.
2. *Harbhajan* v. *Sri Gopal,* (1933) 14 Lah. 188 : 143 IC 589 : (1933) Lah. 417.
3. *Nanna Lal* v. *Bal Mokand,* (1933) Lah. 591 : 146 IC 847 : 34 PLR 1022; *Bichhia Lal* v. *Munshi,* (1922) Lah. 466 : 68 IC 932.
4. *Kala Ram* v. *Punjab National Bank,* (1935) PC 14 : 37 Bom. LR 387 : 39 CWN 412 : 61 CLJ 212 : (1935) OWN 194 : 153 IC 662 : (1935) MWN 102 : 41 LW 164 : 68 MLJ 206.

distributed among the partners or their representatives according to their rights.

Analogous law—Sec. 39 of the English Partnership Act runs thus—

> "39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interest as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after deducting what may be due form them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm".

Distribution of surplus and lien.—For the discharge of the liabilities of a partner *qua* partner each member of a firm has a right to have the property of the partnership applied in payment of the debts and liabilities of the firm.[1] Then only the surplus is to be distributed amongst the partners and their legal representatives. Every partner has a legal right as against all other partners to have the assets of partnership applied in the payment of the debts and liabilities of the firm and for sharing of the surplus among the partners according to the rights.[2] The partnership property will retain its character as such even after dissolution until the winding up.[3] Whatever may be the mode of distribution adopted by the partners, in law, there can be a *pro rata* distribution only of the residue left after meeting all the liabilities.[4] Where a partner sues for dissolution, though he will be deemed as retiring from that date and the other partners continue to carry on the business in the same name from the date of dissolution, the share of the outgoing partner in a decree amount yet to be realised (though written off by the others) should be deducted from any decree that may be passed against the other partners in favour of the outgoing partner.[5] The distribution of the firm's assets amongst the partners or allotment to one of them does not constitute a transfer or sale of the assets.[6] The expression distribution according to their rights" in Section

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1. *Featherstonhaugh* v. *Fenwick*, (1810) 34 ER 115 : 11 RR 77; *Darby* v. *Darby*, (1856) 61 ER 992 : 106 RR 408; *Syers* v. *Syers*, (1876) 1 AC 174; *Basheshar Nath* v. *Shibba Mal*, (1934) 15 Lah. 474 : 151 IC 383 : 36 PLR 303 : (1934) Lah. 336.
2. *Yogesh Kumar Gupta* v. *Miss Anuradha Rangarajan*, 2007 (2) R.A.J 436 (Del).
3. *R.S.G.R. Ramchand & Sons* v. *State of U.P.*, AIR 1974 Delhi 69; *Smt B. Devi* v. *P.C.D.F. Ltd.*, AIR 1974 All. 11 : 1974 All. LJ 269.
4. *Manohar Das* v. *Board of Revenue*, AIR 1971 All. 523 : 1971 All. LJ 719 : 1971 All.WR 509.
5. *Mahendra Kumar* v. *Kantilal*, (1980) 21 Guj. LR 746.
6. *C.I.T.* v. *Dewas Cine Corporation*, AIR 1968 SC 676 : (1969) SCJ 691.

46 means distribution in proportion to their rights under the partnership agreement and the Act,[1] or in proportion to their respective interests or contribution.[2] And for the proper division of the surplus assets, he has a right to have whatever may be due to the firm from his co-partners, as members thereof, deducted from what would otherwise be payable to them in respect of these shares. This is what is sometimes called partner's lien or *quasi* lien. As Venkatasubba Rao, J., observed in *Babu* v. *Gokuldoss,*[3] this is merely a convenient mode of referring to the right and the word "lien" in this phrase is not used in its ordinary technical sense.

The lien springs into active existence only on the dissolution of the partnership. It operates upon all partnership property at the time of dissolution, and does not extend to after-acquisitions by the persons who carry on the business.[4]

The lien is available even to the representative of a deceased partner,[5] and against the other partners and all people claiming through them *e.g.,* executors, mortgagees,[6] trustees in bankruptcy etc.[7]

The lien however is not one, which affects each particular piece of property belonging to the partnership so as to affect it in the hands of a person dealing in good faith with a surviving partner. It is really a general lien upon the surplus assets.[8]

As pointed in Halsbury, the right is not enforceable against purchasers or pledges of specific assets of the partnership who might reasonably suppose that all the partnership debts had been paid or who otherwise deal with the surviving partner *bona fide.* Thus a person who *bona fide* purchases specific items of partnership property will get a good title clear of the lien of the partners.[9]

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1. *Valliammal Aehi* v. *Ramanathan Chettiar,* AIR 1969 Mad. 257 : ILR (1969) Mad. 734.
2. *Appanna* v. *Balaji Lal,* AIR 1957 AP 974.
3. (1930) 50 MLJ 404 : (1930) Mad. 393 : 30 LW 657 : 126 IC 97 affirmed by P.C. on appeal, (1934) MWN 717; *In re. Bourne,* (1906) 2 Ch. 427.
4. *West* v. *Skip,* (1749) 27 ER 1006; *Payne* v. *Hornby,* (1858) 53 ER 643.
5. *Stocken* v. *Dawson,* (1848) 50 ER 335; *Suganchand* v. *Lukhe* , (1938) Nag. 182 : 173 IC 871.
6. *Cavander* v. *Bulteel,* (1873) 9 Ch. AP 79.
7. *Skip* v. *Harwood,* (1747) 36 ER 739 (Lien available against execution creditor of surviving partner).
8. See *In re Bourne,* (1906) 2 Ch. 427.
9. *Re. Langmead's Trusts,* (1855) 44 ER 138 : 109 RR 161, on appeal from (1855) 52 ER 509; *Re Bourne,* (1906) 1 Ch. 113 and (1906) 2 Ch. 427.

But the lien does not extend to any ordinary debts due from the partner to the firm. Thus in respect of a private personal debt of a partner, the other partners have, in case of the partner's insolvency, only the right to prove against the estate.[1]

And as between partners *inter se,* it has been held by the Judicial Committee that the mere fact that one partner has advanced money to another partner in order to help him to acquire a partnership share does not give the creditor-partner a lien over the debtor's share in the partnership so as to give priority in the insolvency of the debtor-partner.[2]

Again, conversion of partnership property into the separate property of a partner has the effect of excluding the lien.[3]

Suits for account between partners—In English law, the rule originally was that Courts of Equity will not interfere between partners except for the purpose of dissolving the partnership or if it was dissolved already, of finally winding up its affairs. But the rigorous application of the rule defeated its own purpose, and enabled partners to take advantage of their own misconduct by forcing the other partners to choose between a continuance of the wrong and dissolution. Latterly, therefore the rule has been relaxed. The position may therefore be stated thus. As a general rule, an action for an account will not lie at the instance of one partner, during the currency of the partnership, without a prayer for dissolution.[4] Partners are not, as regards partnership dealings considered as debtor and creditor, *inter se,* until the concern is wound up or accounts settled.[5] A surviving partner cannot sue the

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1. *Ryall* v. *Rolle,* (1749) 26 ER 107.
2. *Nand Kishore* v. *Official Receiver Delhi,* (1938) PC 277 : (1938) OWN 1147 : 178 IC 406; affirming 15 Lah. 474 : 36 PLR 303 : 151 IC 383 : (1934) Lah. 336.
3. **See** *Lingen* v. *Simpson,* (1824) 57 ER 236 : 24 RR 249 and *Re Langmeads Trusts,* supra; *Dwarka Das* v. *Jadab Chandra,* (1924) 51 Cal. 761 : (1924) Cal. 801 : 39 CLJ 439 : 28 CWN 704 : 78 IC 731.
4. *Krishnaswami* v. *Jayalakshmi,* (1931) 54 Mad. 671 : 130 IC 766 : (1931) MWN 497 : 33 LW 307 : (1931) Mad. 300 : 60 MLJ 315; *Damodara* v. *Subaraya,* (1917) 33 MLJ 509; *Shib Ram* v. *Bhinta Har,* (1933) Lah. 1032 : 147 IC 875; *Kassa Mal* v. *Gopi,* (1886) 9 All. 120 ("Actions between partners which involve the taking of partnership accounts prior to dissolution are almost unheard of"); *Gopalchetty* v. *Vijiaraghava,* (1922) 45 Mad. 378 : 26 CWN 977 : 24 Bom. LR 1197 : 20 ALJ 862 : (1922) PC 115 : 43 MLJ 305 (where an asset falls in, after the dissolution, a partner may sue for his share in such asset); *Ram Charan* v. *Krishna Lal,* (1914) 17 CWN 351; *Mahadeo* v. *Gajadhar,* (1913) 16 CWN 897; *Bhut Nath* v. *Girish Chandra,* (1907) 11 CWN 311; *Annamalai* v. *Annamalai,* (1919) 52 IC 456; *Rustomji* v. *Purushottamdas,* (1902) 25 Bom. 606 (Advance by partner is a mere item in partnership account and cannot be sued for separately); Compare however *Vallamkonda Subbiah* v. *Maluppeddi Venkataramiah,* (1908) 31 Mad. 343.
5. *Ghisulal* v. *Ghambhirmall,* (1935) 62 Cal. 510 : 39 CWN 606 : (1938) Cal. 377.

legal representatives of a deceased partner for recovery of alleged overdrawings by the deceased, without taking a final account:[1] nor can one partner sue another for damages for breach of partnership covenants. In cases of this kind, the proper remedy is a suit for general accounts.[2] But where special grounds are shown for a mere decree for accounts unassociated with an order for dissolution, the Court may award relief, after giving the defendant an opportunity to show cause against the award of such relief.[3] Any of the partners may sue for a general account, including the partner who had been keeping the accounts.[4] [*Vide* comment on Sec. 25 *supra*].

The right to call for accounts upon the dissolution of a firm is mutual and each partner is entitled to an account from his co-partners of their partnership dealings and transactions unless he had legally waived or parted with such right.[5]

Suit for partial account—Competency—Where the account sought is in respect of a matter which, though arising out of the partnership business, does not involve the taking of general accounts, the Court will give the relief asked for,[6] and will refuse to interfere only if a partial account will work injustice to the other partner.[7] Where, after a dissolution and winding up of a partnership, an asset falls in, it is open to a partner to sue for his share in such asset.[8] Where a Hindu joint family is a member of a firm along with strangers to the family, and the partnership is dissolved, and partnership assets are in the hands of strangers, it is open to any member of the family to sue for recovery of his share and the Court will, for the purpose of ascertaining his share, order an account.[9] Again, where by the terms of the contract between the partners, account is to be rendered annually by the managing partner, a

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1. *Ramaswamy* v. *Muthukaruppan,* (1925) 48 MLJ 444 : (1925) MWN 497 : (1925) Mad. 737 : 88 IC 153.
2. *Santhanakrishna* v. *Chellappa,* (1927) Mad. 650 : 25 LW 506 : 101 IC 390.
3. *Lachmi Chand* v. *Jagooo Lal,* (1937) Pat. 55 : 166 IC 953.
4. *Ram Sukh Mal* v. *Har Sahai,* (1938) Lah. 758 : 40 PLR 753; *Rama Nand* v. *Nand Kishore,* (1937) Lah. 312.
5. *Hazi Mohammad Akbar* v. *Dwaraknath Sarkar,* (1910) 6 Ind. Cas. 63 Cal.; *Iqbal Singh* v. *Jagdish Chandra,* AIR 1988 All. 242 : (1988) 2 Cur.CC 6 : 1988 All.WC 913.
6. *Krishnaswami* v. *Jayalakshmi,* (1931) 54 Mad. 671 : 60 MLJ 315 : 33 LW 307; *Karri Venkata* v. *Kollu Narasayya,* (1908) 32 Mad. 76; *Shib Ram* v. *Chinta Har,* (1933) Lah. 1032; *Durga* v. *Raghu,* (1898) 26 Cal. 254.
7. *Karri Venkata* v. *Kollu Narasayya,* (1908) 32 Mad. 76; *Lakshmanan* v. *Nagappa,* (1918) 34 MLJ 408; *Lachmi Chand* v. *Jagoo Lal,* (1937) Pat. 55 : 166 IC 953.
8. *Gopal Chetty* v. *Vijiaraghava,* (1922) 45 Mad. 378 : 26 CWN 977 : 24 Bom. LR 1097 : 20 ALJ 862 : (1922) PC 115 : 43 MLJ 305; *Sonun Ram* v. *Sewa Ram,* (1938) Lah. 259.
9. *Sambasiva* v. *Natesa,* (1938) 1 MLJ 106 : (1938) MWN 22 : 176 IC 821 : (1938) Mad. 388.

suit for partial account will be competent.[1] So too, where a partner withholds the annual profits from a member of the firm, the partner excluded may sue for his share of the profits.[2] Similarly, where the basis of the claim is unconnected with the partnership business or is only remotely connected with it, an action may be maintainable, when no injustice is caused to the other side.[3] Thus where one of several partners takes a promissory note from the others in repayment of an advance, he can sue on the promissory note.[4]

CONTRIBUTION—The cases discussed with reference to contribution between partners also illustrate this aspect of the matter.

Partnership actions—Parties.—All partners must be made parties,[5] including the legal representatives of deceased partners.[6] But sub-partners are not necessary parties.[7] In a suit for dissolution, however, an assignee of one of the partners will be a proper party.

In a partnership action, each of the partners is really in turn plaintiff and defendant, and in both capacities, comes before the Court for adjudication of his rights relatively to the others.[8]

The mere fact of a partner being himself in possession of the partnership books does not disable him from maintaining a suit for accounts of a dissolved partnership for the account books alone will not be sufficient to determine what *specific* amount is payable to him.[9]

Where one person is a common partner in two firms, no action will lie as between them so long as the person continues as common partner.[10]

Forum of suit.—A suit for dissolution may be brought in the Court within whose jurisdiction the partnership business was carried on;[11] similarly

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1. *Binraj* v. *Kisanlal,* (1933) Nag. 127 : 141 IC 277 (2).
2. *Hari Mal* v. *Kirparam,* (1922) 2 Lah. 351 : 66 IC 478 : (1922) Lah. 195. **See also** *Raghubar* v. *Sheoram,* (1904) 1 ALJ 94.
3. *Ramaswami* v. *Muthukaruppa,* (1925) 48 MLJ 444; *Ghisulal* v. *Ghambhirmall,* (1935) 62 Cal. 510 : 39 CWN 606 : (1938) Cal. 377; *Sankara* v. *Epari,* (1916) 49 IC 191.
4. *Vallankondu Subbaiah* v. *Malupeddi Venkataramiah,* (1908) 31 Mad. 343. **See** *Thirunavukkarasu* v. *Muthukrishna,* (1931) MWN 467.
5. *Ramdayal* v. *Janmejoy,* (1887) 14 Cal. 791; *Paras Das* v. *Prem Chand,* (1935) Pat. 456 : 159 IC 586.
6. *Ambika* v. *Tarini,* (1914) 18 CWN 464; *Syed Abdul Hawk* v. *Vaikuntam,* (1927) 52 MLJ 318 : (1927) Mad. 491 : 100 IC 616; *Janaki* v. *Bindabun,* (1843) 3 MIA 175.
7. *Chidambaram Chetty* v. *Karuthan Chetty,* (1916) 34 IC 543 : (1916) 4 LW 10.
8. *Arura Mal* v. *Makhan Mal,* (1930) 11 Lah. 358 : 122 IC 730 : (1930) Lah. 725.
9. *Dogar Singh* v. *Mt. Parbatti,* (1936) Lah. 146 : 161 IC 669.
10. *Rustomji* v. *Purshothamdas,* (1902) 25 Bom. 606; *Chandulal* v. *Keshavlal,* (1936) Bom. 246 : 38 Bom. LR 486 : 163 IC 579.
11. *Niranjan* v. *Tulsi Ram,* (1919) 17 ALJ 1015; (Cf.) *Kellie* v. *Fraser,* (1875) 2 Cal. 445.

a suit for partnership accounts may be filed at the place where the contract of partnership was entered into.[1] Where the business of the partnership is carried on at more than one place, the suit may be filed in any of such places.[2] In connection with the expression "carrying on business" in relation to a partnership, the Privy Council in an early case laid stress on the question where the account books were kept, as decisive of the matter.[3]

Receiver, appointment of.—In partnership actions, a Receiver is generally appointed for realising the assets with a view to the winding up of the partnership. For that purpose the receiver may carry on the business in so far as it is necessary and incidental to the winding up.[4] The Court may appoint one of the parties in such cases.

Nature of decree.—The Court should ordinarily direct an account to be taken from the commencement of the partnership.[5] The accounts of a partnership must be taken once for all in a suit to which all the partners or their representatives are parties, and the law does not contemplate successive suits for taking of accounts at the instance of the various partners.[6] In taking accounts and ascertaining the shares of profits, illegal payments made by one of the partners by way of bribe in order to secure business for the partnership cannot be taken into account.[7] Once the rights and liabilities of the partners are fixed in the preliminary decree for accounts, they cannot be varied thereafter.[8] In cases where a new partnership based on the old partnership is revived or reconstituted, it is permissible, for the purposes of accounts, to go into the accounts of the old partnership.[9] Where a suit for accounts is filed, the business will be deemed to be continuing till the passing of the final decree.[10] Where the accounting party alleges that certain sums of money due to the

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1. *Nihal Chand* v. *Jai Ram,* (1931) Lah. 673 : 132 IC 218; *Durga Das* v. *Jain,* (1917) 41 All. 513.
2. *Thimmappa* v. *Balakrishna,* (1925) 50 MLJ 298 : (1926) Mad. 426; *Prem Narain* v. *Ram Lal,* (1915) 26 IC 225; *Bavah* v. *Khajee Meah,* (1869) 4 MHCR 218.
3. *Luchmee Chand* v. *Zoreswar,* (1860) 8 MIA 291.
4. *Radha Kanta* v. *Benode Behari,* (1934) Cal. 444 : 148 IC 459.
5. *Shawal Ram* v. *Tansukdas,* (1930) Cal. 154 : 33 CWN 1104 : 125 IC 721; *Gokulkrishna* v. *Sashimukhi,* (1913) 16 CWN 299. As to the procedure in such cases, **see** *Tarif Singh* v. *Kanshi Ram,* (1936) Lah. 458 : 160 IC 642.
6. *Kathan Chand* v. *Amichand,* (1934) MWN 539 : 40 LW 792 : (1934) Mad. 665 : 67 MLJ 413.
7. *Venkatachela* v. *Natesa Chetty,* (1939) MWN 480 : 49 LW 705 : (1939) 1 MLJ 905; but **see** contra, *Joti Prasad* v. *Hardwari Mal,* (1932) 53 All. 54 : 137 IC 334 : (1932) All. 128.
8. *Lilaram Kewalram* v. *Hiranand Notandas,* (1937) Sind 103 : 169 IC 635.
9. *Dayal Chand* v. *Ram Chand,* (1927) Lah. 249 : 102 IC 694; *Ahinsa Bibi* v. *Abdul Khader,* (1901) 25 Mad. 26.
10. *Haji Hedayatullah* v. *Mahomed Kamil,* (1924) 29 CWN 161 : 19 LW 425 : (1924) PC 93.

firm had been set off against cross-claims made against the firm, he must establish validity of the claims against the firm.[1] When after a partner's death the surviving partner takes over the assets at his valuation and carries on the business (without there being any agreement) and the legal representative of the deceased partner complains of the valuation, the Court should give the survivor the option of accepting a valuation as fixed by the Court and in the alternative, direct a sale.[2] No partner can be said to have a beneficial interest in any particular estate or property until the partnership is wound up.[3]

Interest.—As an action of this kind is not one to recover a debt, which could be said to be due at the date of the plaint, interest will be awarded only from the date of the final decree.[4]

Re-opening of settled accounts.—Generally a settled account between the partners is a good ground of defence,[5] but the Court may in particular cases re-open the account or give leave to surcharge and falsify. As a rule, settled accounts are not re-opened except for fraud.[6]

Costs—Ordinarily, the costs are paid out of the assets,[7] and where there are none, by the partners in proportion to their respective shares. But when one of the partners either denies the fact of partnership or places obstacles to the taking of accounts and so renders a suit necessary, it is usual to make such partner pay the costs up to the hearing.[8]

47. Continuing authority of partners for purposes of winding up.—After the dissolution of a firm, the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise:

1. *Khunni Lal* v. *Damodar Das,* (1937) 170 IC 326.
2. *Sivagnanathammal* v. *Nallaperumal,* (1934) MWN 1325 : 67 MLJ 880.
3. *In re. Adarji Mancherji,* (1931) 55 Bom. 795 : (1931) Bom. 428.
4. *Tara Singh* v. *Sahib Devi,* (1937) Lah. 254 : 172 IC 250 : ILR (1937) Lah. 492; *Suleman* v. *Abdul Latif,* (1930) 58 Cal. 208 : 124 IC 891 : (1930) PC 185 : (1930) ALJ 868 : 34 CWN 737 : 32 Bom. LR 1152 : 52 CLJ 10 : 32 LW 184 : (1930) MWN 1120 : 59 MLJ 121; *Khemchand* v. *Mulchand,*. (1932) Sind 126 : 1139 IC 614 : 26 SLR 385.
5. *Pethaperumal Chettiar* v. *Ramaswami Chettiar,* (1938) 2 MLJ 505 (Plaintiff dispensing with accounts and agreeing to take a gross sum—Held he could not reopen); (Cf.) *Henry Me Kellar* v. *John Wallace,* (1853) 5 MIA 372; *Law* v. *Law,* (1905) 1 Ch. 140.
6. **See** *Kurundili Ammal* v. *Kunhi Kannan,* (1930) Mad. 141 : 123 IC 596; *Baney Madhub* v. *Subal Chandra,* (1906) 11 CWN 776; *Syed Abdoola* v. *Mahmood,* (1925) Ran. 99 : 75 IC 171.
7. *Butcher* v. *Pooler,* (1883) 24 Ch.D. 273.
8. Per Pontifer, J., in *Ram Chunder Shaha* v. *Manick Chunder,* (1881) 7 Cal. 428.

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.

Analogous law.—Sec. 38 of the English Partnership Act—Same as the present section.

Limitation.—Art. 106 of the Limitation Act, 1908 provided a three year's period from the date of dissolution for a suit for an account and for a share of the profits of a dissolved partnership.[1] The fact that the instrument of partnership is registered does not have the effect of enlarging the period of limitation.[2]

Power of partners after dissolution.—The general rule that the agency of a partner is determined by dissolution finds its exception in the present section. A pending suit for eviction of tenant is a transaction begun and unfinished and the partner suing in the firm's name has a right to prosecute the suit till its completion and till satisfaction was obtained of the decree if passed, and till the assets are placed in the hands of the partner to whom they are assigned by mutual agreement. The winding-up process is not complete till this is done.[3] As Lord Eldon observed in *Peacock* v. *Peacock* [4] in the absence of express contract a partnership may be determined, when either party thinks proper, but not in the sense that there is an end of the whole concern. All the subsisting engagements must be wound up; for that purpose, they remain with a joint interest but they cannot enter into into new engagements. Therefore, notwithstanding a dissolution, each partner may pay or receive payment of partnership debt.[5] Similarly, he may pledge partnership assets for completing

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1. *Srinivasulu* v. *Ramakrishna,* (1933) Mad. 353 : (1933) MWN 689 : 37 LW 288; *Sudarsanam Maistri* v. *Narasimhulu,* (1901) 25 Mad. 149. The article applies only where accounts have yet to be taken; **see** *Thirumalappa* v. *Ramappa,* (1937) 2 MLJ 511 : 46 LW 910 : (1937) MWN 1285.
2. *Vairavan* v. *Ponnayya,* (1898) 22 Mad. 14.
3. *Sajjan Singh* v. *Nadeali and Brothers, Bhopal,* (1977) MPLJ 72.
4. (1809) 33 ER 902 : 10 RR 1380. **See also** *Crawshay* v. *Collins,* (1808) 35 ER 736 : 10 RR 61; *Cruickshank* v. *M'Vicar,* (1844) 50 ER 42. The English Act being in identical terms, the principles of the English decisions are applicable. **See** *Babu* v. *Official Assignee,* (1934) 57 Mad. 931 : 36 Bom. LR 858 : 38 CWN 1018 : CLJ 50 : (1934) ALJ 600 : 4 AWR 441 : 6 RPC 160 : 150 IC 1 : 40 LW 80 : (1934) MWN 717 : (1934) PC 138 : 67 MLJ 167.
5. *Firm Lal Singh-Amir Singh* v. *Dhanni Singh Diwan Singh,* (1928) Lah. 832 : 102 IC 50; *Annamalai* v. *Annamalai,* (1918) 10 LW 67 : 52 IC 456 (2); *Palaniappa* v. *Veerappa,* (1917) 41 Mad. 446 : 34 MLJ 41 : 44 IC 466 (Release). But, a fraudulent release can be avoided by the other partners. **See** *Veerasamy* v. *Ibramsa,* (1909) 19 MLJ 221.

a transaction begun already or for securing a debt already incurred.[1] In such circumstances, the power extends even to sale of the assets.[2] But if certain items of assets are taken over *en bloc* by a firm consisting of some of the partners of the dissolved firm, the transaction is liable to be set aside.[3] A continuing or surviving partner may issue a bankruptcy notice in the firm name in regard to a decree, obtained before the dissolution.[4] He may also withdraw a deposit.[5] In taking an account of the profits after dissolution, the partner by whose exertions they were made is given some compensation for his trouble.[6]

With regard to the relationship between a continuing partner and the representatives of a deceased partner, the Judicial Committee have held that the surviving partners hold a fiduciary relationship towards the deceased partner's representatives as regards his interest in the partnership property, though the latter have no such right in any individual asset of the partnership property as will entitle them to interfere with the surviving partner's right to dispose of any such asset for the purpose of realisation.[7]

After a firm is dissolved and the winding up process is not complete, in the absence of a contract to the contrary, partners have no right to use partnership property for their own benefit unless other partners also consent.[8]

Limitations of partner's power.—The power extends only so far as may be *necessary* to wind up the affairs of the firm and complete transactions begun already. So, a partner has no authority to acknowledge a debt or make a part payment,[9] (because it is not necessary for the winding up). Nor has the partner power to strike a balance of account.[10] One Madras case has held,

1. *Butchart* v. *Dresser,* (1853) 68 ER 1004 : 102 RR 269; *Re' Bourne,* (1906) 1 Ch. 113 & (1906) 2 Ch. 427; *Re. Clough,* (1885) 31 Ch.D. 324; *Sesha Ammal* v. *Vairavan,* (1918) 42 Mad. 15 : 8 LW 503 : 47 IC 958; *Solema Bibi* v. *Hafez Mahommad Hussain,* (1927) 54 Cal. 687; *Adm.-General* v. *Official Assignee, Madras,* (1909) 32 Mad. 46 : 3 IC 163; *Haji Mahomed* v. *Dwarkanath,* (1910) 14 CWN 1106.
2. *Babu* v. *Gokuldass,* (1930) 57 MLJ 404 : 30 LW 657; *Fox* v. *Hanbury,* (1776) 98 ER 1179; *Smith* v. *Oriell,* (1801) 102 ER 142; *Harvey* v. *Crickett,* (1816) 105 ER 1074 : 17 RR 338.
3. *Muthiah Chetty* v. *Veerappa,* (1929) 52 Mad. 509 : (1929) Mad. 627 : 121 IC 493 : 56 MLJ 776.
4. *Re. Frank Hill Ex parte Holt & Co.,* (1921) 2 KB 831.
5. *Dixon* v. *National Bank of Scotland,* (1947) SC (HL) 50; *Suganchand* v. *Lukhe,* (1938) Nag. 182; The rule is the same between partners *inter se* on dissolution of other grounds. **See** *Sonum Ram* v. *Sewa Ram,* (1938) Lah. 259.
6. *Brown* v. *Da Tastet,* (1821) 37 ER 858 : 23 RR 59.
7. *Babu* v. *Official Assignee, Madras,* (1934) MWN 717 (PC). [See note 1 affirming *Babu* v. *Gokuldass,* (1930) 57 MLJ 404. **See also** *Hugh Stevenson* v. *Aktienesgellschaft,* (1918) AC 239.
8. *Rajendra Kumar Sharma* v. *Brijendra Kumar Sharma,* AIR 1994 All. 62, 66 : 1994 LJ 390 : 1994 All. CJ 171 : 1993 (2) All. Rent Cases 42 : 1993 All. WC 1528 : 1993 (2) Cur. CC 423 : 1993 (1) Cur. LJ 428 : (1993) 2 BC 501.
9. *Watson* v. *Woodman,* (1875) Eq. 721; *Rajagopala* v. *Krishnaswami,* (1898) 8 MLJ 261.
10. *Bhanun Ram* v. *Jiwanda Ram,* (1926) Lah. 522 : 95 IC 88.

however, that a part payment by a partner to a creditor who is ignorant of the fact of dissolution is binding.[1]

The authority of the survivors after dissolution of the firm will enable them to sue in their own names and recover any debt due to the firm.[2]

The right to wind up is a personal right of a partner. Hence should a partner die or become bankrupt his executor or trustee in bankruptcy cannot interfere.[3]

RIGHT TO SUE FOR RECOVERY OF PARTNERSHIP DEBTS.—The rule in English law is that though the *right* of a deceased partner devolves on his legal representatives, yet the *remedy* survives only to the partners, who have to enforce their right by action and account to the legal representative. [*Vide* Commentary on Sec. 45, Contract Act]. This was an exception to the general rule as to devolution of joint rights in English law, and the exception has practically been made the rule in Sec. 45 of the Contract Act. However, Order 30, Rule 4, Civil Procedure Code has modified Sec. 45 and enables a suit to be brought or continued without the necessity of impleading the legal representative of a deceased partner. Such legal representative may however if he desires apply to be brought on record. There is a difference of opinion among the several High Courts on the interpretation of the rules.[4] **[1253]**

As regards suits against a firm, it has been held in India following the English rule that, if the plaintiff seeks in suing the firm to hold the private estate of a deceased partner liable, he must add as defendant the personal representative of such partner.[5]

Proviso—The adjudication of one partner as insolvent determines his power to deal with the assets.[6] But a person who represents himself or knowingly suffers himself to be represented as the partner of a bankrupt will be liable for the latter's acts.[7]

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1. **See** *Mahadeva Iyer* v. *Ramakrishna Iyer,* (1925) 50 MLJ 67 : (1926) Mad. 114 : 23 LW 199 : (1925) MWN 707 : 92 IC 653.
2. **See** *Gajanand* v. *Sardarmal,* AIR 1961 Raj. 293; *Ramrichpal* v. *Bikaner Stores Supply etc., Co.,* AIR 1966 Raj. 187.
3. **See** *Abdul Gani* v. *Periyaswamy Chetty,* AIR 1960 Mad. 495; *Venkatasubbamma* v. *Subba Rao,* AIR 1964 AP 462; *Probodh Chandra* v. *Bharat Loon Co. Ltd.,* AIR 1964 Assam 114.
4. *Maung Shwe Htein* v. *Ma Lon Ma Gale,* (1929) 7 Ran. 558 : (1929) Ran. 310 : 120 IC 910; *Muthu K.M. Meyyappa* v. *Periyah,* (1931) 9 Ran. 85 : (1931) Ran. 74 : 131 IC 506.
5. *Mohammed Yusuf* v. *Muhammad Sadulla,* (1930) 52 Mad. 885 : 57 MLJ 344 : 30 LW 219: (1929) Mad. 733 : 119 IC 603; *Mathuradas* v. *Ibrahim,* (1927) 51 Bom. 986 : (1927) Bom. 581 : 29 Bom. LR 1296 : 105 IC 305.
6. *Hague* v. *Rolliston,* (1768) 92 ER 134; *Thomason* v. *Frere,* (1809) 103 ER 834 : 10 RR 341.
7. *Lacy* v. *Woolcott,* (1823) 2 Dewl & Ry. 458; *Craven* v. *Edmondson,* (1830) 130 ER 1463 : 31 RR 529.

Receiver and manager in winding up proceedings.—Generally, the winding up is left to the partners themselves, but, if they are unable to agree, the Court may appoint a receiver to collect the outstanding or where necessary, a manager to conduct the entire winding up.[1]

48. Mode of settlement of accounts between partners.—In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed:

(a) Losses, including deficiencies of capital, shall be paid first out of profits, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

(b) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order:

(i) in paying the debts of the firm to third parties;

(ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital;

(iii) in paying to each partner rateably what is due to him on account of capital; and

(iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

Analogous law.—Sec. 44 of the English Partnership Act—Substantially same as the section.

Settlement of accounts.—The Special Committee says:

"This is the accounting clause and is most important. It is copied with only very slight verbal alterations, from Section 44

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1. *Krishnabai* v. *Varjivandas,* (1930) Bom. 236 : 125 IC 442; *Pini* v. *Rancoroni,* (1892) 1 Ch. 633; *Taylor* v. *Neate,* (1888) 39 Ch. Div. 538; *Radha Kanta* v. *Benode Behari,* (1934) Cal. 444 : 148 IC 459.

of the English Act and requires little explanation. That section has stood with success the incessant and vigilant scrutiny of lawyers, accountants, and businessmen in England for nearly forty years and may safely be followed".

Mode of settling accounts.—The rules set out in Section 48 concerning mode of settlement of accounts between partners apply subject to any different stipulation in the deed of partnership.[1] With reference to the corresponding section in the English Act. Lindley observes: "If the assets are not sufficient to pay the debts and liabilities to non-partners, the partners must treat the difference as a loss and make it up by contributions *inter se.* If the assets are more than sufficient to pay the debts and liabilities of the partnership to non-partners, but are not sufficient to repay the partners their respective advances, the amount of unpaid advances ought to be treated as a debt of the firm but payable to one of the partners instead of to a stranger. If, after paying all the debts and liabilities of the firm and the advances of the partners there is still a surplus, but not sufficient to pay each partner his capital, the balances of capitals remaining unpaid must be treated as so many losses to be met like other losses.

When partners have advanced unequal capitals, and have agreed to share profits and losses equally, a deficiency of capital must be treated like any other loss and the assets remaining after payment of all debts and advances must be distributed amongst the partners so as to make each partner's loss of capital equal, and if the assets are not sufficient there must be such a contribution among the partners as to put them all on any equality."[2]

Whenever a stock is taken, and a surplus appears, that surplus is divided according to the shares, and is carried to the accounts of the respective partners. If instead of a surplus a deficiency appears, the loss is apportioned in the same way.[3] There is nothing in the Partnership Act providing priority to debts due under the Income-tax Act or Sales Tax Act.[4] A Commissioner appointed to go into the accounts of a partnership on the death of a partner must follow the procedure prescribed by Sections 46 and 48. He cannot allow to the heir of deceased partner standing to his personal account before the debts of third parties are cleared and the loans taken by the firm from the partners are repaid.[5]

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1. *Navneetdas* v. *Gordhandas,* AIR 1955 MB 113.
2. Lindley on Partnership 10th Edn., (1935) p. 704; (Cf.) *Garner* v. *Murray,* (1904) 1 Ch. 57 (If partner is insolvent and unable to contribute his share of the loss of capital, solvent partners not bound to contribute for him).
3. *K.A. Mohammed Kasim* v. *Controller of Estate Duty,* AIR 1967 Ker. 130 : 1966 Ker. LJ 928.
4. *Union of India* v. *Palleswar Rao,* (1971) 2 An. WR 32.
5. *Sunder Devi* v. *Brij Lal,* AIR 1981 Delhi 208 : ILR (1981) 1 Delhi 144.

The mode of settlement of accounts of partnership provided by Sec. 48 is "subject to an agreement by the partners to the contrary". It is very much open for the partners to agree not to be bound by such mode.

Where the award given by an arbitrator to whom the partners have referred the dispute is a non-speaking award and not in accordance with the mode prescribed by Sec. 48, the award cannot be invalidated since the partners are capable of settling the accounts outside the mode prescribed.[1]

There is no rule of law precluding an action being brought by any party to a partnership for recovering any amount from any partner even though it may have some connection with the partnership concern itself.[2]

A partner of a dissolved firm has a right to maintain a suit for rendition of accounts of partnership firms established out of the funds of dissolved partnership firm.[3]

Where the defendant partner by a deed of dissolution has relinquished and surrendered his rights and interest in the assets of the partnership firm which include good will and any other right (s) whatsoever, it cannot be said that the defendant has given the name of the partnership firm but for the trade mark since the goodwill and other rights would naturally include the right relating to trade mark of the firm.[4]

Clause (a)—Losses—How to be met.—In the absence of special agreement, the partners are bound to share losses in the same proportion in which they share profits. A deficiency of capital occurs where the assets are insufficient to pay the amount of capital invested; the deficiency in such as case is a loss of capital and has to be borne by the partners in the agreed proportions.[5] The clause provides that losses shall be met by available undistributed profits. Where the profits are not enough to cover the losses, then they must be paid out of capital; and even if this is insufficient, the deficiency must come out of the partners' private purses. Of course, all this applies only in the absence of any special agreement. **[1257]**

Clause (b)—Distribution of assets.—In the first place the assets including withdrawal by the partners should be collected as indicated in

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1. *Asandas Mitharam Narsinghani* v. *T.M. Sevakramani,* AIR 1999 SC 3803 (DB) : (1999) 3 SCC 110 : 1999 (9) Supreme 193 : 1999 (2) R.A.J. 151 : 2000 (2) CLT 287 (SC).
2. *Harivallabh* v. *Ahmed Ali,* AIR 1969 Guj. 145 : ILR (1968) Guj. 159.
3. *Rishi Ram Gupta* v. *Hari Ram Gupta,* 2002 AIHC 2281, 2283.
4. *Harmohan Singh* v. *Gurbax Singh,* AIR 2001 Del. 507, 509.
5. **See** *Binnie* v. *Mutrie,* (1887) 12 AC 160 (a case before the English Partnership Act); *Nowell* v. *Nowell,* (1869) 7 Eq. 538.

clause (b); thereafter the debts of the firm to third parties should be paid and if there is loss the directions in clause (a) would apply and if there is a surplus the directions in clause (b)(ii), (iii) and (iv) would operate in that order.[1] The assets are to be distributed in the order of priority specified in the clause. Advances are placed on a higher footing than capital, as they are in the nature of a loan by the advancing partner.[2] **[1259]**

(b) (ii) provides for the refund of actual capital contributed and if the available assets are insufficient to refund the said amount, a rateably reduced amount shall have to be refunded. The term capital cannot be equated to the term "assets" of the firm at all. Capital contributed by a partner is in the nature of the advance or a loan and it has no higher quality at all. Just loan advanced by a partner does not get expanded in proportion to the enhanced value of the assets. The capital contributed by a partner also does not get augmented in proportion to the assets of the firm. Therefore property which has been used and treated as partnership property cannot be presumed to belong to one partner only, simply because he paid for it.[3]

On the dissolution of partnership firm not only the partners are entitled to share the assets of the firm but also the third parties such as the creditor and in fact the third parties to whom the firm owes liability will have preference over the other partners in the distribution of the assets of the Firm.[4]

Sub-clause (iv)—Residue.—In the distribution of the residue, a debt due by one partner to the firm may be assigned to another partner as for his share of the residue.[5] Similarly, immovable property may be assigned over to one partner.[6]

In *Suleman* v. *Abdul Latif,*[7] the Privy Council have held that interest is not chargeable on sums due form partners until the date of final decree. And

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1. *Bhagubata Sinha* v. *Sankaran,* 1973 (2) CWR 1860; *Nag Kuer* v. *Sham Lal,* AIR 1925 PC 257 : (1925) 92 IC 754.
2. *Austin* v. *Jackson,* (1879) 11 Ch.D. 942; *Potter* v. *Jackson,* (1880) 13 Ch.D. 845.
3. *K.A. Gundu Rao* v. *Ramnarayana Avadhani,* AIR 1994 Kar. 217, 220 : 1994 (2) Civ. LJ 34 : ILR (1994) Karn. 642 : 1994 (1) Kant. LJ 340.
4. *Shaik Bahseer Ahmed* v. *Shaik Yakoob Ahmed,* 2006 (3) R.A.J. 398 (AP).
5. *Jagannadiah* v. *Narasimham,* (1928) Mad. 1133 : (1928) MWN 690 : 113 IC 669.
6. *Samuvier* v. *Ramasubbier,* (1931) 55 Mad. 72 : 132 IC 305 : (1931) Mad. 580 : 60 MLJ 527 (Instrument of dissolution affecting title to immovable property requires registration), dissenting from *Venkataratnam* v. *Subba Rao,* (1926) 49 Mad. 738 : (1926) Mad. 1040 : 51 MLJ 410 : (1926) MWN 732 : 24 LW 529 : 96 IC 881. **See also** *Joharmal* v. *Tej Ram,* (1893) 17 Bom. 235.
7. (1930) 58 Cal. 208 : (1930) PC 185 : 34 CWN 737 : 59 MLJ 121 : 32 LW 184 : (1930) MWN 1120 : 32 Bom. LR 1152. **See also** *Umamaheswara* v. *Munisami,* (1926) 50 MLJ 428 : 94 IC 306 : (1926) Mad. 642.

where the dues have to be converted form one currency into another, the rate of exchange is that obtaining on the date of completion of the winding up.[1]

When a suit is brought for settlement of accounts of dissolved firm, interest can be allowed from the date of plaint.[2]

Settled Accounts:—Normally the courts will not reopen the settled accounts. But there cannot be bar to reopen, where the accounts contain fraudulent errors. The correct approach is that the court shall not reopen the settled account, but when accounts books are shown to be erroneous to a considerable extent both in amount and in number of items or where a fiduciary relationship exists and a considerable extent of errors are shown or where a fiduciary relation exists and one or more fraudulent errors or omissions are shown, the court will reopen even a settled account.

49. Payment of firm debts and of separate debts.— Where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

Analogous law.—Presidency Town Insolvency Act, Secs. 49 (4) and 70 run thus:

> "49 (4) In the case of partners the partnership property shall be applicable in the first instance in payment of the partnership debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts. Where there is a surplus of the separate property of the partners, it shall be dealt with as part of the partnership property; and where there is a surplus of the partnership property, it shall be deal with as part of the respective separate property in proportion to the rights and interest of each partner in the partnership property".
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> "70. Where one partner in a firm is adjudged insolvent, a creditor to whom the insolvent is indebted jointly with the other

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1. *Muthayya* v. *Veerappa,* (1929) 52 Mad. 509 : (1929) Mad. 627 : 56 MLJ 776 : 29 LW 636 : (1929) MWN 345 : 121 IC 498.
2. *Vincent Antony* v. *S.A. Thomas Fernando,* AIR 1978 Mad. 90 : 90 Mad.LW 655 : ILR (1978) 1 Mad. 313.

partners in the firm or any of them shall not receive any dividend out of the separate property of the insolvent until all the separate creditors have received the full amount in respect of their respective debts".

Provincial Insolvency Act, Sec. 61(4)—Same as Sec. 49 (4) above.

Firm debts and separate debts—In *Twiss* v. *Massey,*[1] Lord Hardwicke said, "Joint creditors as they give credit to the joint estate, have first their demand on the joint estate, and separate creditors, as they gave credit to the separate estate, have first their demand on the separate estate".

The rule enacted in the present section is, as James, L.J., observed in *Lacey* v. *Hill,*[2] "a sort of rough code of justice, intended to avoid a race, competition and scramble between the joint creditors and the separate creditors of the insolvent partners".

This section comes into operation only when there are joint as well as separate debts and estates.[3] Again, if both joint and separate creditors agree to the consolidation of the joint and separate estates with a view to proportionate distribution, the section will not apply. Further it may be noted that any disposition of the partnership property by agreement among the partners is effective, except where it is made in order to defeat the creditors of the partnership. It will, therefore, be open to partners to convert firm property into the separate estate of one of the members, and the creditors of the firm, has no right to be consulted.[4]

By way of exception to the general rule of the section, a creditor who has taken security from the joint estate has been permitted to prove against the separate estates without giving up the security, and *vice versa.*[5] Again, a creditor induced to lend to the firm by fraud practised on him by a partner in the course of the business may prove against either estate on the principle of joint and several liability of the partners.[6] A third exception is where the joint and separate estates are mixed. For instance, it has been held by the Madras

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1. (1737) 26 ER 43; *In re. Simpson,* (1874) 9 Ch. Ap. 572.
2. (1872) 8 Ch. 441; *Bhaseshar Nath* v. *Shibba Mal,* (1934) 15 Lah. 474 : 151 IC 383 : 36 PLR 303 : (1934) Lah. 336. (Cf.) *Read* v. *Bailey,* (1877) 3 AC 94.
3. *Re Budget, Cooper* v. *Adams,* (1894) 2 Ch. 555; *Re. Kensington, Ex parte Taylor,* (1808) 33 ER 592 : 9 RR 325; *Ex parte Read,* (1894) 1 QB 638.
4. *Jamandas* v. *Ramadhar,* (1922) Nag. 70 : 64 IC 719.
5. *Rolfe* v. *Flower,* (1866) 1 PC 27; *Ex parte Honey,* (1871) 7 Ch.A. 178; *Ex parte West Riding Banking Co.,* (1881) 19 Ch.D. 105; *Ex parte Dickin,* (1875) 20 Eq. 757; *Ex parte Stone,* (1873) 8 Ch. Ap. 914; *Ex parte Ackermen,* (1808) 33 ER 653 : 9 RR 358 (Firm creditor petitioning to adjudicate partners for private debt).
6. *Re Macfadyen,* (1908) 2 KB 817; *Ex parte Adamson,* (1878) 8 Ch. D. 807.

High Court that among Nattukottai Chettys, the distinction between joint and separate estates is very thin.[1] **[1260]**

In a case under old Sec. 262 of the Contract Act, it was held that an outgoing partner has a right to be indemnified against the partnership debts by the appropriation thereto of the partnership assets.[2]

The rights created by the section regarding joint and separate creditors may be applied in suits and execution proceedings.[3]

Where a decree is passed against a firm and its members making the decretal amount payable by them jointly and severally, the executing Court has to execute the decree as it stands and where the partner is sought to be proceeded against by attachment of his property he cannot insist that the property of the firm should first be proceeded against. To such a case Sec. 49 has no applicability.[4]

Partner competing with joint creditors—As a rule no partner or his executor or administrator can compete with the joint creditors.[5] As to the case of an executor, Lord Cairns said in *Nanson* v. *Gordon*,[6] "If the reason [for the rule against competition] is that the hand to pay should not prove in competition with those who are to receive, then whether that hand to pay is the living hand of the man himself or the deputed hand of his executors, is utterly immaterial". Of course, this embargo upon competition with the joint creditors has no operation where the particular partner is for any reason, not liable for any joint debts.[7] Again, a partner whose separate property has been misappropriated by the other partners may prove, along with the joint creditors, and *vice versa*.

50. Personal profits earned after dissolution.—Subject to contract between the partners, the provisions of clause (a) of Section 16 shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken after the firm

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1. See *Official Assignee, Madras* v. *Palaniappa*, (1918) 41 Mad. 824 : 35 MLJ 473 : 8 LW 530 : (1918) MWN 721 : 49 IC 220; *Chidambaram Chetty* v. *Ramaswami Chetty*, (1914) 27 MLJ 531 : 26 IC 911.
2. *Jeramdas* v. *Official Assignee*, (1933) Sind 182 : 144 IC 674.
3. *Sundara Iyer* v. *Baluswami*, AIR 1956 Mad. 192; *Pacific Bank* v. *Thakur Singh*, AIR 1949 Cal. 396 : ILR (1945) 1 Cal. 153.
4. *Nilakanth* v. *M/s. Raj & Company*, AIR 1982 Bom. 388 : 1982 Mah. LJ 285. See also *Kedar Nath* v. *Firm Rekh Chand*, AIR 1983 All. 270.
5. *Nanson* v. *Gordon*, (1876) 1 AC 195; *Ex parte Blythe*, (1881) 16 Ch.D. 620; *Ex parte Sillitoe*, (1824) 2 LJ Ch. 137 : 26 RR 204.
6. (1876) 1 AC 195 (203).
7. *Ex parte Andrewz*, (1884) 25 Ch.D. 505.

is dissolved on account of the death of a partner and before its affairs have been completely wound up:

Provided that where any partner or his representative has bought the good-will of the firm, nothing in this section shall affect his right to use the firm name.

Analogous law—Sec. 29 of the English Partnership Act dealing with accountability for private profits, provides in Clause (2) as follow:

> "29 (2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up either by any surviving partner or by the representatives of the deceased partner".

Scope—This section is only a special application of the rule as to personal profit earned by a partner enacted in Sec. 16. This section operates only in the absence of a contract to the contrary. [See commentary on Sec. 16 and also on Sec. 30]. **[1204]**

Where a partnership has bee dissolved by death or bankruptcy, etc., the relation between the surviving partner and the former partner is a fiduciary one.[1] So, a lease renewed by a surviving partner in the interval between dissolution and actual winding up enures to the benefit of the partnership.[2]

Where any profits are made by a surviving partner after dissolution and before winding up, such profits also belong to the firm. The partner may have to account for the same together with interest thereon.[3]

51. Return of premium on premature dissolution.—Where a partner has paid a premium on entering into partnership for a fixed term, and the firm is dissolved before the expiration of that term otherwise than by the death of a partner, he shall be entitled to repayment of the premium or of such part thereof as may be reasonable, regard being had to the terms upon which he became a partner and to the length of time during which he was partner, unless—

(a) the dissolution is mainly due to his own misconduct, or

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1. *Babu* v. *Official Assignee Madras,* affirming (1934) MWN 717 (PC); *Babu* v. *Gokuldoss,* (1930) Mad. 393 : 57 MLJ 404; *Hugh Stevenson* v. *Actiengasellschaft,* (1918) AC 239.
2. *Clements* v. *Hall,* (1858) 44 ER 954 : 119 RR 74 : (Cf.) *Ahmed Musaji* v. *Hashim,* (1915) 42 Cal. 914.
3. *Swaminatha Chettiar* v. *Nagalingam Chettiar,* (1952) 2 MLJ 249; *Hakim Rai* v. *Gangaram,* AIR 1942 PC 61.

(b) the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it.

Analogous law—Sec. 40 of the English Partnership Act—Substantially the same.

Return of premium—This section deals with the case of failure of consideration, and is a particular application of the general law as to refund of consideration where there has been subsequent failure of consideration. A premium is defined by Strahan as a sum of money paid by an incoming partner to the other partner or partners, not by way of contribution to the firm in which the payer is about to acquire an interest, but for the personal use and benefit of the other partner or partners.

The section excepts cases of the death of a partner, for death is a contingency that could be expected.[1] So too, in the case of a partnership at will, the section can obviously have no application, unless indeed, it is a case of absolute lack of *bona fides* on the part of the recipient of the premium.[2] But for these two exceptions, the section will ordinarily apply to cases of lunacy of insolvency,[3] though not to cases of insolvency of the firm as a whole.[4] Where it is the disagreement between partners that leads to dissolution, the tendency as Lindley says, is to apportion the premium not only in cases where the partner who received the premium has misconducted himself but also to cases where neither partner is to blame.[5] **[1169]**

As to the amount to be refunded, the rule generally is "to apportion the premium with reference to the agreed and actual duration of the partnership".[6]

Sub clause (a)—Misconduct—The case of *Bluck* v. *Capstick*,[7] illustrates this. In this connection, the observations of Lord Cairns in *Attwood* v. *Maude*,[8] are worthy of note:

"If the partner who has paid the premium is guilty of a breach of the partnership articles and is himself the author of the dissolution, the Court

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1. (Cf.) *Ferns* v. *Carr*, (1885) 28 Ch.D. 409 (Case of articled clerk of solicitor-death of solicitor—Premium not returnable).
2. *Featherstonhaugh* v. *Turner*, (1858) 53 ER 693 : 119 RR 462; *Tattersall* v. *Groote*, (1800) 126 ER 1197; *Whincup* v. *Hughes*, (1871) 6 CP 78.
3. *Freeland* v. *Stanfield*, (1854) 65 ER 490 : 97 RR 306.
4. *Akhurst* v. *Jackson*, (1818) 36 ER 308.
5. *Bullock* v. *Crockett*, (1862) 66 ER 509 : 133 RR 169.
6. *Lyon* v. *Tweddell*, (1881) 17 Ch.D. 529; *Peace* v. *Hewitt*, (1862) 54 ER 1045 (Return of premium may be claimed even if both sides are in fault); *Wilson* v. *Johnstone*, (1873) 16 Eq. 606.
7. (1879) 12 Ch.D. 863.
8. (1868) 3 Ch.A 369.

will not allow him to found a claim to the restitution of the premium upon his own wrongful act."

It may be mentioned here that incompetence is not misconduct.[1]

Sub-clause (b)—Agreement.—*Lee* v. *Page,*[2] illustrates this. Where the articles contain an arbitration clause, it will be open to the arbitrator to order return of the premium.[3]

52. Rights where partnership contract is rescinded for fraud or misrepresentation.—Where a contract creating partnership is rescinded on the ground of the fraud or misrepresentation of any of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(a) to a lien on, or a right of retention of, the surplus of the assets of the firm remaining after the debts of the firm have been paid, for any sum paid by him for the purchase of a share in the firm and for any capital contributed by him;

(b) to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm; and

(c) to be indemnified by the partner or partners guilty of the fraud or misrepresentation against all the debts of the firm.

Analogous law.—Sec. 41 of the English Partnership Act—Same as the section.

Rescission of partnership contract.—The section relates to fraud in the making of the contract, not the performance of it.[4] For fraud practised in the course of the partnership, the remedy will be by way of dissolution. **[1176]**

The right to rescind is subject to the duty to refund any benefits received.[5] (*Cf.* Sec. 64, Contract Act). It cannot be exercised to the prejudiced of third parties.[6] Acquiescence and estoppel may similarly bar the right.[7]

1. *Brewer* v. *Yorke,* (1882) 46 LT 289.
2. (1861) 126 RR 839.
3. *Belfield* v. *Bourne,* (1894) 1 Ch. 521.
4. *Adam* v. *Newbigging,* (1888) 13 AC 308; *Rawlins* v. *Wickham,* (1858) 44 ER 1285.
5. *Urquhart* v. *Macpherson,* (1878) 3 AC 831.
6. *Clarke* v. *Dickson,* (1858) 120 ER 453 : 113 RR 583.
7. *Law* v. *Law,* (1906) 1 Ch. 140.

The right does not preclude any other right (*e.g.*) a right to sue for damages for misrepresentation of fraud,[1] or to a personal decree against the partners.[2]

A claim for rescission of the partnership contract may be made in the alternative with a claim for dissolution.[3]

53. Right to restrain from use of firm name or firm property.—After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up:

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

Scope—As the Special Committee points out, this section is merely complimentary to Sec. 50 The English Act did not deal with this matter, though it is one of great practical importance. The Special Committee introduced the present section acting on the views expressed by Lindley and Sir Frederick Pollock. The case of *Re. David & Mathews,*[4] lays down the principle embodied in this section. **[1206]**

Where the appellant (partner) took over the business assets along with the goodwill and liabilities and carried on a separate business after dissolution in the name of the original firm receiving full quota of woolen yarn allotted to the original firm, negativing the claim of the other partners to proportionate share in the allotted quota, the Supreme Court held that quota attaches to the owner of the business at the point of time it is granted, that it is not an asset of partnership and cannot be divided, that the appellant's quota is an asset in the items of partnership and not an after-acquired asset of the partnership and it is his property.[5]

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1. *McConnel* v. *Wright,* (1903) 1 Ch. 546; *Derry* v. *Peek,* (1889) 14 AC 337; *Minck* v. *Roshan Lal,* (1931) Lah. 390 : 130 IC 644.
2. *Adam* v. *Newbigging,* (1838) 13 AC 308.
3. *Bagot* v. *Easton,* (1877) 7 Ch.D. 1.
4. (1899) 1 Ch. 378, **see also** *Ramalinga* v. *Ramalinga,* (1938) 2 MLJ 790 : 48 LW 334 : (1938) MWN 854 : (1938) Mad. 929 (where deft is invited to settle the accounts but refuses to do so he cannot rely on the section and obstruct the use of partnership property by plaintiff).
5. *Shadi Lal* v. *Nagin Chand,* AIR 1973 SC 776 : (1973) 1 SCC 185.

54. Agreements in restraint of trade.—Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits; and notwithstanding anything contained in Section 27 of the Indian Contract Act, 1872, (9 of 1872), such agreement shall be valid if the restrictions imposed are reasonable.

Analogous law.—The repealed Sec. 27, Exception 2, of the Indian Contract Act.

An agreement that on the termination of the partnership neither of its two partners who were the selling agents of a textile mill should take up the agency of the mill is in restraint of trade and is not enforceable.[1] The restraint should be so designed as to afford protection to the concerned party and at the same time not so large as to affect the interest of the public.[2]

55. Sale of goodwill after dissolution.—(1) In settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm.

Rights of buyer and seller of goodwill

(2) Where the goodwill of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business, but, subject to agreement between him and the buyer, he may not—

(a) use the firm name,

(b) represent himself as carrying on the business of the firm, or

(c) solicit the custom of persons who were dealing with the firm before its dissolution.

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1. *Deva Sharma* v. *Laxminarayan,* AIR 1956 Punj. 49; *Mansaram* v. *Tej Bhan,* AIR 1958 Punj. 5; *Premji Damodar* v. *Govindji & Co.,* AIR 1943 Sind 197.
2. *Krishna Rao* v. *Shankar,* (1954) 56 Bom. LR 973.

Agreements in restraint of trade

(3) Any partner may, upon the sale of the goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits, and notwithstanding anything contained in Section 27 of the Indian Contract Act, 1872, (9 of 1872), such agreement shall be valid if the restrictions imposed are reasonable.

Principle.—The Special committee observe: "Clause 54 does not profess to be an exhaustive codification of all the judicial rulings on the difficult subject of goodwill. It includes only the outstanding rules, and does not introduce the various refined modifications and qualifications disclosed by a study of the English case-law appertaining thereto.

The expression "goodwill" connotes the value of the business, which is transferred into the hands of the successor providing a right to the successor to use the old name, which facilitates the old customers of maintaining their connection and also giving an advantage of the reputation of the old business.[1]

"The term 'goodwill' has been defined in various ways but never quite successfully, and it is not proposed to make the attempt here. It is sufficient that there is an intangible but valuable thing attached to a healthy business, which is known to all as the "goodwill of the business"; and the Bill uses this well-known term without defining it, and then lays down the consequences which ordinarily follow when it is sold under that name.

"Clause 15 has already included the goodwill of the business in the property of the firm. Sub clause (1) of Sec. 55 reasserts this from a particular point of view, and requires that the goodwill of the business shall be sold like any other part of the property of the firm when the affairs of the firm are wound up, either along with other property or separately. The definite inclusion of goodwill as part of the property of the firm renders this sub-clause a short and inevitable step, requiring little justification, but is in accordance with English law.[2]

"Sub-clause (2) begins with an important proposition defining the rights which are ordinarily retained by the seller of a goodwill. In spite of the sale of the goodwill of a firm, any partner may set up a competing business alongside the old premises of the firm, and may even advertise the business.[3] This is in

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1. *Ramnik Vallabhdas Madhvani* v. *Taraben Praveen Lal Madhvani,* (2004) 1 SCC 497.
2. *Jennings* v. *Jennings,* (1898) 1 Ch. 378 at page 389; *Hill* v. *Fearis,* (1905) 1 Ch. 466; *In re. David and Mathews,* (1899) 1 Ch. 378 and other cases. For Indian cases **see** *Suleman* v. *Abdul Latif,* (1930) PC 185; *Ramakrishna* v. *Muthuswami,* (1929) 52 Mad. 672.
3. *Kennedy* v. *Lee,* (1817) 36 ER 170 : 17 RR 110; *Hookham* v. *Pottage,* (1872) 8 Ch. 91.

accordance with the overriding principle that a man may trade as he chooses, in fair competition with others. If he wishes to obtain a higher value for his goodwill by restricting this right, he must make a special bargain [See sub-clause (3)]. Things, which he may not do, are given in (a), (b), (c) of the sub-clause:

(a) he may not use the firm-name;[1]

(b) he may not represent himself as succeeding to the business of the firm;

(c) he may not solicit old customers of the firm.[2]

"These propositions are fairly simple, and follow naturally from the sale of the goodwill of the business; for, though the seller is entitled to carry on a competing business from his connection with the business whose goodwill he has sold for value.

"These simple rules do not exhaust the English rulings on the subject, which have introduced many refinements and distinctions, particularly in connection with clause (c). The Bill does not propose to adopt any of these. In particular it does not include the proposition that where a partner has been adjudicated insolvent, he is not prevented from soliciting the old customers of the firm. This is based on *Crutwell* v. *Lye*,[3] and *Walker* v. *Mottram*,[4] which are derived from the general consideration that the insolvent's share in the assets of the firm, including the goodwill, is sold over his head, for the benefit of his creditors, and he himself is in no way privy to the sale and should not therefore be bound by a condition which amounts to a personal undertaking. It seems to us that the better rule is to provide that the value of the goodwill should be left unimpaired, for the benefit of the creditors of the insolvent. The English rulings go further than this and would extend the rule in *Crutwell* v. *Lye*, to expelled partners,[5] and to sales by a Court in an action for dissolution,[6] and sales by a trustee of a deed of assignment for the benefit of creditors,[7] [Lindley (1979) 14 Edn. pp. 221, 222, but in these cases the sale usually follows from

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1. *Churton* v. *Douglas*, (1859) 70 ER 385 : 123 RR 56; *Burchell* v. *Wilde*, (1900) 1 Ch. 551; *Townshend* v. *Jarman*, (1900) 2 Ch. 698.
2. *Trego* v. *Hunt*, (1896) AC 7; *Labouchere* v. *Dawson*, (1872) 13 Eq. 322; *Leggott* v. *Barrett*, (1880) 15 Ch.D. 306 (He may deal with customers of the old firm); *Curl* v. *Webster*, (1904) 1 Ch. 685 (The old customers must willingly deal with him of their own accord; otherwise, it will be soliciting).
3. (1810) 34 ER 129 : 11 RR 93.
4. (1884) 19 Ch.D. 355.
5. *Dawson* v. *Beeson*, (1882) 22 Ch.D. 204.
6. *Irish* v. *Irish*, (1888) 40 Ch.D. 49.
7. *Trarey* v. *Cooper*, (1927) 2 KB 384.

what was originally a voluntary act by the seller and the seller derives some benefit from the sale. It seems undesirable to define and elaborate the new statutory rules and this extent. In any case, these matters are expressed to be subject to agreement by the buyer and the partner concerned and where there is no agreement any loss to the seller arising from the absence of these refinements, which are all in favour of the seller, will be balanced by the enhanced value of the goodwill.

"Sub-clause (3), as was sub-clause (2) of clause 36, is a modification of the general rule that each partner may carry on a business competing with that of which the goodwill has been sold, and is derived from Explanation I to Section 27 of the Indian Contract Act, 1872."

Sub-section (1)—Goodwill.—Section 55 does not provide that goodwill may be taken into account only when there is a general dissolution of the firm, and not when the representatives of a deceased partner claim his share in the firm, which by express stipulation is to continue notwithstanding the death of the partner.[1] In a Madras case under the old Contract Act it had been held that the term "partnership assets" must be deemed to include the goodwill.[2] And the Judicial Committee has held likewise that in a suit for dissolution, the goodwill should be included in the assets.[3]

The section operates only subject to any contract to the contrary and so it will be open to partners to stipulate that the surviving partners may retain the benefit of the goodwill on terms.[4]

Sub-section (2)—Sale of goodwill.—The sale of the goodwill does not prevent the partners from carrying on a competing business with the buyer,[5] provided it is not under the old firm name.[6] They may even advertise their business.[7] But the effect of probable competition will be a factor in the valuation of the goodwill.[8] **[1255]**

Where the use of a name is likely to mislead the public, an injunction may be granted to restrain the use of the name.[9]

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1. *Khushal Khemgar* v. *Mrs. Khorshed,* AIR 1970 SC 1147 : (1970) 1 SCC 415.
2. *Ramakrishnayyar* v. *Muthuswami,* (1929) 52 Mad. 672 : 56 MLJ 657 : (1929) Mad. 456 : 29 LW 60 : 121 IC 609.
3. *Suleman* v. *Abdul Latif,* (1930) 53 Cal. 208 : (1930) ALJ 868 : 34 CWN 737 : 32 Bom. LR 1152.
4. *Smith* v. *Nelson,* (1905) 92 LT 313; (Cf.) *Hordern* v. *Hordern,* (1910) AC 465.
5. *Trego* v. *Hunt,* (1896) AC 7; *Jennings* v. *Jennings,* (1898) 1 Ch. 378. **See** *Abdul Sattar* v. *Hafiza Bibi,* AIR 1944 Mad. 725.
6. *Churton* v. *Dougles,* (1859) 70 ER 385; *Levy* v. *Walker,* (1879) 10 Ch.D. 436.
7. *Kennedy* v. *Lee,* (1817) 36 ER 170 : 17 RR 110.
8. *Abdul Latif* v. *Suleman Umer,* (1929) Sind 85 : 110 IC 639.
9. *Muthu K.M. Meyyappa* v. *Periah,* (1931) 9 Ran. 85 : (1931) Ran. 74 : 131 IC 506.

The buyer has the right to the use of the firm name and can represent himself as having succeeded to the business. But he must not by using the name expose his vendors to any liability by leading the public to believe that the vendors are in the business.[1]

Where after the dissolution of a partnership in plying ferries, one of the partners established a new ferry at a different place with new boats, it was held that he was entitled to do so and that no question of setting up a competing business arose.[2]

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1. *Levy* v. *Walker,* (1879) 10 Ch.D. 436.
2. *Khalidur Hasan* v. *Janardan Prasad,* (1934) Pat. 264 : 149 IC 124.

CHAPTER VII

REGISTRATION OF FIRMS

Introduction.—With reference to this chapter the Special Committee observes in its report as follows:

> "17. **The outlines of the scheme are briefly as follows** :—The English precedent in so far as it makes registration compulsory and imposes penalty for non-registration has not been followed, as it is considered that this step would be too drastic for a beginning in India, and would introduce all the difficulties connected with small and ephemeral undertakings. Instead it is proposed that registration should lie entirely within the discretion of the firm or partner concerned, but, following the English precedent, any firm, which is not registered, will be unable to enforce its claims against third parties or against his fellow partners. One exception to this disability is made—any unregistered partner in any firm, registered or unregistered, may sue for dissolution of firm. This exception is made on the principle that registration is designed primarily to protect third parties, and the absence of registration need not prevent the disappearance of an unregistered or imperfectly registered firm. Under this scheme, a small firm, or a firm created for a single venture, not meeting with difficulty in getting payment, need never register; and even a firm with a large business need not register until it is faced with litigation. Registration may then be effected at any time before the suit is instituted. The rights of third parties to sue the firm or any partner are left intact.
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> 19. The framing of inducements to register changes in a firm has been difficult but the devices proposed in the Bill are put forward as being as strong as may be created, in the absence of a penal sanction and without altering any of the established principles of partnership law.
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> 23. It is anticipated that once a firm has been registered, the register of firms will continue to contain a complete and up-do-date list of all partners who will be liable for the debts of the firm to persons who propose to deal with the firm".

56. Power to exempt from application of this Chapter.—The State Government of any State, may, by notification in the Official

Gazette, direct that the provisions of this Chapter shall not apply to that State or to any part thereof specified in the notification.

57. Appointment of Registrars.—(1) The State Government may appoint Registrars of Firms for the purposes of this Act, and may define the areas within which they shall exercise their powers and perform their duties.

(2) Every Registrar shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code (45 of 1860).

58. Application for registration.—(1) The Registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating—

(a) the firm name,

(b) the place or principal place of business of the firm,

(c) the names of any other places where the firm carries on business,

(d) the date when each partner joined the firm,

(e) the names in full and permanent addresses of the partner, and

(f) the duration of the firm.

The statement shall be signed by all the partners, or by their agents specially authorised in this behalf.

(2) Each person signing the statement shall also verify it in the manner prescribed.

(3) A firm name shall not contain any of the following words, namely:

"Crown", "Emperor", "Empress", "Empire", "Imperial", "King", "Queen", "Royal", or words expressing or implying the sanction, approval or patronage of Government, except when the State Government signifies its consent to the use of such words as part of the firm name by order in writing.

Analogous law.—Sec. 3 English Registration of Business Names Act, 1916:

> "3 (1) Every firm or person required under this Act to be registered shall furnish by sending by post or delivering to the Registrar at the Registrar's office in that part of the United Kingdom in which the principal place of business of the firm or person is situated a statement in writing in the prescribed form containing the following particulars:
>
> (a) The business name; (b) The general nature of the business; (c) The principal place of the business; (d) Where the registration to be effected is that of a firm, the present Christian name and surname.....(e) Where the registration to be effected is that of an individual, the present Christian name and surname.....(f) Where the registered or principal office; (g) If the business is commenced after the passing this Act, the date of the commencement of the business.
>
> (2) Where a business is carried on under two or more business names, each of those business must be stated".

Partnership—Formalities of.—An agreement of partnership may be, oral or in writing. If in writing, it has to be stamped under Article 46 of the Stamp Act.

Article 62 of the Stamp Act requires an assignment of a share in a partnership to be stamped at one half the duty payable on a conveyance for a consideration equal to the value of the share.

Registration under the Registration Act.—Registration under the Partnership Act is different from registration under the Indian Registration Act.[1] It is not necessary that a partnership deed should be registered under the Registration Act. It may be a question, however, whether it will require

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1. *Girdhari Lal* v. *Spedding Co.*, AIR 1954 HP 52.

registration if the partnership property is immovable or where the business is that of buying and selling immovable property.[1] **[1181]**

It has been held in Madras case, *Samuvier* v. *Ramasubbier,*[2] that an assignment of a share in a partnership where it comprises immovable property will have to be registered under the Registration Act.

Registration with Registrar of Firms.—Under the new Partnership Act, a partnership has to be registered with the Registrar of Firms: otherwise certain disabilities will follow: these are mentioned in Secs. 68 and 69 *infra.* Mere despatch of an application for registration under Section 58 is not tantamount to registration of the firm.[3] A suit to enforce an implied term in a partnership deed for getting the partnership registered will not lie.[4]

Difference between English and Indian law.—Under Sec. 5 of the English Act, the particulars for purposes of registration have to be given within fourteen days of the commencement of the business. The present section says registration may be effected at any time.

Sub-section (i)—Application for registration.—The Special Committed point out that the sub-section reduces the particulars to be furnished to the minimum required for the information and benefit of third parties and that nothing of the internal economy of the firm need be disclosed beyond the mere names of the partners and the duration of their partnership. **[1261]**

Where an application for registration is in conformity with Section 58, the Registrar is bound to record an entry of the statement under Section 59 in the Register of Firms.[5] Registration cannot be refused on the ground of the same or similar firm name having been already registered.[6] Substantial compliance with the provisions of Chapter VII will suffice.[7] Registration raises a presumption as to the Registrar's satisfaction under the section.[8] The

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1. **See** *Maungs Po* v. *Mahomed Cassim,* (1903) 30 Cal. 1016 : 13 MLJ 329 : 7 CWN 86 : 5 Bom. LR 975 (PC); *Grey* v. *Smith,* (1889) 43 Ch.D. 208; *De Nicols* v. *Curlier,* (1900) 2 Ch. 416; *Dale* v. *Hamilton,* (1846) 44 ER 907 : 71 RR 127.
2. (1931) 33 LW 576 : 132 IC 305 : (1931) Mad. 580 : 60 MLJ 527, dissenting from *Venkataratnam* v. *Subba Rao,* (1926) 49 Mad. 738 : (1926) Mad. 1040 : 51 MLJ 410 : 96 IC 881. Cf. *Gopala Krishnan & Bros.* v. *Nagama Nicksh,* (1983) 96 LW 551.
3. *Firm Sitaram Agarwal* v. *Harnath,* AIR 1970 Raj. 99 : 1969 Raj.LW 561; *Girdhari Lal's case,* AIR 1954 HP 52; *Chhottey Lal* v. *Collector of Moradabad,* AIR 1922 PC 279.
4. *Keshavlal & Co.* v. *Chunilal & Co.,* AIR 1941 Rang. 196 : 196 IC 96.
5. *Hiralal Agarwal* v. *State of Bihar,* AIR 1972 Pat. 507 : 1972 BLJR 971 : 1972 Pat.LJR 546.
6. *Ibid.*
7. *Sohanlal Pachista & Co.* v. *Bilasray,* AIR 1954 Cal. 179.
8. *Girdhari Lal* v. *Spedding Co.,* AIR 1954 HP 52; *Bilasroy* v. *Scindia Steam Navigation Co.,* AIR 1940 Raj. 294; *Het Ram* v. *Subhag Chand,* AIR 1941 Oudh 367.

registration of a firm under this section must have been completed before a partner can institute any suit under Section 69. The mere sending of a statement to the Registrar is not enough.[1]

Sub-section (iii)—Prohibited firm names.—This clause is taken from Sec. 3(3) of the Indian Companies Act. **[1162]**

59. Registration.—When the Registrar is satisfied that the provisions of Section 58 have been duly complied with, he shall record an entry of the statement in a register called the Register of Firms, and shall file the statement.

Register of firms—The Special Committee point out in regard to this matter that the position of the Registrar is this:

> (1) "He is a mere recording officer and the entries he makes will contain only the facts or alleged facts of which he is given notice. So long as any statement or notice is formally correct, he has no discretion but to record them in the Register of Firms".
>
> (2) "In addition to making the necessary entries in the Register of Firms, he is required to file the original of every document submitted to him. The original statement and all subsequent statements and notices will be filed together, so that all original papers relating to any firm will be conveniently found together in one file". **[1261]**

60. Recording of alterations in firm name and principal place of business.—(1) When an alteration is made in the firm name or in the location of the principal place of business of a registered firm, a statement may be sent to the Registrar accompanied by the prescribed fee, specifying the alteration, and signed and verified in the manner required under Section 58.

(2) When the Registrar is satisfied that the provisions of sub-section (1) have been duly complied with, he shall amend the entry relating to the firm in the Register of Firms in accordance with the statement, and shall file it along with the statement, relating to the firm filed under Section 59.

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1. *Bank of Koothatukalam* v. *Thomas,* AIR 1955 Trav. Co. 155; *Ram Prasad* v. *Kanta Prasad,* AIR 1935 All. 898; Cf. however *Jayalakshmi Rice and Oil Mill Contractors Co.* v. *C.I.T.,* AIR 1967 AP 99 : 1967 (1) An.WR 192 : (1967) 1 ITJ 364.

Record of alterations.—This section refers to the alterations in the firm name and the principal place of business. So the degree of formality required is as under Sec. 58. **[1268]**

The Registrar while considering the application for the purpose of recording the alterations in the firm name and principal place of business must make an effort to satisfy himself whether the alleged alterations or changes have taken place at all, although Sec. 63 is silent in this regard, the verification by the Registrar becomes mandatory. [1]

61. Noting of closing and opening of branches.—When a registered firm discontinues business, at any place or begins to carry on business at any place, such place not being its principal place of business, any partner or agent of the firm may send intimation thereof to the Registrar, who shall make a note of such intimation in the entry relating to the firm in the Register of Firms, and shall file the intimation along with the statement relating to the firm filed under Section 59.

Notice of closing and opening of branches.—This section relates to the noting of changes as to closing and opening of branches, a comparatively less important matter. So, notice may be given by *any partner,* or agent of the firm while under the previous section the intimation has to be signed and verified by all the partners. **[1265]**

62. Noting of changes in names and addresses of partners.—When any partner in a registered firm alters his name or permanent address, an intimation of the alteration may be sent by any partner or agent of the firm to the Registrar, who shall deal with it in the manner provided in Section 61.

63. Recording of changes in and dissolution of firm.—(1) When a change occurs in the constitution of a registered firm any incoming, continuing or outgoing partner, and when a registered firm is dissolved, any person who was a partner immediately before the dissolution, or the agent of any such partner or person specially authorised in this behalf, may give notice to the Registrar of such change or dissolution, specifying the date thereof; and the Registrar shall make a record of the notice in the entry relating to the firm in

1. *G. Vikas Reddy and Company* v. *District Registrar of Assurances, Hyderabad,* 2007 (2) ALD 667 : 2007 (3) ALT 480.

the Register of Firms, and shall file the notice along with the statement relating to the firm filed under Section 59.

Recording of withdrawal of a minor

(2) When a minor who has been admitted to the benefits of partnership in a firm attains majority and elects to become or not to become a partner, and the firm is then a registered firm, he, or his agent specially authorised in this behalf, may give notice to the Registrar that he has or has not become a partner, and the Registrar shall deal with the notice in the manner provided in sub- section (1).

Principle.—The Special Committee observe:

21. As regards retired or expelled partners, who are legally on the same footings, there will be strong inducement to have the changes noted in the register. The law provides that a retired or an expelled partner continues to be liable for the acts of the firm, and he continues to be liable for any act of theirs purporting to be done on behalf of the firm, until public notice is given of the retirement or expulsion. Clause 71 of the Bill provides that this public notice can be given as regards retirement and expulsion only by notice to the Registrar, which will be recorded in the register. Hence, when a partner retires or is expelled, it will be in his own interest and also in the interest of the remaining partners to give immediate notice of the change to the Registrar.

22. Similar considerations apply when a firm is dissolved. All the partners will still be liable for the acts of any of them, which would have bound the firm if done before its dissolution until public notice is given. Here again, it will be in the interest of all the partners that early notice should be given, and this can only be done by notice to the Registrar.

As regards a partner newly introduced into the firm, if he fails to register, he will incur a grave risk of being unable to claim his due from his partners, and will have to rely solely on their good faith or sue for dissolution. On the other hand, the third party who deals with a firm and knows that a new partner has been introduced can either make registration of the new partner a condition for further dealings, or content himself with the certain security of the other partners and the chance of proving by other evidence the partnership of the new but unregistered partner. A third party who deals with a firm without knowing

of the addition of a new partner counts on the credit of the old partners only, and will not be prejudiced by the failure of the new partner to register.

20. As regards outgoing partners, the Bill provides that the estate of the deceased partner of an insolvent partner is in no case liable for the acts of the firm after his death or insolvency. This rule is well established and is hard and fast. Nothing in the way of registration of the death or insolvency of a partner therefore can improve the position of third parties and no inducement need be offered, beyond the desire, which will actuate most firms to keep their entry in the register up-to-date, for the information and benefit of intending customers. These are the exceptions mentioned above, where the existence of a name on the register may not establish the partnership of the person named. **[1266]**

The Registrar cannot record the dissolution of a firm on notice given by a person who on his own showing could not be considered as a partner immediately before the dissolution.[1] On the retirement of one of the two partners of a firm the question of notifying a change in the constitution of the firms does not arise at all.[2]

Where the Registrar has reconstituted a partnership firm at will in accordance with the agreement between the partners, that the partnership shall continue in case of the death of any partner, the petitioner desiring to discontinue cannot challenge the order for the reconstitution of the firm by seeking dissolution of the firm.[3]

Section 63 (1) does not prescribe any period of limitation for intimating to the Registrar any change in the constitution of the firm. The section employs permissive words. Nor does it authorise the rule-making authority to prescribe. Rule 4 (2) of the Andhra Pradesh Partnership (Registration of Firms) Rules prescribing fifteen days is therefore beyond the rule-making power of the State Government.[4]

Merely because in the constitution of the partnership firm there is change on account of inducting a new partner, no fresh registration of the firm is necessary to maintain a suit by the partnership firm.[5]

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1. *Durga Prosad* v. *Registrar of Firms,* AIR 1966 Cal. 573 : 69 Cal.WN 929.
2. *Venkateswara Chit Fund* v. *Ballarata Santana,* 1976 (1) CWR 111.
3. *S.C. Kesarwani* v. *Asst. Registrar, Firms, Societies and Chits,* AIR 2003 All. 254.
4. *Rajasthan Trading Co.* v. *The Registrar of Firms,* (1974) 1 An. WR 319 : (1971) 1 APLJ 200. See *O. Balanarayanan* v. *Registrar of Firms,* AIR 1984 Ker. 20 : 1983 Ker.LT 441.
5. *P.N. Shanmugam* v. *P.D. Vadivelu,* 2007 (2) ALD (NOC 43).

Where an existing registered partnership firm is reconstituted by induction of new partners, the firm does not require re-registration by the Registrar of firms but failure to inform about the change to Registrar rendering the reconstituted firm liable for penalty. [1]

A notice under sub-section (1) alleged to be forged takes the matter into Section 471 of the Penal Code, and the bar of Section 195 Criminal Procedure Code is not attracted.[2]

64. Rectification of mistakes.—(1) The Registrar shall have power at all times to rectify any mistake in order to bring the entry in the Register of Firms relating to any firm into conformity with the documents relating to that firm filed under this Chapter.

(2) On application made by all the parties who have signed any document relating to a firm filed under this Chapter, the Registrar may rectify any mistake in such document or in the record or note thereof made in the Register of Firms.

Rectification of mistakes.—This section simply confers on the Registrar a power to correct clerical errors in the documents or in the record or note thereof made in the Register of Firms. **[1263]**

Where the partners desiring to register the Partnership Firm as a company but mistakenly filed Form V which is meant for the dissolution of the firm and the Registrar made an entry in the register of dissolution of Firm, rejection of the rectification of mistake by the Registrar is incorrect particularly when there was no dispute between the partners.[3]

The Registrar's power under Section 64 (1) is a limited power restricted to rectifying any mistake so as to bring the entry in the Register of Firms in conformity with the document relating to the firm filed under Chapter VII which a look at the documents filed and the previous entries relating to them in the Register will make manifest.[4]

However it has been held by the Andhra Pradesh High Court that although an unregistered Partnership Firm is barred in filing a suit to pursue its claims but once firm is registered there is nothing in law which prevents the firm from pursuing its claim in respect of pre-registration transactions to which it was otherwise entitled.[5]

1. *Sharad Vasant Kotak* v. *Ramanitilal Mohanlal Chawda*, AIR 1998 SC 877, 886.
2. *Madan Mohan Sharma* v. *Smt. Renuka Sharma*, 1981 Guj. LJ 1301.
3. *K.C. Palanisamy* v. *Registrar of Firms*, AIR 2005 Mad 375.
4. *Durga Prosad* v. *Registrar of Firms*, AIR 1966 Cal. 573 : 69 Cal.WN 929.
5. *Samyuktha Cotton Trading Co.* v. *Bheemineni Venkata Subbaiah*, AIR 2005 AP 1.

65. Amendment of Register by order of Court.—A Court deciding any matter relating to a registered firm may direct that the Registrar shall make any amendment in the entry in the Register of Firms relating to such firm which is consequential upon its decision; and the Registrar shall amend the entry accordingly.

Amendment of register by Court—As the Registrar is only a recording office, he has no jurisdiction to canvass the accuracy of the statements contained in any document. So, this section invests the civil Court with jurisdiction to adjudicate in cases of dispute. **[1264]**

66. Inspection of Register and filed documents.—(1) The Register of Firms shall be open to inspection by any person on payment of such fee as may be prescribed.

(2) All statements, notices and intimations filed under this Chapter shall be open to inspection, subject to such condition and on payment of such fee as may be prescribed.

Right to inspection.—The inspection of the Register and original documents is made subject to conditions, which may be prescribed. The Special Committee said:

> "It is deemed inadvisable to allow untrammelled inspection by any member of the public of these important documents. The rules will probably require the inspection to be carried out under some kind of supervision and will require the person applying for inspection to show that he is in some way interested in the contents of the original document and that inspection of the Register itself is not sufficient for his purposes". **[1262]**

67. Grant of copies.—The Registrar shall on application furnish to any person, on payment of such fee as may be prescribed, a copy, certified under his hand, of any entry or portion thereof in the Register of Firms.

Right to copies.—This is limited to the Register of Firms, and does not extend to the originals filed. **[1262]**

68. Rules of evidence.—(1) Any statement, intimation or notice recorded or noted in the Register of Firms shall, as against any person by whom or on whose behalf such statement, intimation or notice was signed, be conclusive proof of any fact therein stated.

(2) A certified copy of any entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement, intimation or notice recorded or noted therein.

The Special Committee said:

> 18. Once registration has been effected, the statements recorded in the register regarding the constitution of the firm will be conclusive proof of the facts therein contained against the partners making them, and no partner whose name is on the register will be permitted to deny that he is a partner—with certain natural and proper exceptions which will be indicated later. This should afford a strong protection to persons dealing with firms against false denials of partnership and the evasion of liability by the substantial members of a firm".

Rules of evidence.—This section makes the original document filed with the Register of Firms, conclusive evidence of the facts thereof, as against any person by whom or on whose behalf such statement or notice was signed. It also provides that certificated copies of the Register of Firms shall be evidence of registration, and of the contents of the original documents. It will therefore not be necessary to produce the originals in Court. **[1268]**

It is open to a person whose name appears in the statement sent to the Registrar as a partner to show that he did not sign the statement nor authorised any one to do so.[1] Where it is found that subsequent to the registration of the firm, the person filing as partner a suit on behalf of the firm had changed and produced the relevant gazette notification, his identity will be deemed to have been established and the suit filed by him will be competent.[2] It is open to third parties to show that a person is or has been a partner liable for the firm's obligations despite non-occurrence of his name in the Register.[3] It is not permissible to adduce oral evidence as to registration.[4] If registration is denied the plaintiff must prove the same by production of a certified copy.[5] A certified copy of the entry relating to the registration of a firm in the register of firms shall alone be proved for the purpose of establishing that the firm is a registered one and the person suing is a partner of the firm on the date of filing of suit, but a mere acknowledgment of the registration of firm cannot be accepted.[6]

1. *Het Ram* v. *Subhag Chand*, AIR 1941 Oudh 367.
2. V. *Anjaneya Setty* v. *M.G. Brothers*, AIR 1981 AP 250 : 1981 (2) ALT 34.
3. *Snowwhite Food Products (P) Ltd.* v. *Sohan Lal Bagla*, AIR 1964 Cal. 209.
4. *Chotteylal* v. *Mohammed Hussain*, AIR 1955 VP 44.
5. *Kapurchand* v. *Laxman*, AIR 1952 Nag. 57. **See** *Jayalakshmi Rice and Oil Mill Contractors Co.* v. *C.I.T.*, AIR 1967 AP 99 (when registration complete).
6. *Narendra Kumar Saxena* v. *M/s. Paper Traders*, AIR 2003 MP 193, 195 : 2003 (2) Civil LJ 617 (MP).

69. Effect of non-registration.—(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third-party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect—

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 (3 of 1909), or the Provincial Insolvency Act, 1920 (5 of 1920), to realise the property of an insolvent partner.

(4) This section shall not apply—

(a) to firms or to partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories are situated in areas to which, by notification under Section 56, this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in Section 19 of

the Presidency Small Cause Courts Act, 1882 (5 of 1882), or outside the Presidency-towns, is not a kind specified in the Second Schedule to the Provincial Small Causes Courts Acts, 1887 (9 of 1887), or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

Analogous law—Sec. 8, English Registration of Business Names Act, 1916 runs as follows:

"8 (1) Where any firm or person by this Act required to furnish a statement of particulars or of any change in particulars shall have made default in so doing then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished, at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise :

Provided always as follows:

(a) The defaulter may apply to the Court for relief against the disability imposed by this section, and the Court, on being satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally, or as respects any particular contracts on condition of the costs of the application being paid by the defaulter, unless the Court otherwise orders, and on such other conditions (if any) as the Court may impose.....

(b) Nothing herein contained shall prejudice the rights of any other parties as against the defaulter in respect of such contract as aforesaid;

(c) If any action or proceeding shall be commenced by any other party against the defaulter to enforce rights of such party in respect of such contract, nothing herein contained shall preclude the defaulter from enforcing in that action or proceeding, by way of counterclaim set-off or otherwise, such rights as he may have against that party in respect of such contract.

The Special Committee observed:

> 24. One more point regarding the registration of firms calls for mention. It is proposed that the chapter, in so far as it provides machinery for registration, amendment of the register, grant of copies and so forth, should come into force along with the rest of the Bill, so that firms may apply for registration at once. The clause regarding the conclusive nature of the statements recorded in the register will come into force at the same time. However, it would obviously be unjust to make all unregistered firms and partners incapable of suing until they have had a reasonable opportunity to register; and it is proposed that they should be allowed one year, by enacting that the clause rendering them incapable of suing shall not come into force until one year after the commencement of the rest of the Act".

Difference between English and Indian law:

1. Sec. 8 of the English Act says only that the rights of the defaulter at any time while he is in default shall not enforceable by action or other legal proceeding, but that the Court may relieve against the disability under certain conditions and subject to specified limitations.[1] The present section says that no suit to enforce a right shall be instituted. In a case,[2] under the Burma Registration of Business Names Act, it was held that a fresh suit after registration was not barred merely by reason of the fact that a prior suit, while the firm was unregistered, had been dismissed.

2. The English Act gives full rights by way of counter-claim or set-off in actions by third parties. The present section has curtailed the right very much. See sub-section (4), clause (b).

3. In the English Act, there is no specific provision saving the powers of an assignee in bankruptcy though decisions have so interpreted it.[3]

Scope.—The section is mandatory.[4] Its effect is that a partner of an unregistered firm cannot sue to enforce a right arising out of a contract falling

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1. **See** *Re Shaer,* (1927) 1 Ch. 335; *Weller* v. *Denton,* (1921) 3 KB 103; *Hawkins* v. *Doche & Sons,* (1921) 3 KB 226.
2. *Maung Tha Nyo & Co.* v. *Ma Un Mo Pru,* (1929) 7 Ran 296 : (1929) Ran. 260 : 119 IC 742.
3. *Hawkins* v. *Douche,* (1921) 3 KB 226.
4. *Loonkaran Sethia* v. *Iran E. John,* AIR 1977 SC 336 : (1977) 1 SCR 853. **See also** *Uma Shankar Bajaj* v. *Narain Das,* AIR 1983 Pat. 329.

within the ambit of the section.[1] On the date of filing of the suit by or on behalf of the partnership firm against the third party, if it is found to be not registered, the suit is hit by Sec. 69 (2) and as such cannot be maintained.[2] Where a suit was filed by the plaintiff representing a partnership firm for the recovery of the amounts under two cheques issued by the defendant, the plea that the partnership firm is not registered cannot be accepted in view of the suit not arising out of contract.[3] A suit brought for the benefit and in the interest of the firm and not one to recover the outstandings of a dissolved firm is hit by Section 69 and is not maintainable.[2] What the section prohibits is the institution of a suit. An executing court cannot consider whether a firm executing a decree was registered or not.[4] Where the execution of an agreement relating to the construction of a shed having not been disputed by the parties, the objection of the defendant that the suit has been preferred neither on behalf the firm nor on behalf of its partner cannot be accepted.[5]

Sec. 69 (2) being a penal provision and must be construed strictly. The said provision is mandatory in nature.[6]

Section 69 (2) being mandatory in character bars an unregistered partnership firm from filing a suit for the realization of money due to it.[7]

For the purpose of the section a firm is deemed to be registered on the date when the Registrar of Firms enters the statement in the Register of Firms under Section 59 and not the date of the application for registration.[8] The question of non-registration may be brought up at any stage of the suit and when raised the court must take cognizance of it.[9] Registration may be made at any time, even on the eve of a suit.[10] Even if a suit had been instituted without registration, the firm can withdraw the suit, and after getting itself registered file a fresh suit.[11] Whether registration of the firm subsequent to

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1. *Balaji Constructions Co.* v. *Lira Siraj Shaikh,* 2006 (2) CCC 105 (Bom).
2. *Loonkaran Sethia* v. *Iran E. John,* AIR 1977 SC 336 : (1977) 1 SCR 853. **See also** *Uma Shankar Bajaj* v. *Narain Das,* AIR 1983 Pat. 329.
3. *Narendra Kumar Saxena* v. *M/s. Paper Traders,* AIR 2003 MP 193, 195 : 2003 (2) Civil LJ 617 (MP).
4. *Kuldip Thakur* v. *Sheomangal,* AIR 1957 Pat. 4.
5. *Multi Metals Ltd.* v. *K.L. Jolly,* AIR 2003 Raj 8, 10.
6. *Raptakos Brett & Co. Ltd.* v. *Ganesh Property,* AIR 1998 SC 3085 : (1998) 7 SCC 184 : 1998 (7) Supreme 276 : 1998 (4) Civil LT 11 (SC).
7. *Hirendra Bhole* v. *Gulati Marketing Company,* AIR 2007 MP 165.
8. *Popular Films* v. *Nalini Saigal,* 84 Cal. WN 867.
9. *Balasore Textile Distributors Association* v. *Indian Union B.N. Railway,* AIR 1960 Orissa 119; *Govindmal* v. *Kunjbehari Lal,* (1954) 56 Bom. LR 348.
10. *Bahal* v. *Kapur & Co.,* AIR 1956 Punj. 24.
11. *Malhotra & Co.* v. *Ramesh Mistri,* AIR 1971 P&H 212.

the filing of suit will satisfy the requirements of Section 69 has led to conflict of judicial opinion, the weight of authority being that subsequent registration is unavailable and the suit must be dismissed.[1] A fresh suit may be brought after registration. If however, by that time the claim had become barred by limitation, the plaintiff has no remedy since such registration has effect only from the date of registration and cannot validate the antecedently instituted suit.[2]

A suit was filed by an unregistered firm but subsequently it was registered while suit was pending, the court held that the bar under Sec. 69 would not apply.[3]

A suit by an unregistered partnership should even at the threshold be deemed to be an action *non est* in the eye of the law. Hence an action brought by an unregistered partnership knowing it was an unregistered firm should be ignored and treated as non-existent.[4] A partner in an unregistered partnership cannot enforce any right if the same arises out of contract entered into by the partnership r partners thereof.[5] But non-registration of partnership was held to be no bar to bring a suit for eviction of the tenant in respect of the property of unregistered firm leased under A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960.[6] Being *non-est* in law an amendment of the plaint to convert the suit as one by one who was a quandom partner of an unregistered firm as if he had become the sole proprietor thereof cannot be permitted.[4] Where a cinema house was being run in partnership, in the absence of registration of firm no suit can be brought demanding partition and accounts. But where the unregistered firm sought to be dissolved, the sale document can be used as evidence.[7]

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1. *Ponneechami* v. *Muthusami,* AIR 1942 Mad. 252; *Prithvi Singh* v. *Haji Hasnali,* (1950) 52 Bom. LR 562; *Abdul Karim* v. *Ramdoss,* AIR 1951 Nag. 159; *Des Raj* v. *Hira Lal,* AIR 1952 Punj. 415; *Durijendranath* v. *Govinda Chandra,* AIR 1953 Cal. 497; *Puran Mal* v. *Central Bank of India,* AIR 1953 Punj. 235; *Nand Kishore* v. *Maheswari Mills,* AIR 1953 MB 42; *Bahal* v. *Kapur & Co.,* AIR 1956 Punj. 24; *Jammu Coal Storage etc. Mills Ltd.* v. *Khairat Lal & Sons,* AIR 1960 J&K 101 (FB); *Union of India* v. *Durgadas Biswanath,* AIR 1961 Assam 24; *Chiman Ram* v. *Gonga Saha,* AIR 1961 Orissa 94; *Ram Adhar* v. *Rama Kirat Tiwari,* AIR 1981 All. 405; *M/s. Buhari Trading Co.* v. *M/s. Star Metal Co.,* AIR 1983 Mad. 150.
2. *Varadarajulu* v. *Rajamanikka,* AIR 1937 Mad. 767.
3. *Samyuktha Cotton Trading Co.* v. *Bheemineni Venkata Subbaiah,* AIR 2005 AP 1 : 2004 (5) ALD 497 : 2004 (3 APLJ 112 : 2004 (5) ALT 534.
4. *Krishnan* v. *Aruna,* (1979) 2 MLJ 1.
5. *Chhote Lal* v. *U.P. State Electricity Board,* AIR 1990 All. 27 : 1989 All.CJ 600 : 1989 All.WC 1291.
6. *A.S. Mehta & Co.* v. *Yogendranath Sachdev,* 2002 AIHC 2011 (AP).
7. *Satchidananda Samanta* v. *Ranjan Kumar Basu,* AIR 1992 Cal. 222, 238.

Section 69 (1) and (2) cover also suits relating to a dissolved firm. The firm need not be in existence at the time of filing the suit. Hence a suit or proceeding to enforce a right emanating from a contract is not maintainable if the dissolved firm was unregistered on the date of its institution.[1] Under these sub-sections a suit is not maintainable at the instance of a dissolved firm against a third party.[2]

Sub-section (1)—Scope.—It appears that the scope of this sub-section is somewhat limited. Apparently, it refers to a suit by one partner against the firm, during the continuance of the partnership; for sub-section (3) (a) says that sub-sections (1) and (2) shall not affect the right to sue for dissolution or for accounts of a dissolved firm. If so, it will be observed that the only suits that lie at the instance of one partner against another in a continuing partnership will be suits for contribution and partial account. It has been pointed out by the Madras High Court in construing Secs. 2 and 9 of the Ceylon Ordinance VI of 1918, which are in *pari materia* with the present section that its effect is only to suspend the right of suit if the partners do not comply with the provisions as to registration and that non-registration does not make the partnership agreement or its transactions illegal or void.[3]

The failure to comply with the provisions of this section has no results beyond those specified. It does not make the partnership illegal. **[1269]**

Applicability—By virtue of Sec. 5 of the Act a Hindu joint family firm is taken out of the ambit of the present section and is therefore not subject to the restrictions imposed by it.[4] A suit instituted in places to which this clause has not been extended will not be affected. Where on the retirement of a partner his minor son who had been admitted to the benefits of the partnership is made a full member no fresh registration is needed.[5] Though a firm was unregistered, a covenant in restrain of trade stipulated to operate on the dissolution of the firm may be enforced after the dissolution.[6]

"Suit"—The word "suit" in the section means a suit as understood in forensic language; and so an application to file an award under Sch. 2, para 20 of the Civil Procedure Code, is not liable to dismissal on the ground that the applicant is an unregistered firm.[7]

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1. *Paras Ram Darshan Lal* v. *Union of India,* AIR 1979 Delhi 135 : 1979 Rajdhani LR 248.
2. *Ram Kumar Shew Chandrai* v. *Dominion of India,* AIR 1977 Cal. 37 : ILR (1977) 2 Cal. 366 : 80 Cal. WN 833.
3. *Chokkalingam* v. *Pichappa,* (1929) MWN 847.
4. *Govinda Lal* v. *Rameshwar Das,* (1937) All. 650 : (1937) ALJ 823 : 171 IC 584; *Hardeo Ram* v. *Ghirdar Lal,* (1935) All. 280 : (1935) ALJ 260 : 153 IC 510. Cf. *Mahendra* v. *Maujelal,* AIR 1981 Pat. 262 : 1981 Pat.LJR 383 : 1981 BLJ 419.
5. *Daulat Goverdhan Sahu* v. *Indian Mill Stores, Raipur,* 1977 MPLJ 491.
6. *Krishna Rao* v. *Shankar,* AIR 1954 Bom. 552.
7. *Paras Ram, Darshan Lal* v. *Union of India,* AIR 1979 Delhi 135 : 1979 Rajdhani LR 248; *Hafiz Qamar Din* v. *Nur Din,* (1936) Lah. 136 : 162 IC 670; *Satish Chandra* v. *P.N. Das & Co.,* (1938) Pat. 231.

"Right arising from a contract"—A petition for adjudication of a debtor is not a proceeding to enforce a right arising from any contract with the creditor, and is therefore not barred by this section.[1] Similarly, a claim petition by a partner of an unregistered firm in a suit between a co-partner and a third party is not hit at by this section.[2] **[1281]**

A promissory note is a species of contract, and so a suit to enforce a right arising from such a contract will be withn the purview of the section.[3] So too, a claim by a partner based on a contract of lease with other partners,[4] will not be maintainable unless the firm is registered.

The Bombay High Court has held that the language of Sec. 69 (1) and (2) is wide enough to cover suits relating to a dissolved firm and therefore a plaintiff suing in respect of a right acquired by him as a partner will be hit by the bar under clause (1).[5] Where a suit was filed for declaration of shares in the firm, rendition of accounts, evolving a scheme and consequential relief, the suit was held to be not maintainable as the firm is unregistered and hit by Section 69.[6] A firm which is not registered is barred from bringing a suit for accounting of dissolved firm.[7]

Nature and extent of disability—As the section only makes registration a condition of competency to file a suit, where a suit by an unregistered firm is dismissed *in limine* on the ground of non-registration it is open to the firm to file a fresh suit after getting itself registered;[8] *a fortiori,* when the suit is allowed to be withdrawn by the court.[9] Similarly, where an unregistered firm filed a suit on a debt, and after the dismissal of the suit under Sec. 69, assigned the debt to a registered firm, it was held that the latter could sue and no question of *res judicata* arose.[10] **[1271]**

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1. *Sreemannarayana Murthy* v. *Arjanudu,* (1938) MWN 1229 : 48 LW 901; *Wardman Finance Corpn.* v. *Ghulam Ahmad,* AIR 1982 NOC 142 (J&K); *Buhari Trading Co.* v. *Star Metal Co.,* (1983) 1 ALJ 10.
2. *Subbayya* v. *Subbarayudu,* (1937) Mad. 730 : (1937) MWN 510; *Virendra Dresses* v. *Varinder Garments,* AIR 1982 Delhi 482 : 1982 Rajdhani LR 538 : 1982 (2) DLT 472 : 1982 (84) Punj.LR 89.
3. *Krishen Lal* v. *Abdul Ghafar Khan,* (1935) Lah. 893 : 160 IC 513.
4. *Saranna* v. *Sooraparaju,* (1937) MWN 1288.
5. *Patel* v. *Husseinbhai,* (1937) Bom. 225 : 39 Bom. LR 260 : 169 IC 424 : ILR (1937) Bom. 628.
6. *Neelakantan Omana* v. *Neelakantan Raveendran,* AIR 1993 Ker. 196 : 1993 Civil Court Cas 235 : 1993 (1) ILR (Ker) 703 : 1992 (2) Ker.LT 956.
7. *Shoib Ullah* v. *Bhartesh Chandra Jain,* AIR 2003 All. 31, 32.
8. *Krishen Lal* v. *Abdul Ghafar Khan,* (1935) Lah. 893 : 160 IC 513; *Buhari Trading Co.* v. *M/s. Star Metal Co.,* AIR 1983 Mad. 150.
9. *Arunagiri Mudaliar, In re.,* (1936) Mad. 697 : 44 LW 247.
10. *Mohan Singh* v. *Janki Das,* (1937) Lah. 241.

AMENDMENT OF PLAINT.—Where a plaint is filed by an unregistered firm, it is in the eye of law, no plaint at all;[1] any subsequent amendment of the plaint after getting the firm registered is totally ineffectual.[2] It has however been held that where a firm is registered after the filing of a suit and the plea in bar of the suit is not taken by the defendant in the pleadings but only at the time of arguments, the suit may be treated as properly instituted on the date of registration of the firm.[3]

Registration—Averment—The law does not require that a plaint by a firm must expressly state that it is registered. Where the defendant does not deny registration and no point is made in the evidence about the absence of registration, the suit cannot be dismissed on the ground that registration has not been proved.[4]

Objection—Time for—It has been held in the Calcutta High Court that as the plea of non-registration is one which goes to the root of the suit, it may be taken up even after the defence has been delivered,[5] and even at the stage of arguments.[6]

Operation of section—Section 69 (2) prohibits institution of suit on behalf of a partnership firm unless (a) the firm was registered and (b) the person suing was shown as partners of the firm in the Register of firms.[7] Where persons suing are not shown as partner in Register of Firms at the time of institution of suit, the suit cannot be maintained.[8] Where the name of a manager of a partnership firm was neither shown in the register of firms as

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1. *Syed Ibrahim* v. *Gurulinga,* (1937) 2 MLJ 717 : (1937) MWN 1056 : (1938) Mad. 185.
2. *Subramania* v. *East Asiatic Co.,* (1936) Mad. 991 : 44 LW 648 : 165 IC 939 : (1936) MWN 1144 : 71 MLJ 663; *Ram Prasad, Thakur Prasad* v. *Kanta Prasad,* (1935) All. 898 : 157 IC 154 : (1935) ALJ 1243; *Chhagan Lal* v. *Mangal Sain,* (1938) Lah. 767 : 40 PLR 667; *Laduram* v. *Jamuna Prasad,* (1939) 20 Pat. LT 33.
3. *Radha Charan Saha* v. *Motilal Saha,* (1937) 41 CWN 534; *Varadarajulu* v. *Rajamanikka,* (1937) Mad. 767 : (1937) MWN 754 : (1937) 2 MLJ 273.
4. *Mahomed Ibrahim* v. *Behari Lal,* (1938) Lah. 96 : 39 PLR 777 : 175 IC 16; *Matichand Kundu Poddar* v. *Mahesh Chandra Kundu,* (1937) 65 CLJ 426 (where pleadings not clear whether plaintiff is a firm under the Act or a joint family business and the plea of non-registration is taken late, Court should not dismiss the suit but should investigate the true character of firm).
5. *Gopinath Motilal* v. *Ramdas,* (1936) Cal. 133 : 161 IC 741; *Krishnan* v. *Aruna,* (1979) 2 MLJ 1.
6. *Radha Charan Saha* v. *Motilal Saha,* (1937) 41 CWN 534; **see also** *Varadarajulu* v. *Rajamanikka,* (1937) Mad. 767 : (1937) MWN 754 : (1937) 2 MLJ 273. **See** *Munavar Hussain Sahib* v. *Narayanan & Bros.,* 1983 (96) LW 137 (SN); *Govardhan Das* v. *Abdul,* AIR 1942 Mad. 775; *Sita Ram Agarwal* v. *Harnath,* AIR 1970 Raj. 99 : 1969 Raj.LW 561.
7. *Sita Ram Agarwal* v. *Harnath,* AIR 1970 Raj. 99; *Firm Ramachandraiah Gupta* v. *Venkata Reddy,* (1970) 1 An. LT 102 : (1970) 1 An. WR 243; *M.A. Hussain* v. *Vasudeo,* (1970) Mys. 299; *Ram Kumar* v. *Dominion of India,* AIR 1977 Cal. 37 : 80 Cal. WN 833.
8. *Bharath Trust* v. *D. Divakara Rao,* AIR 1993 Ker. 88.

partner nor any power of attorney given by the partner to sign and verify the plaint, the institution of suit by him cannot be allowed as compliance of Sec. 69 (1) is mandatory.[1] In a suit filed on behalf of a partnership firm in connection with the recovery of the agency commission the plaintiff although was not shown as a partner of the firm but by virtue of being a Karta of a Hindu Undivided Family was a partner of the firm and duly authorised by the firm to sign, verify and institute the suit, the objection of the defendants that the plaintiff's suit in his individual capacity cannot be maintained particularly when the entire exchange of communication and negotiations have taken place between the defendant and the plaintiff.[2] When a plea of bar of suit under Section 69 (2) is raised the court will have to examine the nature of the right sought to be enforced and whether it raises from a contract. If it is found that the right issues from a tort or from rights conferred by statutory provisions, the bar will not operate.[3] The bar, for instance, will not arise with regard to a suit against the maker and endorser by the endorsee of a cheque who comes to hold it in due course.[3] Where a suit has been filed by an unregistered partnership firm against railways claiming damages for the loss of consignment holding the railways for tortuous liability as common carrier but not enforcing of its rights arising from the contract. Sec. 69 (2) has no application.[4] Where the suit is by a partner whose name is entered in the Register of Firms on behalf of the firm, the addition of other names who are also described as partners is inconsequential.[5] Where new partners were admitted without dissolution of the registered firm, the partners whose names appear in the partnership can maintain the suit against other partners whose names appear in the original deed of partnership.[6] Only when some of the members sue on behalf of the firm and objection is taken that they did not by themselves constitute the firm when the suit was instituted the maintainability of the suit becomes affected.[7] If on disclosure of the names of some of the existing partners under Order 39, Rule 3, Civil Procedure Code the names of some of the existing partners are found not included in the Register of Firms, the suit is not competent.[8] Proof of mention of the plaintiff's name in the Register of Firms may be by producing

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1. *Popular Automobiles* v. *G.K. Chami,* AIR 2002 Ker 33, 36.
2. *Continental and Eastern Agencies* v. *Coal India Ltd.,* AIR 2003 Delhi 387, 392.
3. *Kerala Arecanut Stores* v. *Ram Kishore & Sons,* 1974 Ker. LT 828.
4. *Union of India* v. *Dhariwal & Co.,* AIR 2007 (NOC) 496 (Raj).
5. *Velu Mudaliar* v. *Sri Venkateswara Finance Corporation,* AIR 1971 AP 63 : (1971) 1 An. WR 287.
6. *Gwalior Oil Mills* v. *Supreme Industries,* (1999) 9 SCC 113; *Qassim Mohd. Yusif Aqil Bastaki* v. *Smt. Sultana Abdul Ahad Narvel,* 2003 (4) Civil LJ 283 (Bom).
7. *J. Purshuttam Das & Co.* v. *R.R. Brothers,* AIR 1973 Pat. 300 : 1973 Pat.LJR 156 : 1973 BLJR 641.
8. *Firm Alwar Iron Syndicate* v. *Union of India,* AIR 1970 Raj. 86 : 1969 RAJ.LW 553.

a certified copy of the Register or in other ways also.[1] For the purpose of proving the registration of the firm and whether the person suing is partner, the proper proof would be a certified copy of the entry relating to the firm but not the acknowledgement of registration of firm.[2] Where one of the partners filed a suit on behalf of a partnership firm for the recovery of money under a promissory note and also filed a certificate issued by the Registrar of Firms showing him as a partner, it is sufficient compliance with Sec. 69 (2) and there is no need of registering the partnership deed.[3] Oral evidence on the question whether the plaintiff is a registered under the Partnership Act is not admissible.[4]

Where a suit filed by a partnership firm is registered on the ground that it is an unregistered firm and as such the suit does not lie, the plea cannot be maintained since such matter becomes a jurisdictional fact forming part of the cause of action in the absence of any pleading or proof in that regard that the cause of action is incomplete.[5]

Sec. 69 (2) containing ambiguity (unlike the English Statute of 1916 and 1985) does not disclose the meaning of the words "arising out of contract", in as much as the provisions is silent whether the contract referred in the section is one entered into by the firm with the defendant or with somebody else who is not the defendant in business or unconnected business and therefore necessitates to look into the Report of the Special Committee for the purpose of ascertaining the true meaning.[6]

By using the words "arising out of a contract" in Sec. 69 (2) what the legislature is referring to a contract by an unregistered firm in the course of business transactions with its customers-defendants, intending to protect those in commerce, dealing with such partnership firm in business and such third parties dealing with partners ought to be enabled to know what the names of the partners of the firm are before they deal with them in business.[6]

There has been a sharp divergence of judicial opinion with regard to the scope and operation of Sec. 69(2) read along with Sec. 74 (b). In the first

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1. *Narendra Kumar Saxena* v. *M/s. Paper Traders,* AIR 2003 MP 193, 195 : 2003 (2) Civil LJ 617 (MP).
2. *J.K. Finance and Chit Funds* v. *R. Surya Kumar,* 2004 (1) ALD 847.
3. *J.K. Finance & Chit Funds* v. *R. Surya Kumar,* AIR 2004 AP 190 : 2004 (1) ALD 847 : 2004 (1) An. WR 171 (AP).
4. *Union of India* v. *Bhardia Bros.,* 1971 (1) CWR 29.
5. *A.P. Co-op. Wool Spg. Mills Ltd.* v. *G.M. & Co. Wood Merchants,* AIR 2003 AP 418, 421 (DB).
6. *Haldiram Bhujiawala* v. *Anand Kumar Deepak Kumar,* AIR 2000 SC 1287, 1290 (DB) : (2000) 3 SCC 250 : 2000 (2) SCJ 75 : 2000 (2) Supreme 145 : 2000 (1) RAJ 452.

place, on the language of Sec. 69(2), it may be open to argument whether it applies at all to contracts entered into before the date of the coming into force of the Act.[1] But assuming its applicability, the chief question that arises for consideration will be whether Sec. 69(2) enacts a mere rule of procedure and is therefore not controlled by Sec. 74 (b). In a number of cases, it was held that Sec. 69 (2) enacts only a processual rule and is therefore retrospective.[2] It was also held with reference to Sec. 74 (b) that it saves only pending legal proceedings and not future proceedings.

But, the Nagpur High Court had taken the contrary view.[3] The question came up for decision before a Bench of the Madras High Court.[4] Pandurang Rao, J., was of the view that the right under Section 69 was not a mere procedural right and that in any case Sec. 74 (b) saved suits relating to causes of action in existence at the date when Section 69 came into force. Venkatramana Rao, J., held that the right under Sec. 69 was only processual and that the very postponement of the operation of Sec. 69 was an indication of the intention of the Legislature to give it retrospective effect. On this difference of opinion, the matter was referred to Varadachariar, J., who agreeing with Pandrang Rao, J., held that the provision contained in Sec. 69 was not in the nature of 'processual' law in the sense in which that term is used in cases discussing the principle of retrospective operation of statutes. A later Bench of the same Court has accepted this view.[5] The Rangoon and Bombay High Courts have also subscribed to the same view.[6]

Where an unregistered firm files a suit, even if the defendant does not raise an objection, Sec. 69 (2) of the Act being mandatory, it cannot be flouted, otherwise it will frustrate the intention of legislature.[7]

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1. Per Varadachariar, J., in *Girdhari Lal* v. *Kappini Gounder,* (1938) 2 MLJ 44 : 48 LW 81 : (1938) Mad. 688.
2. *Surendranath De* v. *Manohar De,* (1934) 62 Cal. 213 : 39 CWN 67 : 153 IC 671 : (1934) Cal. 754; *Basanta Kumar Pal* v. *Durgadas,* (1935) 39 CWN 1080; *Ram Sundar* v. *Madhu Sudan,* (1936) 40 CWN 1180 : 64 CLJ 554; *Danmal* v. *Balu Ram,* (1936) 58 All. 495 : (1935) ALJ 1245 : 160 IC 277 : (1936) All. 3; *Sundaraja* v. *Mannarswami,* (1937) Mad. 528 : (1937) MWN 320 : 169 IC 688 : (1937) 1 MLJ 610; *Syed Ibrahim* v. *Gurulinga,* (1937) 2 MLJ 717 : (1937) MWN 1056 : (1938) Mad. 185; *Catholic Sangam* v. *Ravi Varma,* (1937) Mad. 419 : 45 LW 276 : (1937) Mad. 419 : 45 LW 276 : (1937) MWN 340 : 171 IC 821; *Krishen Lal* v. *Abdul Ghafur,* (1935) 17 Lah. 275 : (1935) Lah. 893; *Shazad Khan* v. *Darbar Babu,* (1936) 17 Pat. 810 : (1937) Pat. 16 : 166 IC 32.
3. *Narmada Ginning Factory* v. *Kastoormal,* (1936) 19 NLJ 262.
4. **See** Note 3.
5. **See** (1939) 1 MLJ 35 (Short Notes).
6. *Soonoiram* v. *Junjilal,* (1938) Ran. LR 371 : (1938) Ran. 273 ; *Revappa* v. *Sidappa,* ILR (1939) Bom. 104 : 40 Bom. LR 1275.
7. *M. Muthukumaraswami* v. *Kumar Textiles,* AIR 1996 Mad. 433, 435.

Enforcement of statutory Right—Where an unregistered firm filed a suit to restrain the defendants from passing off the goods of the defendants as those of plaintiffs infringing the trade-mark name "Haldiram Bhujiawala" and claimed damages, the Supreme Court held that Sec. 69 (2) is not attracted when the suit is for enforcing a statutory right or a common law right.[1]

Where an unregistered partnership firm sought to recover the money from the defendant who endorsed two cheques which were dishonoured, the suit cannot be resisted on the ground of non-registration of the firm since partnership rights not arising out of the contract are immune from sub-section (2) of Sec. 69.[2]

Where the plaintiff partnership firm filed a suit alleging that the defendant interpolated the partnership deed, the contention of the defendant that the plaintiff firm being an unregistered one is barred from filing the suit cannot be accepted, since the plaintiff was not seeking to enforce any right arising out of a contract.[3]

Non-registration of a partnership firm is no bar under Sec. 69 (2) for filing a petition by it as landlord of the leased property for eviction of the tenant.[4]

If the right sought to be enforced does not arise from a contract to which the unregistered firm is a party, or is not enter into in connection with the business of the unregistered firm with the third party, the bar contained in Sec. 69 (2) will not apply.[5]

Sub-section (3)—Scope—The sub-section provides for the application of sub-sections (1) and (2) to claims of set off and also to other proceedings of any kind which can properly be said to be for enforcement of any right arising from contract. The words "other proceedings have to be given their full meaning untrammelled by the words, "a claim to set off". Hence where a partner of an unregistered partnership applies under Section 8 (2) of the Arbitration Act to enforce a right arising from a contract between the partners, the proceedings will be barred by Section 69(3).[6] Proceedings as contemplated by clause (3) of 69 is the proceedings brought by an unregistered

1. *Haldiram Bhujiawala* v. *Anand Kumar Deepak Kumar,* AIR 2000 SC 1287, 1290 (DB) : (2000) 3 SCC 250 : 2000 (2) SCJ 75 : 2000 (2) Supreme 145 : 2000 (1) RAJ 452.
2. *Narendra Kumar Saxena* v. *M/s. Paper Traders,* AIR 2003 MP 193, 195 : 2003 (2) Civil LJ 617 (MP).
3. *I.B.P. Company, Calcutta* v. *Uday Singh Jeet Ram,* AIR 2004 P & H 300.
4. *Dungarsi Ranchhodas Jayesh Niwas, Kozhikode* v. *Moolji Visanji,* AIR 2004 Ker 314.
5. *Purushottam* v. *Shivraj Fine Art Litho Works,* 2006 (2) CTLJ 269 (SC) : 2007 (50) AIC 65 (SC).
6. *Jagdischandra Gupta* v. *Kajarai Traders (India) Ltd.,* AIR 1964 SC 1882 : (1965) 1 SCJ 249. **See also** *Iqbal Singh* v. *Shanti Devi,* AIR 1977 All. 352 :1977 All. LJ 397 ; *Paras Ram Darshan Lal* v. *Union of India,* AIR 1979 Delhi 135 : 1979 Rajdhani LR 248.

partnership firm in a court attracting the bar under the section and the reference to arbitration without intervention of the court cannot said to be prohibited.[1] Where one partner of an unregistered firm seeks relief by filing a petition under Sec. 20 of Arbitration Act praying for the reference of the dispute to the arbitrator, non-registration cannot be handicap on the maintainability of the application since Sec. 69 (1) of the Act is not bar, on the other hand the application is saved by clause (a) of Sec. 69 (3) of the Act.[2] Section 69 prohibits a partner of unregistered firm from filing a suit or enforcing a right arising out of contract but not an application made under Sec. 9 of Arbitration and Conciliation Act 1996.[3] Where the petitioner who entered into a contract with an unregistered firm and initiated proceedings invoking the agreement to refer the dispute to the arbitrator and the firm had only to defend it, such proceedings are not barred and Sec. 69 (3) is not attracted.[4]

Although a Partnership Firm is not registered under Section 69 of the Partnership Act, its right to maintain an application under Section 9 of Arbitration and Conciliation Act is not affected.[5]

As contemplated under Section 8 readwith Section 20 of the Arbitration Act where an application is specifically made to refer the dispute to arbitrators and it is merely registered as a title suit, the application cannot be converted into a suit seeking dissolution of partnership which is totally a different and independent proceeding and for seeking the remedy of dissolution it is necessary to bring a separate suit.[6]

According to a decision of the Madras High Court.[7] Section 69 (3) shows that notwithstanding the prohibition contained in Section 69 (1) an unregistered partnership agreement could be enforced for obtaining only three reliefs and no more; (1) to apply for dissolution of the firm and for accounts, (2) to ask for accounts of a dissolved firm, and (3) to realise the property of the dissolved firm. A suit for recovery of a specific sum of money by one partner against the other partner cannot be maintained. He can only ask for the dissolution of the firm and for accounts.

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1. *Ram Nandan Prasad Sinha* v. *K.M. Consultants,* AIR 2002 Bom 90, 92 (DB).
2. *Ram Kumar Agarwal* v. *Ramkishan Tayal Fouji,* AIR 1991 MP 188.
3. *Masood Mohmmed Husain* v. *Gulam Rasul Mohammedali Shaikh,* 2007 (2) R.A.J 674 (Bom); *Mulakh Raj* v. *Smt. Shashi Rani,* AIR 2005 Del 374.
4. *Kamal Pushp* v. *D.R. Construction Co.,* AIR 1996 MP 139, 143 : 1996 Jab.LJ. 225 : 1996 MPLJ 240.
5. *Firm Ashok Traders* v. *Gurumukh Das Saluja,* AIR 2005 SC 1433 : (2004) 3 SCC 155.
6. *Ramesh Choubey* v. *Dulari Kuer,* AIR 2006 Pat 167.
7. *Sudalal Muthu Pillai* v. *Santhanam,* (1981) 1 MLJ 347 : 94 LW 271; *Jagat Mittar Saigal* v. *Kailash Chander Saigal,* AIR 1983 Del. 134.

Where one of the partner of unregistered partnership firm has filed a suit seeking declaration of share, proper administration of the firm and rendition of accounts, the suit is not maintainable but however he is entitled to file a fresh suit seeking dissolution of the firm.[1]

Where an unregistered partnership firm was dissolved owing to the retirement of all partners but one a suit for the recovery of dues due to the dissolved firm is maintainable by the sole surviving partner.[2]

The Allahabad High Court has held with reference to sub-clause (a) that it is open to a partner of an unregistered firm to ask for dissolution and for accounts in one and the same suit.[3]

Where the suit is filed seeking rendition of accounts of the dissolved partnership, the objection on the ground of non-registration cannot be raised.[4]

The Lahore High Court has also held likewise.[5] The Bombay High Court has also affirmed the position that it is open to the members of a dissolved partnership to recover debts due to the concern.[6]

The Nagpur High Court has held that this clause does not contemplate an execution proceeding.[7]

When a partnership agreement relating to a firm of three partners provided that on the death of any partner his legal heir would be taken as partner, a suit by such heir on the death of a partner for a declaration of his partnership in the firm would not be barred and would be saved by sub-section (3) though the firm was unregistered.[8] Want of registration of a firm is no objection to filing claims to attached property[9] or for filing petition for adjudication of a debtor in insolvency.[10]

Arbitration being a part of the contract as between the parties, has to be construed as proceedings to enforce a right arising from a contract to be enforced by one party against another and as such a petition by a partner under Sec. 20 of the Arbitration Act cannot be maintained, when partnership is unregistered except in cases of seeking dissolution or for accounts or to realise the property of dissolved firm.[11]

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1. *Ramesh Kumar Bhalotia* v. *Lalit Kumar Bhalotia,* AIR 2001 Pat 174, 176.
2. *Vaiyapuri* v. *M. Sunderesan,* AIR 2002 Mad 28.
3. *Gulab Rai* v. *Shibba Mal,* (1937) All. 674 : (1937) ALJ 825 : 171 IC 545; **but see** *Magan Behari* v. *Ram Pratap,* (1939) AWR 335.
4. *Ram Singh* v. *Daulat Ram,* AIR 2008 HP 1.
5. *Jhandu Mal* v. *Pulia Mal,* (1937) Lah. 633 : 39 PLR 197 : 168 IC 692.
6. *Appaya* v. *Subbarao,* (1937) 39 Bom. LR 1214.
7. *Jamal Usman* v. *Umar Haji,* (1939) NLJ 148.
8. *Pradip Kumar Datta* v. *Gopal Chandra Bose,* AIR 1981 Cal. 85.
9. *Shah Chandanmal etc. Co.* v. *Castelino,* (1977) 2 Karn. LJ 396; *Subbayya* v. *Subbarayudu,* AIR 1937 Mad. 730.
10. *Sreemannarayanamurthy* v. *Arjanudu,* 48 LW 901.
11. *Chandulal Hathibhai Shah* v. *Champaklal Ambalal Parikh,* AIR 1994 Bom. 16 : 1994 (1) Arbi. LR 12 : 1994 (2) Bom. CR 174 : 1993 (3) Cur. CC 381 : 1993 Mah. LJ 1267.

When there is mutual consent among the partners for the dissolution of the unregistered firm and the partnership deed contained an arbitration clause, making a reference to arbitration in terms of agreement regarding working out the rights flown from dissolution for settlement of accounts of the dissolved firm or any right or power to realise the property of the dissolved firm etc. would be valid because there would be no dispute as regards right arising from contract of a firm and it would form part of exception engrafted in Sec. 69 (3).[1]

It is true that sub-section (2) of Sec. 69 of the Act bars a suit to enforce a right arising from a contract by or on behalf of a firma against any third party if the firm is not registered. There however exists the relevant provision contained in sub-sec. (3) thereof to save the power to realise the property of a dissolved firm from the operation of sub-sections (1) and (2). It thus becomes clear that the power to realise the debt due to a dissolved firm will not be governed by sub-section (1) or sub-section (2) of Sec. 69 of the Act. The bar carried thereunder or either of them will not operate against a suit for recovery of a debt due and payable to an unregistered dissolved firm.[2]

The words "enforcement of any right to sue for the dissolution of a firm" in Section 69(3)(a) mean that the exception would save the right to ask for all consequential reliefs like taking of accounts and passing a final decree.[3]

The words "or any right or power to realise the property of a dissolved firm" have the effect of removing any disability, which subsisted during the life of the partnership,[4] and would cover not only to recover the firm's property from a stranger but also from a partner.[5] The right to realise the property of the firm will include the right to sue to recover a debt due to the unregistered firm.[6] Non-registration of partnership firm does not extinguish the right to sue for dissolution of the firm or the rendition of accounts or a right or power to realise the property of a dissolved firm.[7]

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1. *Krishna Motor Service* v. *H.B. Vittala Kamath,* AIR 1996 SC 2209, 2211.
2. *Kantilal Jetha Lal Gandhi* v. *Ghanshyam Retilal Vyas,* AIR 1993 Guj. 56, 58 : 1993 (1) Bank LJ 7 : 1992 (3) Cur. CC 674 : 1993 Civ. CC 52 : 1992 (2) Guj. LR 1297 : 1992 (2) Guj. LH 187.
3. *Abdul Razack* v. *Mushiruddin Ahmed,* AIR 1961 Cal. 660; *Muthu Varkey* v. *Pyli Verghese,* AIR 1960 Ker. 286; *Damodar* v. *Khusal,* AIR 1943 Nag. 12; *Shibba Mal* v. *Gulab Rai,* AIR 1939 All. 735.
4. See *Shanmugha Mudaliar* v. *Rathina Mudaliar,* AIR 1948 Mad. 187; *Punnaiah* v. *Badhaiaya,* AIR 1948 Mad. 441;*Krishnan Neelakantan* v. *Krishnan Kochuknnan,* AIR 1967 Ker. 96 : 1966 Ker.LT 855 : 1966 Ker.LJ. 911 : ILR (1967) 1 Ker. 1; *Bharat Prasad* v. *Paras Singh,* AIR 1964 All. 15.
5. *Basantlal* v. *Chiranjilal,* AIR 1968 Pat. 96 : 1967 BLJR 735 : ILR 46 Pat. 1028; *Sheo Dutt* v. *Pushi Ram,* AIR 1947 All. 229; Cf. *Mohammed Abdul Samad* v. *Madrasa Rowther,* AIR 1959 Mad. 440, 441.
6. *Radhey Shyam* v. *Beni Ram,* AIR 1967 All. 28 : 1966 All.LJ. 841.
7. *P. Venkateswarlu* v. *C. Lakshmi Narasimha Rao,* AIR 2002 AP 62, 64 : 2001 (3) ALD 565 : 2001 (2) LS 88 : 2001 (3) ALT 449.

Although Sec. 69 is applicable to a claim of set-off or other proceeding to enforce a right arising from the contract, but it would not affect the enforcement of any right in a suit relating to dissolution of the firm or rendition of the accounts of the dissolved firm or to release the property of a dissolved firm.[1]

Where the plaintiff filed a suit to account for his profits and also for the dissolution of unregistered firm is entitled for a decree.[2]

Sub-section (4)—It has been held that where a suit is instituted for a sum exceeding Rs. 100, no decree can be passed even for Rs. 100.[3] When a suit or cross-objection is not cognizable by the Small Causes Court Section 69(4)(b) will not apply. Hence a suit for injunction and for accounts between partners even if tentatively valued at Rs. 100 will not be covered by Section 69(4) (b).[4] The Supreme Court also held that the right to sue for dissolution of the firm must, of necessity, be interpreted to mean the right to enforce the arbitration clause for resolving the disputes of the dissolved firm or for rendition of accounts or any right or power to realise the property of the dissolved firm.[5]

Want of registration does not preclude a partner from asking for the dissolution of the firm or for the administration of the assets of a dissolved firm. He can sue an erstwhile partner for rendition of accounts.[6]

Want of registration does not render invalid an arbitration clause in the partnership deed. The firm can have the dispute referred to arbitration without the court's intervention.[7]

Plea of Non-registration—Though it would be proper for the plaintiff to set out the fact of registration, failure to do so will not entail rejection of plaint.[8] The defendant need not raise the plea of non-registration in his written statement but may do so at any time,[9] even during the course of arguments.[10]

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1. *S.K. Vijayakumar* v. *S.K. Ravikumar,* 2007 (2) R.A.J. 539 (Kar); *Ess Vee Traders* v. *Ambuja Cement Rajasthan Ltd.,* 2006 (4) R.A.J. 474 (Del); *Vanita Gambhir* v. District Judge, Delhi, 2005 (1) R.A.J. 188 (Del); *Mulakh Raj* v. *Shashi Rani,* 2005 (1) R.A.J. 387 (Del).
2. *Bharatesh Chandra Jain* v. *Shoiab Ullah,* (2004) 13 SCC 358.
3. *Nidthu Charan Saha* v. *Jojindra Nath Pal,* (1937) 42 Cal. WN 841.
4. *Md. Khalil Rahaman* v. *Bhagabati Charan Ray,* AIR 1978 Cal. 321.
5. *Premlatha* v. *Ishar Dass Chamanlal.* AIR 1995 SC 714, 717 : (1995) 2 SCC 145 : 1995 (1) JT 557 : 1995 (1) Scale 145 : 1995 (1) UJ 421 : 1995 (1) BC 636.
6. *Budheswar Barua* v. *Jatindra Nath Barua,* AIR 1976 Gau. 12.
7. *Rampa Devi* v. *Bishambhar Nath Puri,* AIR 1976 All. 19.
8. *Matichand Kundu Poddar* v. *Mahesh Chandra Kundu,* (1937) 65 Cal. LJ 426.
9. *Gopinath Matilal* v. *Ramdas,* AIR 1936 Cal. 133 : 161 IC 741.
10. *Radha Charan Saha* v. *Motilal Saha,* (1937) 41 Cal. WN 534.

Where the partnership firm was reconstituted and re-registered time and again under the same name of the firm, the proceedings filed by a partner of the original firm on the basis of the agreement with the appellant company to which the party filing the proceedings was also a party, the proceedings cannot be questioned on the ground that the original firm party to the agreement was not adequately represented since the reconstitution and re-registration of the firm does not affect its status with which the appellant company had a contract.[1]

70. Penalty for furnishing false particulars.—Any person who signs any statement, amending statement, notice or intimation under this Chapter containing any particular which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to three months, or with fine, or with both.

71. Power to make rules.—(1) The State Government may by notification in the Official Gazette make rules prescribing the fees which shall accompany documents sent to the Registrar of Firms, or which shall be payable for the inspection of documents in the custody of the Registrar of Firms, or for copies from the Register of Firms :

Provided that such fees shall not exceed the maximum fees specified in Schedule I.

(2) The State Government may make rules—

(a) prescribing the form of statement submitted under Section 58, and of the verification thereof;

(b) requiring statements, intimations and notices under Sections 60, 61, 62 and 63 to be in prescribed form, and prescribing the form thereof;

(c) prescribing the form of Register of Firms, and the mode in which entries relating to firms are to be made therein,

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1. *Arvind Constructions Co. (P) Ltd.* v. *Kalinga Mining Corporation,* AIR 2007 SC 2144 : (2007) 6 SCC 798.

and the mode in which such entries to be amended or notes made therein;

(d) regulating the procedure of the Registrar when disputes arise;

(e) regulating the filing of documents received by the Registrar;

(f) prescribing conditions for inspection of original documents;

(g) regulating the grant of copies;

(h) regulating the elimination of registers and documents;

(i) providing for the maintenance and form of an Index to the Register of Firms; and

(j) generally, to carry out the purposes of this Chapter.

(3) All rules made under this section shall be subject to the condition of previous publication.

Every rule made by the State Government under this section shall be laid, as soon as it is made, before the State Legislature.

Rules.—This section gives power to make rules. The rules made must not be inconsistent with the Act.[1] They should also be reasonable.[2] The Government of India have framed rules prescribing the maximum fixed under the Act as the fee payable.[3] The several State Governments have also framed rules.

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1. *Rajasthan Trading Co.* v. *Registrar of Firms,* (1974) 1 An. WR 319; *O. Balanarayanan* v. *Registrar of Firms,* AIR 1984 Ker. 20 : 1983 Ker.LT 441.
2. (Cf.) *Narain Chandra* v. *Corporation of Calcutta,* (1909) 37 Cal. 545; *Rajan Chetty* v. *Seshayya,* (1895) 18 Mad. 236.
3. *Corporation of Madras* v. *Spencer & Co.,* (1929) 52 Mad. 764 : 30 LW 372 : 57 MLJ 71 : (1929) MWN 431 : (1930) Mad. 55.

CHAPTER VIII

SUPPLEMENTAL

72. Mode of giving public notice.—A public notice under this Act is given—

(a) where it relates to the retirement or expulsion of a partner from a registered firm, or to the dissolution of a registered firm, or to the election to become or not to become a partner in a registered firm by a person attaining majority who was admitted as a minor to the benefits of partnership, by notice to the Registrar of Firms under Section 63, and by publication in the *Official Gazette* and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business, and

(b) in any other case, by publication in the Official *Gazette* and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business.

Public Notice—The present Act provides that public notice is enough both as regards old and new customers. Both in English Law and according to the old Contract Act it was necessary that in case of old customers, there must be individual notice, while public notice was enough as regards others.[1]

73. Repeals.—Repealed by the Repealing Act, 1938 (1 of 1938), Section 2 and Schedule.

74. Savings.—Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect—

(a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

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1. *Jwala Dutt* v. *Bansilal,* (1929) 53 Bom. 414 : 56 MLJ 739 : 33 CWN 585 : 29 LW 584 : 31 Bom. LR 687 : (1929) PC 183 : 115 IC 707; *Jagat Chandra* v. *Gunny Hajee,* (1925) 53 Cal. 214 : 30 CWN 11 : (1926) Cal. 271 : 91 IC 824; *Chandu* v. *Eduljee,* (1982) 8 Cal. 678.

(b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability or anything done or suffered before the commencement of this Act, or

(c) anything done or suffered before the commencement of this Act, or

(d) any enactment relating to partnership not expressly repealed by this Act, or

(e) any rule of insolvency relating to partnership; or

(f) any rule of law not inconsistent with this Act.

Savings—"This is a formal section intended to save existing rights and existing rules of law not specifically affected".

Clause (a) to (c)—These clauses show that the Act is not retrospective. Clause (b) has been much discussed with reference to Section 69. See para, "Operation of Section", and cases noted thereunder.

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SCHEDULE I

MAXIMUM FEES[1]

[See sub-section (1) of Section 71]

Document or act in respect of which the fee is payable			Maximum fee
Statement under Section 58	.....	.....	Three rupees.
Statement under Section 60	.....	.....	One rupee.
Intimation under Section 61	.....	.....	One rupee.
Intimation under Section 62	.....	.....	One rupee.
Notice under Section 63	.....	.....	One rupee.
Application under Section 64	.....	.....	One rupee.
Inspection of the Register of Firms inspectingunder sub-section (1) of Section 66 volume of the Register.	.....	.....	Fifty paise for one
Inspection of documents relating inspection of to a firm under sub-documents relating to one of section (2) all 66 firm.	.....	.....	Fifty paise for
Copies from the Register of Firms each hundred words or part thereof.	.....	.....	Twenty five paise for

SCHEDULE II

REPEALED.

[Repealed by Repealing Act 1 of 1938, Sec. 2 and Schedule]

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1. The Government of India have framed rules prescribing the maximum fee mentioned here as the fee payable.

CENTRAL RULES

THE INDIAN PARTNERSHIP (FEES) RULES, 1932

[RULES FRAMED UNDER SECTION 71 OF THE ACT]
(DEPARTMENT OF COMMERCE)
[SIMLA, THE 24TH SEPTEMBER, 1932]

Notification No. 17-C (15)-32-dated the 24th September, 1932.—In exercise of the powers conferred by sub-section (1) of Section 71 of Indian Partnership Act, 1932 (IX of 1932), the Governor-General-in-Council is pleased to make the following rules, the same having been previously published as required by sub-section (3) of the said section, namely :—

1. **Short title and Commencement.**—(1) These rules may be called the Indian Partnership (Fees) Rules, 1932.

(2) They shall come into force on the first day of October, 1932.

2. **Definition.**—In these rules, "the Act" means the Indian Partnership Act, 1932 (IX of 1932).

3. **Fees payable to Registrar of Firms.**—The fees which shall be payable for the inspection of documents in the custody of the Registrar of Firms or for copies from the Registrar of Firms shall be the maximum fees as specified in Schedule I to the Act. They shall be paid in cash.

STATE RULES

ANDHRA PRADESH PARTNERSHIP (REGISTRATION OF FIRMS) RULES, 1957

1. **Short title** :—These rules may be called the Andhra Pradesh Partnership (Registration of Firms) Rules, 1957.

2. **Definitions.**—In these rules unless there is anything repugnant in the subject or context,—

(a) "the Act" means the "Indian Partnership Act, 1932", and

(b) "Registrar" means the "Registrar of Firms".

3. **Form and verification of statements under Section 58 and 60.**—The statements submitted to the Registrar under Sections 58 and 60 of the Act shall respectively be in Forms I and II annexed to these rules, and shall be verified in the manner indicated therein provided that when a statement is signed by a specially authorised agent, the original power of attorney or an expressed letter of authority from the partner or partners concerned shall be produced for inspection by the Registrar to prove authentication.

4. **Form of intimations and notices under Sections 61, 62 and 63.**—(1) Intimations and notices under Sections 61, 62, 63 (1) and 63 (2) of the Act shall respectively be in Forms III, IV, V and VI annexed to these rules, with such variations as circumstances may require.

(2) Every statement, intimation or notice relating to a firm, under Sections 60, 61, 62, 63 (1) or 63 (2) of the Act, shall be sent or given to the Registrar together with the prescribed fee within 15 days from the date of occurrence of the event referred to in such statement, intimation or notice.

5. **Register of Firms.**—The Register of Firms shall be in Form A annexed to these rules. The name of, and the particulars relating to, a firm shall be entered therein in the order of its registration on a separate page or pages as the case may be. Each firm shall be assigned a number in a consecutive series commencing and ending with the calendar year. A note of every document filed shall be entered in the Register in the page or pages allotted to the firm concerned and shall be signed by the Registrar.

6. **Amendment of entries in Register.**—When an entry made in the Register of Firms is to be amended, the amendment shall be shown by means of a suitable note in the remarks column opposite to the entry concerned, and the new entry shall be made at the end of the existing entry or entries with suitable cross-references.

7. **Protest against entries in Register.**—Where any partner or other person interested, makes a protest in writing to the Registrar disputing any entry made in the Register of Firms, the Registrar shall record such protest, and make a reference thereto in red ink in the remarks column against the disputed entry.

8. **The Registrar's power of inquiry and investigation.**—The Registrar may, in case of dispute, institute such inquiries or make such investigation as may, in his opinion, be necessary for the proper performance of his duties under the Act.

9. **Index to Register of Firms.**—(a) An index to the Register of Firms shall be prepared in English on loose sheets lettered alphabetically and shall contain the particulars shown in Form B annexed to these rules. A fresh index shall be prepared for each calendar year. The name of each firm shall be indexed as soon as the entries relating thereto are made in the Register of Firms.

(b) After all the firms registered in a year have been indexed, the index shall be checked by the Registrar who shall add a certificate in token of such check, and pages shall then be numbered in ink.

(c) The index for each year shall, after it has been checked be bound into volumes of convenient size.

10. **Acknowledgement of registration and documents.**—(a) Upon the registration a firm, the Registrar shall grant to the firm an acknowledgement in Form C annexed to these rules, and on the filing of any document required to be filed under the Act, he shall grant to person filing it a certificate in Form D annexed to these rules.

(b) On every document filed under this Act, the Registrar shall endorse the following particulars, namely :

(i) the number borne by the firm on the register ;

(ii) the name of the firm ;

(iii) the description of the document ;

(iv) the serial number of the document ; and

(v) the date of filing.

The Registrar shall also affix his signature and the seal of his office to such document.

(c) If there is no space on the document for entering the particulars referred to in clause (b), the entry shall be made on a separate paper which shall be attached to the document and a note of the fact shall be made on the document itself and signed by the Registrar.

11. Filing of documents.—(a) The Registrar shall examine every statement, intimation, notice or other document received by him which is required by the Act to be registered, recorded or filed and if he finds any such statement, intimation, notice or other document to be defective or incomplete in any of the particulars required by the Act or these rules, he shall return it to the party or firm tendering, it, for due rectification or completion and until such statement, intimation, notice or other document is so required or completed, he shall not register, record or file the same.

(b) No statement, intimation, notice or other document in respect of which a fee is payable shall be registered, or filed by the Registrar, until the fee has been paid to him and the Registrar shall, pending such payment, act as if no such statement, intimation, notice or other document had been tendered for registration, record or filing.

(c) A separate file shall be maintained in respect of each firm in which all documents relating thereto received from time to time by the Registrar shall be filed.

12. Account of and receipt for fees.—An account of all fees received in the Registrar's office shall be maintained therein.

A receipt in Form E shall be granted in respect of every fee received.

13. Inspection of the indexes to the Register of Firms and of original documents.—(i) the indexes to the register of firms maintained by the Registrar may be inspected by any person on payment of the following fees:

(a) for searching the index for any one year for entries relating to single firm—ten rupees ;

(b) for searching the index for every other year for entries relating to the same firm—two rupees.

(ii) All statements, notices and intimations filed by a firm under Chapter VII of the Act may also be inspected on payment of the prescribed fee by any person, on his satisfying the Registrar that he is interested in the firm:

Provided that no fee shall be leviable for the inspection made by or at the instance of Government Officers for bonafide public purposes.

14. Application for copies and fees for documents filed and acts done under the Act.—(1) (a) The fee which shall accompany documents sent to the Registrar or which shall be payable for the inspection of documents in the custody of the Registrar or for copies from the Registrar of Firms be the maximum as prescribed in Scheduled I to the Indian Partnership Act, 1932 as amended by the Indian Partnership (A.P. Amendment) Act, 1994 (27 of 1994).

(b) Fee for a certified copy of an acknowledgement of registration of a firm shall be ten rupees.

(c) Fee for a certified copy or extract from any other document or register shall be one rupee for each one hundred words or part thereof.

Provided that no fee shall be leviable for the grant of copies (including copies from the Register of Firms to the Government Officers for bona fide public purpose).

(2) Every application for a copy of inspection under the Act shall be in writing.

15. Seal.—The seal used by the Registrar shall bear the words "Registrar of Firms, Andhra Pradesh". [G. O. Ms. No. 228, dt. 05-12-1996.]

16. Preservation and elimination of registers and records.—(a) The Registrar of Firms and the index thereto shall be preserved permanently.

(b) All other records, including the statements referred to in Section 58 may be destroyed.

(i) in the case of a firm which has been dissolved on the expiry of five years from the date of its dissolution ; and

(ii) in the case of firm which, though not dissolved, has not been transacting business and has not been heard for a period of not less than seven years, in accordance with and subject to the provisions of sub-rule (c).

(c) In cases falling under clause (ii) of sub-rule (b), the Registrar shall published in the Andhra Pradesh Gazette and at the same time send by the registered post to any one of the partners of the firm concerned to his last known address, a notice stating that the records and statements relating to the firm will be destroyed unless cause is shown to the contrary within a period of three months from the date of the publication of the notice in the Andhra Pradesh Gazette. If cause is not shown as aforesaid, the records and statements may be destroyed.

17. Translation to be furnished where original not in English.—If any document required to be filed under the Act or any portion of such

document is not in English language, a translation of such document or portion certified as correct by at least one partner (or his authorised agent) shall be furnished along with each copy of such document or portion.

18. Office hours.—The office of the Registrar shall be open for business (Sundays and authorised holidays excepted) between the hours of 10.30 a.m. and 5.00 p.m. except on Saturdays, when it shall be open between the hours 11.00 a.m. and 1.00 p.m.

19. Administration Report.—The Registrar shall submit to the State Government so as to reach them on or before the 15th June in each year, a report on the working of the Indian Partnership Act, 1932 during the official year ending the 31st March preceding.

FORM I

[See Rule 3]

Application for registration of firm by the names.....

*[Filing Fee—Rs. 100/-]

Presented or forwarded to the Registrar of Firms for Filing by.....

We, the undersigned, being the partners of the firm[1] ..... hereby apply for registration of the said firm and for that purpose, supply the following particulars, pursuant to Section 58 of the Indian Partnership Act, 1932.

The firm's name[1]
Place of business

(a) *Principle place*
(b) *Other places*

Name of partners in full	Date of joining the firm[2]	Permanent address in full
1.		
2.		

Duration of the Firm

Station

Date

Signature of the partners or their Specially authorised agents

1. Here enter the name of the firm.
2. If any partner is a minor the fact whether he is entitled to the benefits of a partnership should be set out herein.

*. Amended by A.P. Act No. 27 of 1994, w.e.f. 01.04.1995.

I, ..., son of ..... years of age, of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date

Witness

Signature

N.B. :—This form must be signed by all partners or their agents specially authorised in this behalf in the presence of a witness or witnesses who must be either a Gazetted Officer, Advocate, Attorney, Pleader, Honorary Magistrate or Registered Accountant.

FORM II

[See Rule 3]

Statement of alteration in the name of the firm or the location of the principal place of business

*[Filing Fee—Rs. 100/-]

Presented or forwarded to the Registrar of Firms for filing by.....

We, the undersigned, being the partners of the firm* ..... hereby supply for the following particulars, pursuant to Section 60 (1) of the Indian Partnership Act, 1932 :

Name of firm

Previous name	New name

Principal place of business

Previous place	New place

Station

Date

Signature of the partners or their Specially authorised agents

I, ..., son of ..... years of age, of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date

Witness

Signature

*. Amended by A.P. Act No. 27 of 1994, w.e.f. 01.04.1995.

I, ..., son of ..... years of age, of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date

Witness

Signature

FORM III

[See Rule 4]

Intimation of Change in the place of business (other than principal place of business)

*[Filing Fee—Rs. 100/-]

Presented or forwarded to the Registrar of Firms for filing by.....

Under Section 61 of the Indian Partnership Act, 1932, intimation is hereby given that the changes specified below have occurred in the place of business of the firm** :

Date of change

(1) The firm has discontinued business at .....

(2) The firm has begun to carry on business at .....

Station

Date

Signature of the partnersor agent of the firm

FORM IV

[See Rule 4]

Intimation of alteration in the name or permanent address of partners

*[Filing Fee—Rs.100/-]

Presented or forwarded to the Registrar of Firms for filing by.....

Under Section 62 of the Indian Partnership Act, 1932, intimation is hereby given that the changes specified below have occurred in the name or/and permanent address of partner in the firm** :

Name of Partner

Previous name (in full)	New name (in full)

*. Amended by A.P. Act No. 27 of 1994, w.e.f. 01.04.1995.

**. Here enter the name of the firm.

N.B.–Strike out items not required.

Address of partner	
Previous permanent address (in full)	Present permanent address (in full)

Station

Date

Signature of any partnersor agent of the firm

FORM V

[See Rule 4]

Notice of change in the Constitution of Firm or of the dissolution of the firm

*[Filing Fee—Rs. 100/-]

Presented or forwarded to the Registrar of Firms for filing by.....

Under Section 63 of the Indian Partnership Act, 1932, notice is hereby given that—

(1) The Constitution of the firm** ..... has been altered as follows :

Name and full address of the incoming partner and date of his joining the firm	Name and full address of the outgoing partner and date of his ceasing to be partner

Station
Date

Signature of the incoming, continuing or outgoing partner or of his specially authorised agent

(2) The Firm**
has been dissolvedwith effect from the

*. Amended by A.P. Act No. 27 of 1994, w.e.f. 01.04.1995.
**. Here enter the name of the firm.

Station
Date

Signature of the person who was a partner immediately before the dissolution or of his specially authorised agent

FORM VI

[See Rule 4]

Notice of election by person admitted to the benefits of partnership on attaining majority

*[Filing Fee—Rs. 100/-]

Presented or forwarded to the Registrar of Firms for filing by.....

Under Section 63 (2) of the Indian Partnership Act, 1932, notice is hereby given that..... admitted to the benefits of the partnership in the firm ..... having now attained majority ..... elects to become/elects not to become partner of the said firm.

Station
Date

Signature of the person electing or of his specially authorised agent

FORM A

[See Rule 5]

Register of firms

1. Serial number of firm
2. Name of firm
3. Date of registration
4. Duration of firm
5. Addresses / Date of change / Remarks
6. Partners :

Name of the partners	Addresses	Date of joining/ceasing	Remarks

*. Amended by A.P. Act No. 27 of 1994, w.e.f. 01.04.1995.

7. Principal place of business and changes therein:

Particulars regarding the place	Date of change	Remarks

8. Other places of business:

Name of place	Date of		Remarks
	Opening	Closing	

Name of Firm

Serial No. of the document	Description of document	Date of filing	Signature of Registrar

Name of Firm

Serial No. of the document	Description of document	Date of filing	Signature of Registrar

FORM B

[See Rule 9]

Index to the Register of Firms

Firm name	Name of partners	Principal Place of Business	Volume Number	First page of entry	Number borne on the register
1	2	3	4	5	6

FORM C

[See Rule 10]

Acknowledgement of Registration of Firms

The Registrar of Firms A.P., hereby acknowledges the receipt of the statement prescribed by Section 58 (1) of the Indian Partnership Act, 1932.

The Statement has been filed and the name of the firm* ..... has been entered in the Register of Firms as No. ..... of 19.....

(Seal)

Registrar of Firms

Andhra Pradesh
Dated the ..... 19 .....

Forwarded to $\frac{\text{Mr}}{\text{Messrs}}$..... with reference..... to $\frac{\text{his}}{\text{their}}$ l etter No. .....dated the ..... 19 .....

FORM D

[See Rule 10 (a)]

Memorandum acknowledging receipt of documents

The Registrar of Firms Andhra Pradesh, hereby acknowledges the receipt of the under mentioned $\frac{\text{document}}{\text{documents}}$ and intimates that $\frac{\text{it has}}{\text{they have}}$ been filed in pursuance of the Indian Partnership Act, 1932 :

(Here enter description of $\frac{\text{document}}{\text{documents}}$).

Station
Dated 19 .....

Registrar of firms

To

$\frac{\text{Mr.}}{\text{Messrs}}$

---

*. Here enter name of the firm.

FORM E

[See Rule 12]

Receipt for fees

Received from
the sum of rupees (in words)
being the fees for Rs. P.

Filing Statement
Filing notice
Inspection of
Copy of (Number of words) Total .....

Station

Date

Registrar of firms.

"SCHEDULE I

Maximum Fees

[See sub-section (1) of Section 71]

Sl. No	Document or act in respect of which the fee is payable	Maximum Fee	
1.	Statement under Section 58	For each partner	100.00
2.	Statement under Section 60		100.00
3.	Intimation under Section 61		100.00
4.	Intimation under Section 62		100.00
5.	Notice under Section 6.3		100.00
6.	Application under Section 6.4		100.00
7.	Inspection of the Register of Firms under sub-section (1) of Section 66	For Inspecting the entry of each firm in the register	20.00
8.	Inspection of documents relating to a firm under sub-section (2) of Section 66	For each inspection of all documents relating to one single firm	20.00
9.	Copies from the Register of Firms	For each hundred Words or part thereof.	4.00"

*. A.P. Act No. 27 of 1994, w.e.f.01.04.1995

ASSAM PARTNERSHIP RULES, 1933

Notification No. 1787 F. (a), dated the 28th August, 1933.—In exercise of the powers conferred by sub-section (2) of Section 71 of the Indian Partnership Act, 1932 (Act IX of 1932), the Governor-in-Council is pleased to make the following rules, namely :

1. These rules, may be called the Assam Partnership Rules, 1933.

2. In these rules unless there is anything repugnant in the subject or context :

(a) "The Act" means the Indian Partnership Act, 1932 ;

(b) "Firm" means 'a body of persons' consisting of two or more partners, to which the Act applies ;

(c) "Registrar" means 'an official' appointed by the Local Government under Section 57 of the Act to perform the duties of Registrar of Firms for the Province of Assam;

(d) "Document" includes "statements, intimations, notices" prescribed by the Act;

(e) "Form" means a Form appended to these rules.

3. The documents required to be filed with the Registrar under Sections 58 (1) and 60 shall be deemed to be duly verified if they are signed and certified by all the partners or by a specially authorised agent on behalf of a partner declaring the statements made therein to be true to his knowledge and belief in the presence of at least one witness who shall attest, the signature by signing his name :

Provided that when a document is verified by a specially authorised agent, the original power of attorney or an expressed letter of authority from the partner concerned shall be produced for the inspection of the Registrar to prove the authentication.

4. (1) The "Register of Firms" to be maintained by the Registrar under Section 59 of the Act shall be in Form VIII.

(2) The statement required under Section 58 of the Act the registration of a firm shall be in Form I.

(3) The statement under Section 60 of the Act, relating to changes in the firms' name and the principal place of business, shall be in Form II.

(4) The notice under Section 61 of the Act of closing and opening of branches shall be in Form III.

(5) The notice under Section 62 of the Act of changes in the names and addresses of partners shall be in Form IV.

(6) The notice of alteration in the Constitution of a firm and dissolution of a firm, under Section 63 (1) of the Act, shall be in Forms V and VI respectively.

(7) The notice of withdrawal from, or remaining in a partnership to be given under Section 63 (2) of the Act by a minor on attaining majority shall be in Form VII.

(8) An Index to the Register of Firms shall be maintained by the Registrar in Form IX.

5. The notice of alteration which is required to be filed with the Registrar under Sections 60, 61, 62 and 63 of the Act shall be filed within 15 days from the date of occurrence.

6. On receipt of every statement, intimation, notice or any other document prescribed by the Act to be filed or registered in his office, the Registrar shall examine it and if it is found to be defective or incomplete in any of the particulars required to be given therein, or not verified in the prescribed manner or in any way not in accordance with the provisions of the Act or these rules he shall return it to the person, applying for filing or recording, or to the firm concerned, and until proper rectification or completion be made, he shall not register or file the document in question, nor shall he file or register the same unless and until the prescribed fees are paid to and received by him. The Registrar shall, pending the receipt of such fees, act in the same way as if no such document or fact had been tendered for filing or recording or registration.

7. The Registrar may acknowledge the receipt for filing of any document after entries have been made in the "Register of Firms".

8. The Registrar may in his discretion institute such inquiries or make such investigation in respect of any matter as may in his opinion be necessary for the proper performance of his duties and administration of the Act, especially when a dispute arises amongst the several partners of a firm. The Registrar may in his discretion call upon any of the partners or all of them to produce any original deed, document or such other evidence as he thinks fit.

9. The office of the Registrar shall be situated in the town of Shillong and shall be open for business (Sundays and authorised holidays excepted) between the hours of 11 a.m. and 4.30 p.m. excepting Saturdays when the office shall remain open for business till 1.30 p.m.

10. (1) Any person may inspect the document or/and the "Register of Firms" kept by the Registrar on payment of fifty paise for the inspection of all documents relating to one firm.

(2) Any person may inspect the particulars of any firm in the "Register of Firms" kept by the Registrar on payment of fifty paise in respect of each volume of the register inspected :

Provided that he shall not have the right, while so inspecting, to take copies or extracts from any of the documents or the register.

(3) Any person shall, on application to the Registrar, be supplied on plain paper with a certified copy or extract of any of the documents or any of the entries or portion thereof in the "Register of Firms" on payment of twenty five paise for each hundred words or part thereof.

11. (1) No document filed in the office of the Registrar of Firms, Assam, under the Indian Partnership Act, 1932 shall be destroyed without the previous order of the Registrar in that behalf.

(2) The registrar may order the destruction of any such document at the expiration of five years after the date of dissolution of the firm in respect of which such document was filed in his office provided that the Registrar shall give three month's previous notice of such destruction by notification in the Assam Gazette.

(3) After the expiration of the said period of three months the registrar, shall, unless sufficient reason has been shown to the contrary, cause all the documents of each firm name in the said notice to be destroyed, and shall record the fact of such destruction in the book kept for such purpose.

FORM I

[See Section 58 and Rule 4 (2)]

Statement required for Registration of a firm

Filing Fee—Rs. 3/-

To

The Registrar of Firms, Assam, Shillong.

We, the undersigned partners of the Firm ..... do hereby submit the following statement, prescribed under Section 58 of the Indian Partnership

Act, 1932, for the purpose of registration of the said firm under Section 59 of the Act.

A. The name of the firm :

B. The duration of the firm (with date of establishment) :

C. The principal place of business, with full address :

D. The names of any other places where the firm carries on business, with full addresses :

1.

2.

3.

E. The names in full and permanent address of all the partners, and the date when each partner joined the firm :

Names in full of partners	Permanent Addresses	Date of joining	Remarks

Witness or Witnesses attesting the Signatures

Signatures of all the Partners of the firm

Date .....

Verification

We, the partners of the firm ..... do hereby declare that the foregoing statement is true to our knowledge and belief.

Witness or Witnesses attesting the Signatures

Signatures of all the Partners of the firm

Date .....

FORM II

[See Section 60 and Rule 4 (3)]

Notice of alteration in the name of the Firm or in location of the principal place of business thereof

Filing Fee—Re. 1/-

To

The Registrar of Firms, Assam, Shillong.

Notice is hereby given, pursuant to Section 60 of the Indian Partnership Act, 1932 of the following alteration in the*_____ name / location of the principal place of business

Date of alteration	Name of the firm		Principal place of business	
	Former name	Present name	Former address	Present address

Witness or Witnesses attesting the Signatures

Signatures of all the Partners of the firm

Date .....

Verification

We, the partners of the firm ..... do hereby declare that the foregoing statement is true to our knowledge and belief.

Witness or Witnesses attesting the Signatures

Date .....

Signatures of all the Partners of the firm

*. Strike out the portion which does not apply.

FORM III

[See Section 61 and Rule 4 (4)]

Notice of closing and opening of place of business (other than the principal place of business)

Filing Fee—Re. 1/-

To

The Registrar of Firms, Assam, Shillong.

Notice is hereby given, pursuant to Section 61 of the Indian Partnership Act, 1932, of the $\frac{\text{closing}}{\text{opening}}$ following place/places of business of the firm (other than the principal place of business).

Place of business closed	Date of closing	Place of business opened	Date of opening	Remarks

Signature of any Partner or Agent of the firm

Date .....

FORM IV

[See Section 62 and Rule 4 (5)]

Notice of changes in the names and addresses of the partners of the firm

Filing Fee—Re. 1/-

To

The Registrar of Firms, Assam, Shillong.

Notice is hereby given, pursuant to Section 62 of the Indian Partnership Act, 1932 of changes in the names and addresses of the partners of the firm.

Former name and address	Present name and address	Remarks

Signature of any Partner or agent of the firm

Date .....

FORM V

[See Section 63 (1) and Rule 4 (6)]

Intimation for recording of changes in the Constitution of a Firm

Filing Fee—Re. 1/-

To

The Registrar of Firms, Assam, Shillong.

Notice is hereby given, pursuant to sub-section (1) of Section 63 of the Indian Partnership Act, 1932, of the following changes in the Constitution of the Firm:

Previous Constitution of the firm		Present Constitution of the firm		
Name of Partners	Permanent addresses	Name of partners	Permanent addresses	Remarks

Signature of any partner or his Agent

Date .....

FORM VI

[See Section 63 (1) and Rule 4 (6)]

Intimation for recording dissolution of a firm

Filing Fee—1/-

To

The Registrar of Firms, Assam, Shillong.

Notice is hereby given, pursuant to sub-section (1) of Section 63 of the Indian Partnership Act, 1932 that the firm ..... was dissolved on 19 .....

Date .....

Signature of any partner or his Agent

FORM VII

[See Section 63 (2) and Rule 4 (7)]

Notice of withdrawal from, or remaining in, a partnership to be given under Section 63 (2) of the Act by a minor on attaining majority

Filing Fee—Re. 1/-

To

The Registrar of Firms, Assam, Shillong.

Notice is hereby given, pursuant to sub-section (2) of Section 63 of the Indian Partnership Act, 1932 that ...../ the undersigned a minor who was admitted to the benefits of partnership in the firm has now attained majority and elects $\frac{\text{to become}}{\text{not to become}}$ a partner of the said firm.

Date .....

Signature of the partner concerned or his specially authorised agent

FORM VIII

[See Section 59 and Rule 4 (1)]

Register of firms

Number of the firm on the Register ..... Important notes
Name of the firm .....
Date of establishment .....
Duration or date of registration .....
Date of dissolution .....
How dissolved

Name and addresses of the partners and the dates of joining or changes therein					Places of business of the firm		
Serial number of documents	Date filing or registration	Description of documents filed	Name	Address (permanent)	Date of joining	Date of changes	Principal place
1	2	3	4	5	6	7	8

Other places	Date of closing or opening	Recording of changes of Constitution or dissolution and also of withdrawal of minor partners	Remarks	Signature of the Registrar
9	10	11	12	13

FORM IX

[See Rule 4 (8)]

Index to the Register of Firms

Name of firm	Date of registration	Number of firm in the Register	Volume of Register and folio
1	2	3	4

THE BENGAL PARTNERSHIP RULES, 1933

Bengal Government Notification No. 229-T. Com., dated 15th May, 1933.—In exercise of the powers conferred by sub-section (2) of Section 17 of the Indian Partnership Act, 1932 (IX of 1932), the Governor-in-Council is pleased to make the following rules, namely :

1. **Short title.**— These rules may be called the Bengal Partnership Rules, 1933.

2. **Definitions.**—In these rules, unless there is anything repugnant in the subject or context—

(a) "Document" includes statements, intimations, notices under the Act ;

(b) "Form" means a Form appended to these rules ;

(c) "Registrar" means a Registrar of Firms appointed under Section 57 of the Act ;

(d) "The Act" means the Indian Partnership Act, 1932.

3. **Form and verification of statements under Sections 58 and 60.**— The documents required to be filed with the Registrar under sub-section (1) of Section 58 and Section 60 shall be deemed to be duly verified if they are signed and certified by all the partners or by a specially authorised agent on behalf of any partner declaring the statements made therein to be true to his knowledge and belief in the presence of at least one witness who shall attest the signatures by signing his name :

Provided that when a document is verified by a specially authorised agent, the original power of attorney or an expressed letter of authority from the partner concerned shall be produced for inspection of the Registrar to prove authentication.

4. **Form of Register of Firms, under Sections 58 and 60, notices under Sections 61, 62 and 63 and Index to the Register of Firms.**—(1) The "Register of Firms" to be maintained by the Registrar under Section 59 of the Act shall be in Form VIII.

(2) The statement required under Section 58 of the Act for the registration of a firm shall be in Form I.

(3) The statement under Section 60 of the Act, relating to change in the firm's name and the principal place of business shall be in Form II.

(4) The notice under Section 61 of the Act of closing and opening of branches shall be in Form III.

(5) The notice under Section 62 of the Act of changes in the names and addresses of partners shall be in Form IV.

(6) The notice of alteration in the Constitution of a firm and dissolution of a firm under Section 63 (1) of the Act, shall be in Forms V and VI respectively.

(7) The notice of withdrawal of a minor partner, under Section 63 (2) of the Act, shall be in Form VII.

(8) An Index to the Register of Firms shall be maintained by the Registrar in Form IX.

5. Time for giving notice of alteration.—The notice of an alteration which is required to be filed with the Registrar under Sections 60, 61, 62 and 63 of the Act shall be filed within fifteen days from the date of occurrence.

6. Examination of documents received by the Registrar.—On receipt of every statement, intimation, notice or any other document required by the Act to be filed or registered in his office, the Registrar shall examine it, and if it is found to be defective or incomplete in any of the particulars required to be given therein, or not verified in the manner prescribed by these rules, or in any way not in accordance with the provisions of the Act or these rules he shall return it to the person who applied for filing or recording or to the firm concerned and until proper rectification or completion is made, he shall not register or file the document in question nor shall he file or register the same unless and until the prescribed fees are paid to and received by him. The registrar shall, pending the receipt of such fees, act in the same way as if no such document or fact had been tendered for filing or recording or registration.

7. Acknowledgement by the Registrar.—The Registrar may acknowledge the receipt of the filing of any document after necessary entries have been made in the "Register of Firms".

8. Enquiries and investigation by the Registrar in case of disputes.—The Registrar may in his discretion institute such enquiries or make such investigation in respect of any matter as may in his opinion be necessary for the proper performance of his duties and the administration of the Act, specially when dispute arises amongst the several partners of a firm, and the Registrar may in his discretion call upon any of the partners or all of them to produce any original deed, document or such other evidence as he thinks fit.

9. Office of the Registrar and business hours.—There shall be an office of the Registrar situated at Calcutta which shall ordinarily be open for business (Sundays and authorised holidays excepted), between the hours 11 a.m. and 4.30 p.m. excepting Saturdays, when the office shall remain open for business till 1.30 p.m.

10. Inspection of documents and conditions and fees thereof.—(1) Any person may inspect the documents filed by firms and the Register of Firms kept by the Registrar on payment of eight annas for each inspection of all documents relating to one firm, and a fee of eight annas for inspection of each volume of the said Register :

Provided that he shall not have the right, while so inspecting to take copies of or extracts from any of the documents of the Register.

(2) The Registrar shall not permit inspection of any document filed by the firm unless it is shown to his satisfaction that the person applying for such inspection is, in some way interested in the contents of the documents.

(3) Any person shall, on application to the Registrar, be supplied with certified copy or extract of any documents or any of the entries or portion thereof in the "Register of Firms" upon payment of four annas for each hundred words or part thereof.

11. Procedure on closing of business and dissolution.—(1) Where the Registrar has reasonable cause to believe that a registered firm is not carrying on business or is not in operation or that it is finally dissolved but the prescribed intimation has not been given, he shall send by post to every partner of the firm at its last known address a letter enquiring whether the firm is carrying on business or is in operation.

(2) If the Registrar receives an answer from any of the partners to the effect that the firm is not carrying on business or is not in operation, or if he does not within one month from the date of the posting of the letter receive any answer, he shall publish, in the local Official Gazette and send to all the partners by registered post a notice that at the expiration of three months from the date of that notice the name of the firm mentioned therein shall, unless cause is shown to the contrary, be struck off the Register of Firms and the Firm shall be dissolved and the registration shall be deemed cancelled.

(3) At the expiration of the time mentioned in the notice the Registrar shall, unless cause is shown previously by the partner, strike its name off the Register, and shall publish notice thereof in the local Official Gazette, and on the publication of such notice in the Official Gazette the firm shall be dissolved.

FORM I

[See Section 58 and Rule 4 (2)]

Statement required for registration of a firm

Filing Fee—Rs. 3/-

To

The Registrar of Firms, Bengal, Calcutta.

We, the undersigned partners of the Firm do hereby submit the following statement, prescribed under Section 58 of the Indian Partnership Act, 1932, for the purpose of registration of the said firm under Section 59 of the Act.

A. The name of the firm :

B. The duration of the firm (with date of establishment) :

C. The principal place of business, with full address :

D. The names of any other places where the firm carries on business, with full addresses :

1.

2.

3.

E. The names in full and permanent addresses of all the partners, and the date when each partner joined the firm :

Names in full of partners	Permanent Address	Date of joining	Remarks

Witness or Witnesses attesting the Signature

Date .....

Signatures of all the Partners of the firm

Verification

We, the partners of the firm ..... do hereby declare that the foregoing statement is true to our knowledge and belief.

Witness or Witnesses attesting the Signatures

Date .....

Signature of all the Partners of the firm

FORM II

[See Section 60 and Rule 4 (3)]

Notice of alteration in the name of the Firm or in location of the principal place of business thereof

Filing Fee—Re. 1/-

To

The Registrar of Firms, Bengal, Calcutta.

Notice is hereby given pursuant to Section 60 of the Indian Partnership Act, 1932 of the following alteration in the name location of the principal place of business* of the firm

	Name of the firm		Principal place of business	
Date of alteration	Former name	Present name	Former address	Present address

Witness or Witnesses attesting the Signatures

Signatures of all the Partners of the firm

Date .....

Verification

We, the partners of the firm ..... do hereby declare that the foregoing statement is true to our knowledge and belief.

Witness or Witnesses attesting the Signatures

Signatures of all the Partners of the firm

FORM III

[See Section 61 and Rule 4 (4)]

Notice of closing and opening of place of business (other than the principal place of business)

Filing Fee—Re. 1/-

To

The Registrar of Firms, Bengal, Calcutta.

Notice is hereby given, pursuant to Section 61 of the Indian Partnership Act, 1932, of the closing/opening of the following place/places of business of the firm ..... (other than the principal place of business).

Place of business closed	Date of closing	Place of business opened	Date of opening	Remarks

Signature of any Partner or Agent of the firm

Date .....

FORM IV

[See Section 62 and Rule 4 (5)]

Notice of changes in the names and addresses of the partners of the firm

Filing Fee—Re. 1/-

To

The Registrar of Firms, Bengal, Calcutta.

Notice is hereby given, pursuant to Section 62 of the Indian Partnership Act, 1932, of changes in the names and addresses of the partners of the firm.

Former name and address	Present name and address	Remarks

Signature of any Partner or agent of the firm

Date .....

FORM V

[See Section 63 (1) and Rule 4 (6)]

Intimation for recording of changes in the Constitution of a Firm

Filing Fee—Re. 1/-

To

The Registrar of Firms, Bengal, Calcutta.

Notice is hereby given, pursuant to sub-section (1) of Section 63 of the Indian Partnership Act, 1932, of the following changes in the Constitution of the firm :

Previous Constitution of the firm		Present Constitution of the firm		Remarks
Name of Partners	Permanent addresses	Name of partners	Permanent addresses	

Date .....

Signature of any partner or his Agent

FORM VI

[See Section 63 (1) and Rule 4 (6)]

Intimation for recording dissolution of a firm

Filing Fee—1/-

To

The Registrar of Firms, Bengal, Calcutta.

Notice is hereby given, pursuant to sub-section (1) of Section 63 of the Indian Partnership Act, 1932, that the firm was dissolved on 19 .....

Date .....

Signature of any partner or his Agent

FORM VII

[See Section 63(2) and Rule 4(7)]

Notice for recording of the fact of a minor enjoying the benefits of partnership electing to become or not to become a partner on attaining majority

Filing Fee—Re. 1/-

To

The Registrar of Firms, Bengal, Calcutta.

Notice is hereby given, pursuant to sub-section (2) of Section 63 of the Indian Partnership Act, 1932 that ..... the undersigned, a minor who was admitted to the benefits of partnership in the firm of ..... has now attained majority and elects to become/not to become a partner of the said firm.

Date .....

Signature of the partner concerned or his specially authorised agent

FORM VIII

[See Section 59 and Rule 4 (1)]

Register of firms

Number of the firm on the register — Important notes

Name of the firm

Date of establishment

Duration of establishment

Duration or date of registration

Date of dissolution

How dissolved

Name and addresses of the partners and the dates of joining or changes therein						Places of business of the firm	
Serial number of documents	Date of filing or registration	Description of documents filed	Name	Address (permanent)	Date of joining	Date of changes	Principal place
1	2	3	4	5	6	7	8

Other places	Date of closing or opening	Recording of changes of Constitution or dissolution and also of withdrawal of minor partners	Remarks	Signature of the Registrar
9	10	11	12	13

FORM IX

[See Rule 4 (8)]

Index to the Register of Firms

Name of firm	Date of registration	Number of firm in the Register	Volume of Register and folio
1	2	3	4

THE BIHAR AND ORISSA PARTNERSHIP RULES, 1933

Notification No. 3654-IJ-I. Com., dated 11th November, 1933.—In exercise of the powers conferred by sub-section (2) of Section 71 of the Indian Partnership Act, 1932 (IX of 1932), the Governor-in-Council is hereby pleased to make the following rules, the same having been previously published as required by sub-section (3) of the said section of the Act :

1. **Short title.**—These rules may be called the Bihar and Orissa Partnership Rules, 1933.

2. **Definitions.**—In these rules—

(a) "the Act" means the Indian Partnership Act, 1932.

(b) "Form" means a form in the Schedule to these rules.

(c) "Section" means a section of the Act.

(d) "Registrar" means the Registrar of Firms.

3. **Forms and verification of statement under Sections 58 and 60.**—The statements required to be sent or delivered to the Registrar under Section 58 and 60 shall respectively be in Forms I and II and shall be verified by signing the form of verification contained in the said Forms.

4. **Forms of intimations and notices under Section 61, 62 and 63.**—Intimations and notices under Sections 61, 62 and 63 (1) and 63 (2) shall respectively be in Forms III, IV, V and VI.

5. **Register of Firms.**—The Register of Firms shall be maintained in Form A. The name of, and the Particulars relating to each firm shall be entered in the said Register in the order of registration of the firm, on a separate page or pages. Each firm shall be assigned in number in a consecutive series commencing and ending with the calendar year. A note of every document filed by, or relating to, a firm shall be entered in the Register in the page or pages allotted to such firm and shall be signed by the Registrar.

6. **Amendment of entries in register.**—When an entry made in the Register of Firms is to be amended, shall be shown by means of a suitable note in the remarks column opposite to the entry or under the head concerned.

7. **Procedure on dispute.**—Where any partner or other person interested makes a protest in writing to the Registrar disputing any entry made in the Register of Firms, the Registrar shall record such protest and make a reference thereto in red ink in the remarks column against the disputed entry.

8. **Index to the Register.**—An index to the Register of Firms shall be maintained in Form B, a number of pages of the Forms being allotted to each letter of the alphabet. As soon as a firm is registered or when the firm name shall be indexed alphabetically with reference to the initial letter of the firm name and on the dissolution of the firm the name shall be cancelled in red ink.

Every such entry or cancellation and any necessary remarks relating thereto shall be signed by the Registrar.

9. **Filing of documents.**—A separate file shall be maintained in respect of each firm, in which all documents relating thereto, received from time to time by the Registrar shall be filed. No documents shall be filed by the Registrar, unless the fee prescribed therefor has been paid.

10. **Acknowledgement of registered documents.**—(a) Upon the registration of firm the Registrar shall grant to the firm an acknowledgement in Form C and on the filing of any documents required to be filed under the Act he shall grant to the person at whose instance it is filed an acknowledgement in Form D.

(b) On every document filed under the Act, by, or relating to a firm, the Registrar shall endorse the following particulars, namely :

(i) the number borne by the firm on the Register;

(ii) the name of the firm ;

(iii) the description of the document ;

(iv) the serial number of the document ; and

(v) the date of filing.

The Registrar shall also affix his signature and the seal of his office to every such document.

(c) If there is no space on the document for entering the particulars referred to in sub-rule (b), the entry shall be made on a separate paper which shall be attached to the document and a note of the fact shall be made on the document itself and shall be signed by the Registrar.

11. **Condition of inspection.**—The Register and the Indexes to the Register shall be open to inspection by any person on a written application. Documents kept in the Registrar's office and other papers filed in connection therewith shall be open to inspection by any person applying therefor, provided the applicant satisfied the Registrar that he has sufficient interest in the contents of the document and paper, if any, for inspection of the Register will not serve the purpose. [Vide Government Notification No. 854-IJ-22-L, dated 13-9-1944].

12. **Grant of copies of entries in Register.**—The Registrar shall on application in writing furnish to any person a copy, certified under his hand,

of any entry or portion thereof, in the Register of Firms on payment of the prescribed fee.

There is no objection to the grant of a certified copy of certificate of registration (Vide Govt. order No. 18-L, dated 5-1-1949).

13. Preservation and elimination of registers and records.—The Register of Firms and the Index thereto shall be preserved permanently. All other records, including the statements referred to in Section 58, relating to any firm may be destroyed on the expiry of five years from the date of the dissolution of each firm.

14. Mode of lodging documents.—Documents may be lodged with the Registrar either in person or sent to him by post.

15. Translation to be furnished when original not in English.—If any document required to be filed under the Act or any portion of such document is not in the English language, an English translation of such document or portion certified as correct by at least one partner (or authorised agent) shall be furnished along with each copy of such document or portion.

16. Administration report.—The Registrar shall submit to the local Government so as to reach them on or before the 1st of June in each year a report on the working of the Act during the official year ending the 31st March, preceding.

FORM NO. I

[See Rule 3]

Application for registration of firm by name*

Filing Fee - Rs 3/-

Presented or forwarded to the Registrar of Firms for Filing by.....

We, the undersigned, being the partners of the firm* ..... hereby apply for registration of the said firm and for that purpose, supply the following particulars, in pursuance to Section 58 of the Indian Partnership Act, 1932 :

The firm's name*

Place of business (a) Principle place (b) Other places

Name of partners in full	Date of joining the firm	Permanent address in full
1.		
2.		

*. Here enter the name of the frim.

If any partner is a minor the fact whether he is entitled to the benefits of partnership should be set out herein.

N.B.—This form must be signed by all partners or their agents specially authorised in this behalf in the presence of a witness or witnesses who must be either a Gazetted Officer, Advocates, Attorney, Pleader , Honorary Magistrate or Registered Account.

Duration of the Firm

Station .....

Date .....

Signatures of the partners or their specially authorised agents

I, ... son of ..... years of age of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date .....

Witness .....

Signature

I, ... son of ..... years of age of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date .....

Signature

Witness .....

FORM NO. II

[See Rule 3]

Statement of alteration in the name of the firm or in the location of the principal place of business

Filing Fee—Re. 1/-

Presented or forwarded to the Registrar of Firms for filing by.....

We, the undersigned, being the partners of the firm* ..... hereby supply the following particulars, in pursuance of Section 60 (1) of the Indian Partnership Act, 1932 :

Name of firm	
Previous name	New name

Principal place of business	
Previous place	New place

*. Here enter the name of the firm.

N.B.—Strike out item not required.

Station .....

Date .....

Signature of the partners or their specially authorised agents

I, ... son of ..... years of age of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date .....

Witness .....

Signature

I, ..., son of ..... years of age, of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date .....

Witness .....

Signature

FORM NO. III

[See Rule 4]

Intimation of change in the place of business (other than principal place of business)

Filing Fee—Re. 1/-

Presented or forwarded to the Registrar of Firms for filing by.....

Under Section 61 of the Indian Partnership Act, 1932, intimation is hereby given that the changes specified below have occurred in the place of business of the firm* :

Date of change

(1) .The firm has discontinued business at .....

(2) .The firm has begun to carry on business at .....

Station .....

Date .....

Signature of the partners or agents of the firm

* Here enter the name of the firm.

N.B.—Strike out item not required.

FORM NO. IV

[See Rule 4]

Intimation of alteration in the name or permanent address of partners

Filing Fee—Re. 1/-

Presented or forwarded to the Registrar of Firms for filing by.....

Under Section 62 of the Indian Partnership Act, 1932 intimation is hereby given that the changes specified below have occurred in the name or/ and permanent address of partner in the firm*.

Name of Firm	
Previous name (in full)	New name (in full)

Address of partner	
Previous permanent address (in full)	Present permanent address (in full)

Station .....

Date .....

Signature of any partner or agents of the firm

FORM NO. V

[See Rule 4]

Notice of change in the Constitution of the Firm or of the dissolution of the firm

Filing Fee—Re. 1/-

Presented or forwarded to the Registrar of Firms for filing by.....

Under Section 63 (1) of the Indian Partnership Act, 1932 notice is hereby given that—

(1) The Constitution of the firm* ..... has been altered as follows :

Name and full address of the incoming partner and date of his joining the firm	Name and full address of the outgoing partner and date of his ceasing to be partner

*. Here enter the name of the firm.

N.B.—Strike out item not required.

Station .....
Date .....

Signature of the incoming, continuing or outgoing partner or of his specially authorised agent

(2) The Firm* ..... has been dissolved with effect from the .....

Station .....
Date .....

Signature of the person who was a partner immediately before the dissolution or of his specially authorised agent

FORM NO. VI

[See Rule 4]

Notice of election by person admitted to the benefits of partnership on attaining majority

Filing Fee—Re. 1/-

Under Section 63 (2) of the Indian Partnership Act, 1932 notice is hereby given that..... admitted to the benefits of the partnership in firm*..... having now attained majority $\frac{\text{elects to become}}{\text{elects not become}}$ a partner of the said firm.

Station .....
Date .....

Signature of the person electing or of his specially authorised agent

FORM A

[See Rule 5]

Register of firms maintained under Section 59 of the Indian Partnership Act, 1932

1. Serial number of firm
2. Name of firm (as originally registered)
3. Date of registration
4. Duration of firm (at the time of registration)
5. Names and addresses of partners and changes therein :

Name of the partners	Addresses	Date of		Remarks
		Joining	ceasing	

*. Here enter the name of the firm.

N.B.—Strike out item not required.

6. Principal place of business and changes therein :

Particulars regarding the place	Date of change	Remarks

7. Other places of business and changes therein :

Name of place	Date of		Remarks
	Opening	Closing	

8. Changes in the name of firm :

Firm name as changed	Date of change	Remarks

9. Documents filed :

Serial No. of the document	Description of document	Date of filing	Signature of Registrar

FORM B

[See Rule 8]

Index to the Register of firms

Firm name	Serial number borne on the Register	Volume Number of the register	First page of entry in the volume	Remarks	Signature of Registrar
1	2	3	4	5	6

FORM C

[See Rule 10 (a)]

Acknowledgement of Registration of Firm

The Registrar of Firms, Bihar and Orissa, hereby acknowledges the receipt of the statement prescribed by Section 58 (1) of the Indian Partnership Act, 1932. The statement has been filed and the name of the firm* ..... has been entered in the Register of Firms as No. ..... of 19.....

Seal

Registrar of Firms

Station .....

Dated the ..... day of.....19

No. Dated the 19.

Forwarded to Mr / Messrs

with reference to his / their letter No.....dated the.....19.....

Registrar of Firms

FORM D

[See Rule 10 (a)]

Memorandum Acknowledging receipt of documents

The Registrar of Firms, Bihar and Orissa, hereby acknowledges the receipt of the under mentioned document / documents and intimates that it has / they have been filed in pursuance of the Indian Partnership Act, 1932 :

(Here enter description of document / documents)

Registrar of Firm

Station .....

Date ..... 19 .....

*. Here enter the name of the firm.

To

Mr.
Messrs

Memo of fees received

No. Dated the 19.....

Forwarded to Mr. / Messrs

with reference to his / their letter No. dated the 19

Registrar of Firm

BOMBAY PARTNERSHIP RULES, 1932

No. 126/3.—In exercise of the powers conferred by sub-section (2) of Section 71 of the Indian Partnership Act, 1932 (IX of 1932), the Governor-in-Council is pleased to make the following rules to carry out the purposes of Chapter VII of the said Act :

1. **Short title.**—These rules may be called the Bombay Partnership Rules, 1932.

2. **Definitions.**—In these rules, unless there in anything repugnant in the subject or context—

(a) "the Act" means the Indian Partnership Act, 1932 ;

(b) "Firm" means a firm to which the Act applies ;

(c) "Register" means the Register of Firms kept under Section 59;

(cc) "Registrar" means the Registrar of firms appointed under Section 57 and includes an Additional Registrar of Firms ;

(d) "Schedule" means the Schedule hereto appended ;

(e) "Section" means a section of the Act.

3. **Forms of statements.**—The statements required to be sent or delivered to the Registrar under Sections 58 to 60 of the Act shall, respectively, be in Forms A and B in the Schedule and be verified in the manner set forth in the footnote to the said forms.

4. **Forms of intimations and notices.**—Intimations and notices given under Sections 61, 62 and 63 of the Act shall respectively be in Forms C, D, E and F in the Schedule or the like effect.

5. **English translation when to be furnished.**—If any document or portion of a document required to be submitted under the Act is not in the English language, a translation thereof, in English verified as correct shall be furnished along with such document to the Registrar.

6. **Form of Register.**—The Register shall be kept in Form G in the Schedule, a separate page or pages being devoted to each firm. The pages, after

the entries are made, shall be bound in proper permanent registers in the order of the consecutive number allotted to each firm on registration.

"Every entry in the Register shall be signed by the Registrar".

7. **Amendment of Register.**—When an entry made in the Register is to be amended, the amendment shall be made by drawing a red line through the entry and making a new entry at the end of the existing entries. A reference in red ink to the serial number of the new entry shall be made against the amended entry.

8. **Procedure on dispute.**—If any person wishes to dispute any entry in the Register, such person shall give the Registrar notice in writing that he disputes the said entry and the registrar shall make remark to that effect at the end of the then existing entries and shall also make a remark in red ink in the remarks column against the entry so disputed.

The Registrar shall then, as soon as may be, send an intimation of such notice to all the partners of the firm concerned and if the person giving such notice is one of the partners, to the remaining partners of such firm, as the case may be.

9. **Filing of documents.**—A separate file shall be maintained in respect of each firm in which the document received by the Registrar relating to the said firm, shall from time to time, be filed. No document shall be filed by the Registrar unless the proper fee prescribed therefor has been paid.

10 **Conditions of inspection.**—The register shall be open to inspection of written application and on payment of the prescribed fee. The file of the documents kept in the Registrar's office shall similarly be open to inspection by any person applying therefor :

Provided the applicant satisfies the Registrar that he has sufficient interest in the contents of the documents of which he applies for inspection and that a mere inspection of the Register will not serve his purpose.

11. **Grant of Copies.**—A copy of any entry in Register shall be supplied to any person on written application and on payment of the prescribed fee.

In case any certified copy are required by the applicant to be sent by post, the necessary postage shall also be paid by the applicant.

12. **Elimination of documents and Registers.**—On the dissolution of a firm, the Index card of that firm shall be marked "dissolved"; and at the expiration of five years from the date of the entry of dissolution in the register, the file and papers relating to such firm may be destroyed; the index card and register relating to such firm shall, however, be retained for a further period of fifteen years.

The following Registers and papers may also be destroyed after five years :

(a) Cash Books (Register of Receipts).

(b) Deposit Registers.

(c) Register of Payments (Day Books).

(d) Contingent Cash Books.

(e) Pay Bills.

(f) Budget papers.

(g) Contingent Bills and Vouchers.

(h) Stationery, Files, Indents.

(i) Establishment Returns.

(j) Applications for leave, etc.

(k) Detailed Lists of Pending Balances.

The following records and papers may be destroyed after one year :

(a) Counterfoils of Cash Receipt Books.

(b) Sale of Forms Account.

(c) Post Books.

(d) Copies of Monthly and Quarterly Reports.

(e) Correspondence regarding Sale of Forms.

(f) Correspondence regarding documents registered.

(g) Correspondence regarding documents rejected.

(h) Applications for inspections of certified copies.

(i) Other miscellaneous correspondence.

(j) Treasury Challans.

(k) Old registers, etc. received from merged States.

13. **Index to the Register.**—The Registrar shall maintain in English an alphabetical card index to the Register showing the number, name and location of the principal place of business of each firm. "Such index shall not be open to inspection by the public".

14. Mode of lodging documents.—Documents may either on payment of the prescribed fee be lodged with Registrar in person or sent to him by post along with the prescribed fee.

"In case any fees are sent by money order, a separate letter advising such remittance and giving proper reference shall also be sent containing clearly the name of the firm so as to enable the fees being properly adjusted. No statement, application, intimation or notice, as the case may be, shall be registered, recorded or filed until the proper fee prescribed in respect thereof has been paid".

15. Power to return defective or incomplete applications, etc.—If the Registrar finds that any statement, intimation, application or notice received by him is defective or incomplete in any of the particulars required by the Act or by these rules, he may return it to the parties for due rectification or completion.

16. Power to make further inquires, etc.—The Registrar may make such further inquires in respect of any statement, intimation, application or notice received by him under the Act or rules thereunder and may call for production of such evidence as he may consider necessary.

For Gujarat the maximum Fees is as below :

*[SCHEDULE I

Maximum Fees

[See sub-section (1) of Section 71]

Document or act in respect of which the fee is payable	Maximum Fee
Statement under Section 58	Fifty rupees
Statement under Section 60	Twenty-five rupees
Intimation under Section 61	Twenty-five rupees
Intimation under Section 62	Twenty-five rupees
Notice under Section 6.3	Twenty-five rupees
Application under Section 6.4	Twenty-five rupees
Inspection of the Register of Firms under sub-section (1) of Section 66	Ten rupees for inspecting one volume of the Register
Inspection of documents relating to a firm under sub-section (2) of Section 66	Ten rupees for the inspecting all documents relating to one single firm
Copies from the Register of Firms	Five rupees for each hundred words or part thereof".

*. Amended by Gujarat Act No. 13 of 1991, Sec. 2 dt. 16-04-1991.

FORM A

[See Section 58]

Application for Registration of firms

We, the undersigned, being partners hereby apply for registration as a firm and for that purpose supply the following particulars pursuant to Section 58 of Indian Partnership Act, 1932

(a) Firm name _____

(b) Place or principal place of business of the firm _____

(c) Names of any other places where the firm carries on business _____

(d) Date on which each partner joined the firm _____

(e) Name in full and permanent (residential) addresses of all the partners. _____

(f) Duration of the firm. In case there is any provision made by contract for the duration of the partnership or for the determination of the partnership, please state the provisions briefly. If no such provision is made, please state accordingly. _____

(g) In case there are any minors admitted to the benefits of partnership—

Name and address of each minor	Date of admission to benefits	Date when he will attain majority

We are sending the prescribed registration fee by Cash-Money order.

We declare that the all the above particulars are true to the best of our knowledge and belief as on this date.

We also declare that up to the date of submission of this application there has not been any change whatever in any of the particulars stated above.

Date this ..... day of ..... 19.

Signatures

Certified that persons who have signed the application have signed it in my presence and have affirmed that the particulars furnished therein are true.

Signature of witnesses

Note 1. For the registration of each firm a separate application is necessary. Accordingly the applicants should apply in this application only particulars of the Firms in respect of which the application is made. This applies in the case of the same person carrying on business in Partnership under different firm names.

Note 2. Against items (b) and (c) the exact location of the place should be given.

Note 3. This application must be signed by all partners or their agents specially authorised in this behalf in the presence of witness who must be a Gazetted Officer, a Justice of the Peace, a Magistrate, a Notary Public or an Attorney of the High Court, an Advocate, a Pleader or a Chartered Accountant.

Note 4. Making a false untrue or incomplete statement is punishable under Section 70 of the Indian Partnership Act, 1932.

FORM B

[See Section 60]

Statement specifying alterations in the firm name or in the location of the principal place of business of the firm.

We, the undersigned, being the partners of the firm of ..... whose registered address is at ..... hereby notify pursuant to Section 60 (1) of the Indian Partnership Act, 1932, that the changes specified below have occurred in this firm :

(a) Change in the firm name
New name

(b) Change in the location of the principal place of business of the firm :

New place of business.

We declare that all the above particulars are true to the best of our knowledge and belief as on this date.

We/I also declare that up to the date of submission of this application there has not been any change in any of the particulars previously intimated save and except the change notified above.

Date this ..... day of ..... 19.

Signatures

Certified that persons who have signed the statement, have signed it in my presence and they have affirmed that particulars furnished therein are true.

Signature of witnesses

Note 1. Strike out items not required.

Note 2. This statement must be signed by all the partners or their agents specially authorised in this behalf in the presence of witness who must be a Gazetted Officer, a Justice of the Peace, a Magistrate, an Attorney of the High Court, an Advocate, a Pleader or a chartered Accountant.

FORM C

[See Section 61]

Notice of change of address

Firm Name

Registered Address

I, Shri ..... hereby give notice pursuant to Section 61 of the Indian Partnership Act, 1932 that the changes specified below have occurred in this firm :

(a) The firm has discontinued business at [1]

(b) the firm has begun to carry on business at [2]

I declare that all the above particulars are true to the best of my knowledge and belief as on this date.

We/I also declare that up to the date of submission of this application there has not been any change in any of the particulars previously intimated save and except the change notified above.

Date this ..... day of ..... 19.

Signatures

1. Such place must not be principal place of business.
2. Here state the place with its exact location.

Certified that the persons who has signed this notice has signed it in my presence and he has affirmed that particulars furnished therein are true.

Signature of witnesses

Note 1. Strike out items not required.

Note 2. This notice must be signed by a partner or his agent specially authorised in this behalf in the presence of witness who must be a Gazetted Officer, a Justice of the Peace, a Magistrate, an Attorney of High Court, an Advocate, a Pleader or a Chartered Accountant.

FORM D

[See Section 62]

Notice of change in the name of partners and his permanent address

Firm name

Registered Address

Notice is hereby given pursuant of Section 62 of the Indian Partnership Act, 1932 that the changes specified below have occurred in the firm :

(a) Change in the name of any partner in a registered firm :

Former name of partner

Name as now altered by the partner

Date on which he changed his name

(b) Change in the permanent address of any partner in a registered firm :

Previous Address

Present Address

I declare that all the above particulars are true to the best of my knowledge and belief as on this date.

We/I also declare that up to the date of submission of this application there has not been any change in any of the particulars previously intimated save and except the change notified above.

Date this ..... day of ..... 19.

Signatures

Certified that the person who has signed this notice has signed it in my presence and has affirmed that particulars furnished therein are true.

Signature of the witnesses

Note 1. Strike out items not required.

Note 2. This notice must be signed by partner or his agent specially authorised in this behalf in the presence of witness who must be a Gazetted Officer, a Justice of the Peace, a Magistrate, an Attorney of High Court, an Advocate, a Pleader or a Chartered Accountant.

FORM E

[See Section 63]

Notice of change of Constitution

Firm Name

Registered address

I, being a partner in the above-mentioned firm / an agent of a partner in the above-mentioned firm a person specially authorised by a partner in the above-mentioned firm to give notice in this behalf.

Hereby give notice that—

(a) the Constitution of the firm has been changed as follows :

(1) Mr./Messrs ..... of has/have joined the firm as new partner/partners on .....

(2) Mr./Messrs ..... of has/have retired as partner/partners of the firm with effect from .....

(b) the said firm has been dissolved on .....

I declare that all the above particulars are true to the best of my knowledge and belief as on this date.

We/I also declare that up to the date of submission of this application there has not been any change in any of the particulars previously intimated save and except the change notified above.

Date this ..... day of ..... 19.

Signature

Certified that the person who have signed this notice has signed it in my presence and he has affirmed that particulars furnished therein are true.

In the case of a person not conversant with the English language, the contents of the above particulars have been explained to him in a language familiar to him and he had affirmed the truth thereof.

Signature of witness

Note 1. Strike out item (a) or (b) whichever is not applicable.

Note 2. Give dates according to the English calendar.

Note 3. In case there is only one person left the firm should be considered as dissolved and the form should be filled in accordingly.

Note 4. This notice must be signed by a partner or his agent specially authorised in this behalf in the presence of witness who must be a Gazetted Officer, a Justice of the Peace, a Magistrate, an Attorney of High Court, an Advocate, a Pleader or a Chartered Accountant.

FORM F

[See Section 63 (2)]

Notice of election by a person admitted as a minor to the benefits of partnership in a firm to become or not to become a partner

Firm Name

Registered address

I, being, a person admitted as a minor to the benefits of partnership in the firm

_____

an agent of the person admitted as a minor to the benefits of partnership in the firm having been specially authorised in this behalf hereby give notice that—

We/I, the said person attained majority on ..... day of ..... 19..... and $\frac{\text{I/have}}{\text{he/has}}$ elected $\frac{\text{to become}}{\text{not to become}}$ a partner in the above-mentioned firm.

I declare that all the above particulars are true to the best of my knowledge and belief as on this date and belief as on this date.

We/I also declare that up to the date of submission of this application there has not been any change in any of the particulars previously intimated save and except the change notified above.

Dated this ..... day of ..... 19 .....

Signature

Certified that the person who has, signed this notice has signed it in my presence and has affirmed that the particulars furnished therein are true.

Signature of witness

FORM G

[See Section 59]

Register of Firms

Firm No.

Name

Business

No. of entry	Date of entry	Nature of entry	Remarks

Registrar of Firms

Note 1. Strike out items not required.

Note 2. This notice must be signed by a person admitted as a minor to the benefits of partnership or his agent specially authorised in this behalf in the presence of witness who must be a Gazetted Officer, a Justice of the Peace, a Magistrate, an Attorney of the High Court, an Advocate, a Pleader or a Chartered Accountant.

THE DELHI PARTNERSHIP (REGISTRATION OF FIRMS) RULES, 1972

No. F. 7/3/70/Firms, dated the 15th September, 1972.—In exercise of the powers conferred by sub-section (2) of Section 71 of the Indian Partnership Act, 1932 read with erstwhile State Ministry's Notification No. 104-J dated the 24th August, 1950 as amended by their Notifications No. 248-J dated the 24th October, 1951 and No. 14-J, dated the 3rd April, 1954, the Administrator of Delhi is pleased to make, after previous publication, the following rules namely :

1. **Short title.**—These rules may be called the Delhi Partnership (Registration of Firms) Rules, 1972.

2. **Definitions.**—In these rules unless there is anything repugnant in the subject or context :

(a) "Act" means the Indian Partnership Act, 1932.

(b) "Document" includes statements, intimations and notices prescribed by the Act.

(c) "Firm" means a body of persons consisting of two or more persons to which the Act applies.

(d) "Form" means a form in the Schedule to these rules.

(e) "Registrar" means an officer appointed by the Lt. Governor under Section 57 of the Act to perform the duties of the Registrar of Firms for the Union Territory of Delhi.

3. **Form and verification of documents under Sections 58 and 60.**—The documents submitted to the Registrar under Sections 58 and 60 of the Act shall, respectively, be in Forms I and II annexed to these rules and shall be verified in the manner indicated therein.

4. **Forms of Register of Firms, statements under Sections 58 and 60. Notices under Sections 61, 62 and 63 and index to Register of Firms.**—(i) The "Register of Firms" to be maintained by the Registrar under Section 59 of the Act shall be in the Form "A" annexed to these rules.

(ii) The statement required under Section 58 of the Act for the registration of a firm shall be in Form I.

(iii) The Statement under Section 60 of the Act relating to changes in the firm's name and the principal place of business, shall be in Form II.

(iv) The notice under Section 61 of the Act of closing and opening of branches shall be in Form III.

(v) The notice under Section 62 of the Act of changes in the names and addresses of partners shall be in Form IV.

(vi) The notice of alteration in Constitution of firm and dissolution of a firm, under sub-section (1) of Section 63 of the Act shall be in Forms V and VI respectively.

(vii) The notice of withdrawal from, or remaining in partnership to be given under sub-section (2) of Section 63 of the Act by a minor on attaining majority shall be in Form VII.

(viii) An Index to the Register of Firms shall be maintained by the Registrar in Form D.

The name and particulars relating to a firm shall be entered in the Register of Firms in the order of its registration on separate page or pages as the case may be. Each firm shall be assigned a number in a consecutive series commencing and ending with calendar year. A note of every document filed shall be entered in the Register in the page or pages allotted to the firm concerned and shall be signed by the Registrar, who will affix his stamp on it.

5. **Amendment of entries in Register.**—When an entry made in the Register of Firms is to be amended, the amendment shall be shown by means of a suitable note in "Red ink" in the remarks column opposite to the entry concerned and the new entry shall be made at the end of the existing entry or entries with suitable cross references.

6. **Procedure on disputes.**—When any partner or other person interested makes a protest in writing to the Registrar disputing any entry made in the Register of firms, the Registrar shall record such protests and make a reference thereto in "Red ink" in the remarks column against the disputed entry.

7. **Examination of documents received by the Registrar.**—On receipt of every statement, intimation notice or any other document required by the Act to be filed or registered in his office the Registrar shall examine it, and

if it is found to be defective or incomplete in any of the particulars required to be given therein or not verified in the manner prescribed by these rules, or in any way not in accordance with the provisions of the Act or these rules, he shall return it to the person who applied for filing or recording or to the firm concerned, and until proper rectification or completion is made, he shall not register or file the document in question nor shall he file or register the same unless and until the prescribed fees are paid to and received by him. The Registrar shall, pending the payment of such fees, act in the same way as if no such document or fact have been tendered for filing or recording or registration.

8. **Acknowledgement by the Registrar.**—The Registrar may acknowledge the receipt for filing of any document after necessary entries have been made in the Register of Firms' in accordance with the Form 'C' annexed to these Rules.

9. **Inquiries and investigation by the Registrar in case of disputes.**—The Registrar may in his discretion institute such enquiries or make such investigations in respect of any matter as may in his opinion be necessary for the performance of his duties and administration of the Act, especially when a dispute arises amongst the several partners of a firm, and the Registrar may in his discretion call upon any of partners or all of them to produce any original deed, document or such evidence as he thinks fit.

10. **Procedure on closing of business and dissolution.**—(i) Where the Registrar has reasonable cause to believe that a registered firm is not carrying on business or is not in operation or that it is finally dissolved but the prescribed intimation has not been given, he shall send by registered post to every partner of the firm at its last known address a letter enquiring whether the firm is not carrying on business or is in operation.

(ii) If the Registrar receives an answer from any partner to the effect that the firm is not carrying on business or is not in operation or if he does not within one month from the date of the posting of the letter receive any answer, he shall publish, in the local official Gazette and send to all the partners by registered post, a notice that at the expiration of three months from the date of that notice the name of the firm mentioned therein, shall, unless cause is shown to the contrary, be struck-off, the Register of Firms and the registration shall be deemed cancelled.

(iii) At the expiration of time mentioned in the notice the Registrar shall, unless cause is shown previously by the partners, strike its name of the Register, and shall publish notice thereof in the local official Gazette, and on the publication of such notice in the official Gazette, the registration of the firm shall stand cancelled.

11. Preservation and elimination of registers and records.—The Register of Firms and the index thereto shall be preserved permanently. All other records including the statements referred to in Section 58 relating to any firm may be destroyed on the expiry of five years from the date of the dissolution of such firm.

12. Index to Register of Firms.—(a) An index to the Register of Firm shall be prepared in English or in Hindi on loose sheets lettered alphabetically and shall contain the particulars shown in Form "A" annexed to these rules. A fresh index shall be prepared for each calendar year. The name of each firm shall be indexed as soon as the entries relating thereto are made in the Register of Firms.

(b) After all the firms registered in a year have been indexed, the index shall be checked by the Registrar who shall add a certificate in token of check and the pages shall then be numbered in ink.

(c) The index for each year shall, after it has been checked, be bound into volumes of convenient size.

13. Filing of documents.—A separate file shall be maintained in respect of each firm, in which all documents relating thereto received from time to time by the Registrar shall be filed. No document shall be filed by the Registrar unless the fee prescribed therefor has been paid.

14. Conditions of inspection.—The register shall be open to inspection on written application and on payment of the prescribed fee. The file of the document kept in the Registrar's office shall similarly be open to inspection by any person applying therefor ; provided the applicant satisfies the Registrar that he has sufficient interest in the contents of the documents or of which he applies for inspection and that mere inspection of Register will not serve his purpose :

Provided that he shall not have the right, while so inspecting, to take copies or extracts from any of the documents or the Register.

15. Grant of copies.—A copy of any entry in the Register shall be supplied to any person on written application and no payment of the prescribed fee.

16. Application for copies to be in writing.—Every application for a copy under Section 67 of the Act shall be in writing on judicial paper.

17. Scale of fees.—For the purpose of Chapter VII the following fees shall be charged in respect of documents noted against each :

(a)	Statement under Section 58	—	Three rupees.
(b)	Statement under Section 60	—	One rupee.
(c)	Intimation under Section 61	—	One rupee.
(d)	Intimation under Section 62	—	One rupee.
(e)	Notice under Section 63	—	One rupee.
(f)	Application under Section 64	—	One rupee.
(g)	Inspection of Register of Firms under sub-section (i) of Section 66.	—	Fifty paise for inspecting one volume of the Register.
(h)	Inspection of documents relating to a firm under sub-section 66.	—	Fifty paise for inspection of all documents relating to one firm.
(i)	Copies from the Register of Firms	—	Twenty-five paise for each 100 words or part thereof.

18. Mode of Payment.—All fees prescribed under the rules shall be paid in the form of Court-Fee Stamps, and the Registrar shall maintain a proper record of the fee so received daily.

FORM NO. I

[Rule 3 and 4 (ii)]

Application for Registration of Firm by the Name .....

Presented or forwarded to the Registrar of Firms for filing by .....

We, the undersigned being the partners of the Firm* ..... hereby apply for registration of the firm and for that purpose supply the following particulars in pursuance of Section 58 of the Indian Partnership Act, 1932.

The firm name*

Place of Business		(a) Principal Place (b) Other Places
Name of Partners in full	Date of joining the firm	Permanent address in full
1.		
2.		
3.		
4.		
5.		
6.		

Duration of the firm

Signatures of all partners or their specially authorised agents

Station .....

Date .....

I, ... son of .,..... years of age of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Signature

Date .....

Witness .....

I, ... son of ..... years of age of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Signature

Date .....

Witness .....

* Here enter the name of the firm

** If any partner is a minor the fact whether he is entitled to the benefits of partnership should be set out herein.

I, ... son of ..... years of age of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Signature

Date .....

Witness .....

I, ... son of ..... years of age of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Signature

Date .....

Witness .....

I, ... son of ..... years of age of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Signature

Date .....

Witness .....

I, ... son of ..... years of age of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Signature

Date .....

Witness .....

N.B. — This form must be signed by all partners or their agents specially authorised in this behalf in the presence of a witness who must be either a Gazetted Officer, Advocate, Attorney, Vakil, Magistrate or Registered Accountant.

FORM NO. II

[Rule 4 (iii)]

Notice of alteration in the name of the firm or in location of the principal place of business thereof

[See Section 60]

To

The Registrar of Firms

Notice is hereby given pursuant to Section 60 of the Indian Partnership Act, 1932, of the following alteration in the * Name ..... of the firm .....

Location of the principal place of business.

Date of Alteration	Name of the firm		Principal place of Business	
	Former Name	Present Name	Former Address	Present Address

Witness or Witnesses attesting the signatures

Signature of all the partners of the firm

Date .....

Verification

We, the partners of the firm ..... do hereby declare that the foregoing statement is true to our knowledge and belief.

Witness or Witnesses attesting the Signature

Signatures of all the partners of the firm

Date .....

N.B. — This form must be signed by all partners or their agents specially authorised in this behalf in the presence of a witness who must be either a Gazetted Officer, Advocate, Attorney, Vakil, Magistrate or Registered Accountant.

* Strike out the portion which does not apply.

FORM NO. III

[Rule 4 (iv)]

Intimation of change in the place of business (other than principal place of business)

Presented or forwarded to the Registrar of Firms for filing by .....

Under Section 61 of the Indian Partnership Act, 1932 intimation is hereby given that the changes specified below have occurred in the place of business of the firm.[1]

Date of change

1. The firm has discontinued business at .....

2. The firm has begum to carry on business at .....

Station .....

Date .....

Verified

Signature of any partner or agent of the firm

---

1. Here enter the name of the firm.

N.B. — Strike out the items not required.

This form must be signed by all partners or his agents specially authorised in this behalf in the presence of a witness who must be either a Gazetted Officer, Advocate, Attorney, Vakil, Magistrate or Registered Accountant.

FORM NO. IV

[Rule 4 (v)]

Intimation of alteration in the name or permanent address of a partner

Presented or forwarded to the Registrar of Firms for filing by .....

Under Section 62 of the Indian Partnership Act, 1932 intimation is hereby given that the changes specified below have occurred in the name or/and permanent address of partner in the firm*.

Name of partner

Previous name (in full)	New name (in full)

Address of Partner

Previous Permanent Address (in full)	Present Permanent Address (in full)

Station .....

Date .....

Signature of any partner, or agent of the firm

Verified

---

1. Here enter the name of the firm.

N.B.— Strike out the items not required.

This Form must be signed by the partner or his agents specially authorised in this behalf in the presence of a witness who must be either a Gazetted Officer, Advocate, Attorney, Vakil, Magistrate or Registered Accountant.

FORM NO. V

[Section 63 (ii) & Rule 4 (vi)]

Notice of change in the Constitution of a registered firm

The Registrar of Firms

I, ... being an incoming/continuing/outgoing partner of the firm* ..... do hereby give you notice to the following change in the Constitution of the said firm.

(Describe the change briefly but clearly and precisely)

N.B.—Certificate copy of alteration with certified copy of the new deed if one has been executed and certified translation of alteration and the deed if not in English language must accompany this notice and be shortly referred to here.

Verified

Date .....

Signature

FORM NO.VI

[Section 63 (i) & Rule (4) (vi)]

Notice of dissolution of a registered firm

To

The Registrar of Firms

I, ... a partner of the firm* ..... (or an authorised agent of) ..... a partner of the firm* ..... hereby give notice of dissolution of the said firm which took effect from the ..... day of ..... 19 .....

Certified copy of a deed dissolving the firm, if any, and certified translation of the deed, if not in the English language, must accompany the notice.

Verified

Date .....

Signature

N.B.—This form must be signed by any of the partners or their agents specially authorised in this behalf in the presence of a witness who must be either a Gazetted Officer, Advocate, Attorney, Vakil, Magistrate or Registered Accountant.

---

* Name of the firm

FORM NO. VII

[Section 63 (2) & Rule (4) (vii)]

Notice of withdrawal or remaining in a partnership to be given by a minor on attaining majority

Presented for filing by .....

I, ... son of ..... having been admitted to the benefits of partnership in the firm* ..... having its principal place of business at ..... hereby give notice that I have attained majority and have elected $\frac{\text{to become and have become}}{\text{not to become and have not become}}$ Partner of the said firm with effect from .....

Verified

Date.....

Signature of Electing Person
(or of person acting as an authorised
Agent of Electing person)

---

* Insert the name of the firm.

N.B.:— This form must be signed by the minor attaining majority or his agent specially authorised in this behalf in the presence of a witness who must be either a Gazetted Officer, Advocate, Attorney, Vakil, Magistrate or Registered Accountant.

FORM A

Register of firms

[See Rule 4 (i), Section 59]

S.N. of Firm :

Name of the Firm :

Date of Registration :

Duration of Firm :

Address :

Name and address of partners & changes therein

Name of partners	Address	Date of		Remarks
		Joining	Ceasing	

Principal place of business & changes therein

Particulars regarding the place Name of business	Date of change	Remarks

Name of Firm

Other Places of business & Changes therein				Changes in the name of the firm	
Name of Place	Date of Opening	Closing	Remarks	Firm name as changed	Date of change
1	2	3	4	5	6

Remarks	S. No. of documents	Description of documents	Date of Filing	Signature of Registrar
7	8	9	10	11

FORM B

[Rule 8]

Acknowledgement of Registration of Firms

The Registrar of Firms, Delhi, hereby acknowledges the receipt of the Statement Prescribed by Section 58 (1) of the Indian Partnership Act, 1932

The Statement has been filed and the name of the firm M/s..... has been entered in the Register of Firms, as No. ..... of 19

SEAL

Registrar of Firms
Delhi

Date the Day of 19

FORM C

[Rule 8]

Memorandum Acknowledging Receipt of documents

The Registrar of Firms, Delhi, hereby acknowledges the receipt of the undermentioned document / documents and intimates that it has / they have been filed in pursuance of the Indian Partnership Act, 1932.

(Here enter description of document/documents)

Station

Date.....

To
Registrar of Firms
M/s.
Delhi

FORM D

[Rule 4 (viii)]

Index to the Register of Firms

Serial No.	Name of the firm	Registration No./Year	Principal Place of business

GUJARAT PARTNERSHIP RULES

[See Bombay Partnership Rules which is applicable to Gujarat].

HARYANA PARTNERSHIP RULES

[Punjab Partnership (Registration of Firms) Rules, 1932 are applicable to Haryana, with Rule 1-A, omitted].

HIMACHAL PRADESH PARTNERSHIP RULES

[Punjab Partnership (Registration of Firms) Rules, 1932 are applicable to Himachal Pradesh, with Rule 1-A Omitted].

JAMMU AND KASHMIR PARTNERSHIP(REGISTRATION OF FIRMS) RULES, 1996 (SAMVAT)

No. 10-L/96.—In exercise of the powers conferred by sub-section (2) of Section 71 of the Jammu and Kashmir State Partnership Act, 1996 (V of 1996), the Government is pleased to make the following rules, the same having been previously published as required by sub-section (3) of the said section namely:

1. **Short title.**—These rules may be called the Jammu and Kashmir Partnership (Registration of Firms) Rules, 1996.

2. **Definitions.**—In these rules unless there is anything repugnant in the subject or context :—

(a) "the Act" means the Jammu and Kashmir Partnership Act, 1996 and

(b) "Registrar" means the "Registrar of Firms" (Registrar, Co-operative Credit Societies).

3. **Form and verification of statements under Sections 58 and 60.**—The statements submitted to the Registrar under Sections 58 and 60 of the Act shall, respectively, be in Forms I and II annexed to these Rules, and shall be verified in the manner indicated therein.

4. **Form of intimation and notice under Sections 61, 62 and 63.**—Intimation and notices under Sections 61, 62, 63 (1) and 63 (2) of the Act shall respectively, be in Forms III, IV, V and VI annexed to these rules with such variations as may be necessary to suit each case.

5. **Register of Firms.**—Register of Firms shall be in Form A annexed to these rules. The name of and the particulars relating to a firm shall be entered therein in the order of its registration on a separate page or pages, as the case may be. Each firm shall be assigned a number in a consecutive series commencing and ending with a calender year. A note of every document filed shall be entered in the register in the page or pages allotted to the firm concerned and shall be signed by the Registrar.

6. **Amendment of entries in Register.**—When an entry made in the Register of Firms is to be amended, the amendment shall be shown by means

of a suitable note in red ink in the remarks column opposite to the entry concerned, and the new entry shall be made at the end of the then existing entry or entries with suitable cross-references.

7. **Protest against entries in Register.**—Where any partner or other person interested makes a protest in writing to the Registrar disputing any entry made in the Register of Firms, the Registrar shall record protest and make a reference thereto in red ink in the remarks column against the disputed entry.

8. **Index to Register of Firms.**—(a) An index to the Register of Firms shall be prepared in English on loose sheets letter alphabetically and shall contain the particulars shown in Form B annexed to these rules. A fresh index shall be prepared for each calendar year. The name of each firm shall be indexed as soon as the entries relating thereto are made in the Register of Firms.

(b) After all the firms registered in a year have been indexed, the index shall be checked by the Registrar who shall add a certificate in token of such check, and pages shall then be numbered in ink.

(c) The index for each year shall after check be bound into a volume or volumes of convenient size.

9. **Certificate of Registration and filing of documents.**—(a) Upon the registration of a firm, the Registrar shall grant to the firm a certificate in Form C annexed to these rules, and on the filing of any document required to be filed under the Act, he shall grant to the person filing it a certificate in Form D annexed to these rules.

(b) On every document filed under this Act, the Registrar shall endorse the following particulars, namely :—

(i) The number borne by the firm on the register ;

(ii) The name of the firm ;

(iii) The description of the document ;

(iv) The serial number of the document ; and

(v) The date of filing.

The Registrar shall also affix his signature and the seal of his office to such document.

(c) If there is no space on the document for entering the particulars referred to in clause (b) the entry shall be made on a separate paper which shall be attached to the document and a note of the fact shall be made on the document itself and signed by the Registrar.

10. Filing of documents.—A separate file shall be maintained in respect of each firm, in which all documents relating thereto received from time to time by the Registrar shall be filed. No document shall be filed by the Registrar unless the fee prescribed therefor has been paid .

11. Account of and receipt for fees.—An account of all fees received in the Registrar's office shall be maintained therein.

A receipt in Form E shall be granted in respect of every fee received.

12. Inspection of original document.—Any person interested in a firm may, on satisfying the Registrar of such interest and on payment of the prescribed fee, inspect the original document relating to the firm with the Registrar.

13. Application for copies to be in writing.—Every application for a copy under Section 67 of the Act shall be in writing on judicial paper.

14. Seal.—The seal used by the Registrar shall bear the words "Registrar of Firms, Jammu and Kashmir State".

15. Preservation and elimination of Registers and records.—The Registers of Firms and the index thereto shall be preserved permanently. All other records including the statement referred to in Section 58 may be destroyed on the expiry of 5 years from the date of the dissolution of the firms concerned.

16. Translation to be furnished where original not in English.—If any document required to be filed under the Act or any portion of such document is not in English language, a translation of such document or portion certified as correct by at least one partner (or his authorised agent) shall be furnished along with each copy of such document or portion.

17. Office hours.—The office of the Registrar of Firms shall be open for business (Sundays and authorised holidays excepted) between the hours of 10 a.m. to 4 p.m.)

18. Administration report.—The Registrar shall submit to the Government so as to reach them on or before the 30th Maghar each year a report on the working of the Jammu and Kashmir Partnership Act, 1996 during the official year ending the 30th Assuj preceding.

FORM A

[Rule 5]

Register of Firms

(Maintained under Section 59 of the Jammu and Kashmir Act, 1996)

1. Serial number of firm.
2. Name of firm.
3. Date of Registration.
4. Duration of the firm.
5. Address.

Name of Firm	Date of change	Remarks

6. Partners

Name of Partners	Address	Date of		Remarks
		Joining	Ceasing	

Name of Firm

Serial Number of the document	Description of document	Date of filing	Signature of Registrar

Name of Firm

Serial Number of the document	Description of document	Date of filing	Signature of Registrar

FORM I

Filing Fee—Rs. 2/-

The Jammu and Kashmir State Partnership Act, 1996 (Samvat)

Application for registration of firm by the name ..... presented to the Registrar of Firms for filing by .....

We, the undersigned, being the partners of the firm ..... hereby apply for registration of the said firm and, for that purpose supply the following particulars pursuant to Section 58 of the Jammu and Kashmir State Partnership Act, 1996.

The Firm's Name

Place of business

(a) Principal place
(b) Other places.

Name of the partners in full	Date of joining the firm	Permanent address in full
1.		
2.		

Duration of the firm

Station .....

Date .....

Signatures of the partners or their specially authorised agents

I, ... son of ..... years of age of ..... religion, resident of ..... do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date .....

Witness .....

Signature

I, ... son of ..... years of age of ..... religion, resident of ..... do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date .....

Witness .....

Signature

N.B.— This form must be signed by all partners or their agents specially authorised in this behalf in the presence of a witness who must be either a Gazetted Officer, Advocate, Attorney, Pleader, or Magistrate.

FORM II

Filing Fee—Seventy Five Paise

The Jammu and Kashmir State Partnership Act, 1996 (Samvat)

Statement of alteration in the name of the firm or in the location of the principal place of business.

Presented to the Registrar of Firms for filing by .....

We, the undersigned being the partners of firm ..... hereby supply the following particulars pursuant to Section 60 (1) of the Jammu and Kashmir Partnership Act, 1996.

Name of Firm

Previous Name	New Name

Principal Place of business

Previous Place	New place

Station .....

Date .....

Signature of the partners or their specially authorised agents.

I, ... son of ..... years of age of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date .....

Witness .....

Signature

I, ... son of ..... years of age of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date .....

Witness .....

Signature

FORM III

[See Section 61]

Filing Fee—Seventy Five Paise

The Jammu and Kashmir Partnership Act, 1996 (Samvat)

Intimation of change in the place of business (other than principal place of business)

Presented to the Registrar of Firms for filing by .....

Under Section 61 of the Jammu and Kashmir Partnership Act, 1996, intimation is hereby given that the changes, specified below have occurred in the place of business of the firm .....

Date of change.

1. The firm has discontinued business at .....
2. The firm has begun to carry on business at .....

Station .....

Date .....

Signature of the partner or agent of the firm

N.B.—Strike out items not required.

FORM IV

[See Section 62]

Filing Fee—Seventy Five Paise

The Jammu and Kashmir Partnership Act, 1996 (Samvat)

Presented to the Registrar of Firms for filing by .....

Under Section 62 of the Jammu and Kashmir Partnership Act, 1996 intimation is hereby given that the change specified below has occurred in the name or / and permanent address of partner of the firm .....

Name of partner

Previous Name (in full)	New Name (in full)

Address of Partner

Previous address (in full)	Present address (in full)

Station .....

Date .....

Signature of any partner or agent of the firm.

FORM V

[See Section 63 (1)]

Filing Fee—Seventy Five Paise

The Jammu and Kashmir Partnership Act, 1996 (Samvat)

Notice of changes in the Constitution of the firm or of the dissolution of the firm.

Presented to the Registrar of Firms for filing by .....

Under Section 63 (1) of the Jammu and Kashmir Partnership Act, 1996 notice is hereby given that :—

(1) The Constitution of the firm ..... has been altered as follows :

Name and full address of the incoming partner and date of his joining the firm	Name and full address of the outgoing partner and date of his ceasing to be partner

Station .....

Date .....

Signature of the incoming, continuing or outgoing partner or of his specially authorised agent.

(2) The firm ..... has been dissolved with effect from .....

Station .....

Date .....

Signature of the person who was a partner immediately before the dissolution or of his specially authorised agent.

FORM VI

[See Section 63 (2)]

Filing Fee—Seventy Five Paise

The Jammu and Kashmir Partnership Act, 1996 (Samvat)

Notice of election by person admitted to the benefits of partnership on attaining majority.

Presented to the Registrar of Firms for filing by .....

Under Section 63 (2) of the Jammu and Kashmir Partnership Act, 1996 notice is hereby given that ..... admitted to the benefits of partnership in the firm ..... having now attained majority elects to become a partner/elects not to become a partner of the said firm.

Station .....

Date .....

Signature of the person electing

or of his specially authorised agent.

FORM B

[Rule 8]

Index to the Register of Firms

Firm name	Name of partners	Principal place of business	Volume number	First page of entry	Number borne on the register
1	2	3	4	5	6

FORM C

[Rule 9 (a)]

Acknowledgement of Registration of Firms

The Registrar of Firms, Jammu and Kashmir State, hereby acknowledges the receipt of the Statement prescribed by Section 58 (1) of the Jammu and Kashmir Partnership Act, 1996. The statement has been filed and the name of the Firm ..... has been entered in Register of Firms as ..... No. ..... of 19

SEAL

Date the ..... day of 19

Registrar of Firm

FORM D

[Rule 9 (a)]

Memorandum Acknowledging Receipt of Documents

The Registrar of Firms, Jammu and Kashmir State, hereby acknowledges the receipt of the undermentioned document/documents and intimates that it has been/they have been filed pursuant to Jammu and Kashmir Partnership Act, 1996.

(Here enter description of document/documents).

Station .....

Date .....

Registrar of Firms

To

Mr.
Messrs.

FORM E

[Rule 11]

Receipt for fees

Received from ..... the sum of rupees (in words) ..... being the fees for .....

Rs..... P.....

Filing statement

Filing notice

Inspection of

Copy of

(number of words) Total:

Station .....

Dated 19

Registrar of Firms

KARNATAKA PARTNERSHIP (REGISTRATION OF FIRMS) RULES, 1954

Notification No. S.R. 6380/J. S. 2-53-11, dated October 11, 1956.—In exercise of the powers conferred by Section 71 of the Indian Partnership Act, (Central Act, IX of 1932) and in supersession of the Mysore Partnership (Registration of Firms) Rules, 1932 and the Madras Partnership (Registration of Firms) Rules, 1932), as in force in Bellary District, the Government of Mysore are pleased to make the following Rules, the draft of the said Rules having been published under Notification No. S.R. 3549/J.S. 2-53-10, dated 4th/9th August, 1954, in Part IV, Section 2-C of the Mysore Gazette, dated 12th August, 1954, as required by sub-section (3) of the said section :

1. **Short title.**—These rules may be called the Karnataka Partnership (Registration of Firms) Rules, 1954.

2. **Definitions.**—In these Rules, unless there is anything repugnant in the subject or context—

(a) "the Act" means the Indian Partnership Act, 1932 ; and

(b) "Registrar" means the Registrar of Firms.

3. **Forms and verification of Statements under Sections 58 and 60.**—The statements submitted to the Registrar under Sections 58 and 60 of the Act shall respectively be in Forms I and II annexed to these Rules and shall be verified in the manner indicated therein, provided that when a statement is signed by a specially authorised agent, the original power of attorney or an express letter of authority from the partner or partners concerned shall be produced for inspection by the Registrar to prove authentication.

4. **Forms of intimations and notices under Sections 61, 62 and 63.**

1. Intimation and notices under Sections 61, 62, 63 (1) and 63 (2) of the Act shall respectively by in Forms III, IV, V and VI annexed to these rules with such variations as circumstances may require.

2. Every statement, intimation or notice relating to a firm, under Sections 60, 61, 62, 63 (1) and 63 (2) of the Act shall be sent or given to the Registrar together with the prescribed fee within fifteen

days from the date of occurrence of the event referred to in such statement, intimation or notice.

5. **Register of Firms.**—The Register of Firms shall be in Form "A" annexed to these rules. The name of and the particulars relating to each firm shall be entered therein in the order of its registration on a separate page or pages. Each firm shall be assigned a number in a consecutive series commencing and ending with the calendar year. A note of every document filed shall be entered in the register in the page or pages allotted to the firm concerned and shall be signed by the Registrar.

6. **Amendment of entries in register.**—When an entry made in the Register of Firms is to be amended, the amendment shall be shown by means of suitable note in the remarks column opposite to the entry concerned, and the new entry shall be made at the end of the existing entry or entries with suitable cross-references.

7. **Protest against entries in register.**—Where any partner or other person interested makes a protest in writing to the Registrar disputing any entry made in the Register of Firms the Registrar shall record such protest and make a reference thereto in red ink in the remarks column against the disputed entry.

8. **The Registrar's powers of enquiry and investigation.**—The Registrar may, in case of dispute, institute such inquiries or make such investigation as may, in his opinion, be necessary for the proper performance of his duties under the Act.

9. **Index to the Register of Firms.**—(a) An index to the Register of Firms shall be prepared in English on loose sheets lettered alphabetically and shall contain the particulars shown in Form B annexed to these rules. A fresh index shall be prepared for each calendar year. The name of each firm shall be indexed as soon as the entries relating thereto are made in the register of firms.

(b) After all the firms registered in a year have been indexed, the index, shall be checked by the Registrar who shall add a certificate in token of such check and the pages shall then be numbered in ink.

(c) The index for each year shall, after it has been checked, be bound into volumes of convenient size.

10. **Acknowledgment of registration and documents.**—(a) Upon the registration of a firm, the Registrar shall grant to the firm an acknowledgment in Form C annexed to these rules and on the filing of any documents

required to be filed under the Act, he shall grant to the person at whose instance it is filed an acknowledgment in Form D annexed to these rules.

(b) On every document filed under the Act, the Registrar shall endorse the following particulars, namely :—

(i) the number borne by the firm on the Register ;

(ii) the name of the firm ;

(iii) the description ;

(iv) the serial number of the document ; and

(v) the date of filing.

The Registrar shall also affix his signature and the seal of his office to such document.

(c) If there is no space on the document for entering the particulars referred to in sub-rule (b), the entry shall be made on a separate paper which shall be made on the document itself and shall be signed by the Registrar.

11. Filing of documents.—(a) The Registrar shall examine every statement, intimation, notice or other document received by him which is required by the Act to be registered, recorded or filed and if he finds any such statement, intimation, notice or other document to be defective or incomplete in any of the particulars required by the Act, or these rules, he shall return it to the party or firm tendering it., for due rectification or completion and until such statement, intimation, notice or other document is so rectified or completed, he shall not register, record or file the same.

(b) No statement, intimation, notice or other document in respect of which a fee is payable, shall be registered, recorded or filed by the Registrar until the fee has been paid to him, and the Registrar shall, pending such payment, act as if no such statement, intimation, notice or other document has been tendered for registration, record of filing.

(c) A separate file shall be maintained in respect of each firm in which all documents relating thereto received from time to time by the Registrar shall be filed.

12. Account of and receipt for fees.—An account of all fees received in the Registrar's office shall be maintained therein. A receipt in Form E shall be granted in respect of every fee received.

13. **Inspection of the indexes to the register of firms and of original document.**—(i) The indexes to the register of firms maintained by the Registrar may be inspected by any person on payment of the following fees :

(a) for searching the index for any one year for entries relating to a single firm—One rupee.

(b) for searching the index for every other year for entries relating to the same firm—fifty paise.

(ii) All statements, notices and intimations filed by a firm under Chapter VII of the Act may also be inspected on payment of the prescribed fee by any person on his satisfying the Registrar that he is interested in the firm.

14. **Application for copies and fees for grant of copies.**—(i) Every application for a copy under Section 67 of the Act shall be in writing.

(ii) For grant of copies, other than copies from the Registrar of Firms, the following fees shall be levied, namely :

(a) for a certified copy of an acknowledgement of registration of a firm—One rupee.

(b) for a certified copy or extract from any other document—Fifty paise for each hundred words or part thereof.

15. **Seal.**—The seal used by the Registrar shall bear the words "Registrar of Firms, Karnataka".

16. **Preservation and elimination of registers and records.**—(a) The Registrar of Firms and index thereto shall be preserved permanently.

(b) All other records, including the statements referred to in Section 58 of the Act, may be destroyed—

(i) in the case of a firm which has been dissolved, on the expiry of five years from the date of its dissolution ; and

(ii) in the case of a firm which, though not dissolved, has not been transacting business and has not been heard for a period of not less than seven years, in accordance with and subject to the provisions of sub-rule (c).

(c) In cases falling under clause (ii) of sub-rule (b), the Registrar, shall publish in the Karnataka Gazette, and at the same time send by registered post to any of the partners of the firm concerned to his last known address, a notice stating that the records and statement relating to the firm will be destroyed unless cause is shown to the contrary within a period of

three months from the date of publication of the notice in the Karnataka Gazette. If cause is not shown as aforesaid, the records and statements may be destroyed.

17. **Translations to be furnished where original is not in English or Kannada.**—If any document required to be filed under the Act, or any portion of such document is not in English or Kannada language, an English translation of such document or portion, certified as correctly by at least one partner (or his authorised agent) shall be furnished along with each copy of such document or portion.

18. **Office hours.**—The office of the Registrar shall be open for business (Sundays and authorised holidays excepted) between the hours of 11 a.m. and 5 p.m. except on Saturdays, when it shall be open between 8 a.m. and 12 noon.

19. **Administration report.**—The Registrar shall submit to the State Government so as to reach them on or before the 1st June in each year, a report on the working of the Act, during the year ending the 31st March preceding.

*[SCHEDULE I

Maximum Fees

[See sub-section (1) of Section 71]

Document or act in respect of which the fee is payable	Maximum Fee
Statement under Section 58	One hundred and one rupee
Statement under Section 60	Fifty rupees
Intimation under Section 61	Twenty five rupees
Intimation under Section 62	Twenty five rupees
Notice under Section 6.3	Twenty five rupees
Application under Section 6.4	One rupee
Inspection of the Register of Firms under sub-section (1) of Section 66	Twenty rupees for inspecting one volume of the Register
Inspection of documents relating to a firm under sub-section (2) of Section 66	Ten rupees for the inspecting all documents relating to one firm
Copies from the Register of Firms	Twenty-five rupees for each hundred words or part thereof".

1. Amended by Karnataka Act No. 1 of 1987, Sec. 2, w.e.f. 30-04-1987.

FORM I

[1][See Rule 3]

Filing Fee Rs. 101/-

APPLICATION FOR REGISTRATION OF FIRM BY THE NAME*

Presented to the Registrar of Firms for filing by

We, the undersigned, being the partners of the firm* hereby apply for registration of the said firm and for that purpose, supply the following particulars, pursuant to Section 58 of the Indian Partnership Act, 1932.

The Firm's Name

Place of business (a) Principal place

(b) Other places.

Name of partners in full	Date of joining the firm	Permanent address in full
1.		
2.		

Duration of the firm

Signature of the partners or their specially authorised agents.

Station.....

Date.....

I, ...son of.....years of age of.....religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date.....

Witness.....

Signature

I, ...son of.....years of age of.....religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date.....

Witness.....

Signature

*Here enter the name of firm.

If any partner is a minor the fact whether he is entitled to the benefits of partnership should be set out herein.

N.B.—This form must be signed by all partners or their agents specially authorised in this behalf in the presence of a witness or witnesses who must be either a Gazetted Officer, Advocate, Attorney, Pleader, Honorary Magistrate or Registered Account.

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1. Amended by Act No. 1 of 1987 w.e.f. 30-4-1987.

FORM II

[See Rule 3]

[1][Filing Fee—Rs. 50/-]

*STATEMENT OF ALTERATION IN THE NAME OF THE FIRM OR IN LOCATION OF THE PRINCIPAL PLACE OF BUSINESS

Presented to the Registrar of Firms for filing by

We, the undersigned, being the partners of the firm* hereby supply the following particulars pursuant to Section 60 (1) of the Indian Partnership Act, 1932 :—

NAME OF FIRM

Previous name

New name

PRINCIPAL PLACE OF BUSINESS

Previous place

New place

Station.....

Date.....

Signature of the partners or their

Specially authorised agents.

I, ...son of.....years of age of.....religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date.....

Witness.....

Signature

I, ...son of.....years of age of.....religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date.....

Witness.....

Signature

* Here enter the name of firm.

N.B.—Strike out items not required.

---

1. Amended by Act No. 1 of 1987 w.e.f. 30-4-1987.

FORM III

[See Rule 4]

[1][Filing Fee—Rs. 25/-]

INTIMATION OF CHANGE IN THE PLACE OF BUSINESS (OTHER THAN PRINCIPAL PLACE OF BUSINESS)

Presented to the Registrar of Firms for filing by

Under Section 61 of the Indian Partnership Act, 1932 intimation is hereby given that the changes specified below have occurred in the place of business of the firm*.

Date of change

1. The firm has discontinued business at

2. The firm has begun to carry on business at

Station .....

Date .....

Signature of any partner or agent of the firm

---

* Here enter the name of firm.
N.B.—Strike out items not required.

FORM IV

[See Rule 4]

INTIMATION OF ALTERATION IN THE NAME OR PERMANENT ADDRESS OF PARTNER

[1][Filing Fee — Rs. 25/-]

Presented to the Registrar of Firms for filing by

Under Section 62 of the Indian Partnership Act, 1932 intimation is hereby given that the change specified below has occurred in the name or/and/ permanent address of partner in the firm*.

---

1. Amended by Act No. 1 of 1987 w.e.f. 30-4-1987.

NAME OF PARTNER

Previous name (in full) New name (in full)

Previous permanent address (in full) Present permanent address (in full)

Station .....

Date .....

Signature of any partner or agent of the firm

* Here enter the name of firm.
N.B.—Strike out items not required.

FORM V

NOTICE OF CHANGES IN THE CONSTITUTION OF THE FIRM OR OF THE DISSOLUTION OF THE FIRM

[1][Filing Fee Rs. 25/-]

[See Rule 4]

Presented to the Registrar of Firms for filing by

Under Section 63 (1) of the Indian Partnership Act, 1932 notice is hereby given that—

(1) The Constitution of the firm* follows :—

Name and full address of the incoming partner and date of his joining the firm	Name and full address of the outgoing partner and date of his ceasing to be partner

Station .....

Date .....

Signature of the incoming, continuing or outgoing partner or of his specially authorised agent.

(2) The firm* has been dissolved with effect from the

Station .....

Date .....

Signature of the person who was a partner immediately before the dissolution or of his specially authorised agent.

*Here enter the name of firm.
N.B.—Strike out items not required.

1. Amended by Act No. 1 of 1987 w.e.f. 30-4-1987.

FORM VI

[1][Filing Fee—Re. 25/-]

NOTICE OF ELECTION BY PERSON ADMITTED TO THE BENEFITS OF PARTNERSHIP ON ATTAINING MAJORITY

[See Rule 4]

Presented to the Registrar of Firms for filing by

Under Section 63 (2) of the Indian Partnership Act, 1932 notice is hereby given that admitted to the benefits of the partnership in the firm*

having now attained majority elects to become/elects not to become ..... a partner of the said firm.

Station .....

Date.....

Signature of the person electing or of his specially authorised agent

*Here enter the name of the firm.

FORM A

[Rule 5]

REGISTER OF FIRMS

(MAINTAINED UNDER SECTION 59 OF THE INDIAN PARTNERSHIP ACT, 1932)

1. Serial number of firm.
2. Name of the firm (as originally registered)
3. Date of registration
4. Duration of the firm (at the time of registration)
5. Name and addresses of partners and changes therein

Name of Partners	Address	Date of Joining/Ceasing	Remarks

6. Principal place of business and changes therein

Particulars regarding the place	Date of change	Remarks

7. Other places of business and changes therein

Name of place	Date of Opening/Closing	Remarks

8. Change in the name of firm

Firm name as changed	Date of change	Remarks

9. Documents filed

Serial number of the document	Description of document	Date of filing	Signature of Registrar

1. Amended by Act No. 1 of 1987 w.e.f. 30-4-1987.

FORM B

[See Rule 9]

INDEX TO THE REGISTER OF FIRMS

Firm name	Serial number borne on the Register	Volume number of the Register	First page of entry in volume	Remarks	Signature of Registrar
1	2	3	4	5	6

FORM C

[See Rule 10 (a)]

ACKNOWLEDGEMENT OF REGISTRATION OF FIRMS

The Registrar of Firms Karnataka hereby acknowledges the receipt of the statement prescribed by Section 58 (1) of the Indian Partnership Act, 1932. The Statement has been filed and the name of the firm* ..... has been entered in the Register of Firms

as No. .....of 19.....

SEAL

Station .....

Date the .....day of 19 .....

No. .....Dated ..... the 19.....

Registrar of Firms

Forward to Mr./ Messrs. with reference to his/their letter No. dated the 19 .....

*Here enter name of the firm.

FORM D

[See Rule 10 (a)]

Memorandum acknowledging receipt of documents

The Registrar of Firms, Karnataka hereby acknowledges the receipt of the under mentioned document document and intimates that it has/they have been filed in pursuant of the Indian Partnership Act, 1932 :

(Here enter description of document documents).

Station .....

Dated 19

Registrar of Firms

Mr.
Messrs

MEMO OF FEES RECEIVED

No.

Dated..... ..... the 19.

Forwarded to Mr./Messrs. with reference to his/their letter No. ..... dated the .....19.

Registrar of Firms

FORM E

[See Rule 12]

RECEIPTS FOR FEES

Received from Rs. P.
the sum of rupees (in words)
being the fees for
Filing Statement
Filing notice
Inspection of
Copy of (number of words) Total :
Station .....
Date 19

Registrar of Firms

KERALA PARTNERSHIP (REGISTRATION OF FIRMS) RULES, 1959

1. **Short Title.**— These rules may be called the "Kerala Partnership (Registration of Firms) Rules, 1959".

2. **Definitions.**—In these Rules, unless there is anything repugnant in the subject or context—

(a) "the Act" means the Indian Partnership Act, 1932, and

(b) "Registrar" means the 'Registrar of Firms'.

3. **Forms and verifications of statement under Sections 58 and 60.**—The statement submitted to the Registrar under Sections 58 and 60 of the Act shall respectively be in Forms I and II annexed to these rules together with the fees specified in those forms and shall be verified in the manner indicated therein : provided that when a statement is signed by a specially authorised agent, the original power of attorney or an expressed letter of authority from the partner or partners concerned shall be produced for inspection by the Registrar to prove authentication.

4. **Forms of intimations and notices under Sections 61, 62 and 63.**—(1) Intimations and notices under Sections 61, 62, 63 (1) and 63 (2) of the Act, shall respectively be in Forms III, IV, V and VI annexed to these Rules together with the fees specified in those forms with such variations as circumstances may require.

2. Every statement, intimation or notice relating to a firm, under Sections 60, 61, 62, 63 (1) and 63 (2) of the act shall be sent or given to the Registrar together with the maximum fees prescribed in the Schedule to the Act, within 15 days from the date of occurrence of the event referred to in such statement, intimation or notice.

5. **Register of Firms.**—The Register of Firms shall be in Form "A" annexed to these Rules. The name of and the particulars relating to each firm shall be entered therein in the order of its registration on a separate page or pages. Each firm shall be assigned a number in a consecutive series commencing and ending with the calendar year. A note of every document filed shall be entered in the register in the page or pages allotted to the firm concerned and shall be signed by the Registrar.

6. **Amendment of entries in Register.**—When an entry made in the Register of Firms is to be amended, the amendments shall be shown by means of suitable note in the remarks column opposite to the entry concerned, and the new entry shall be made at the end of the existing entry or entries with suitable cross-references.

7. **Protest against entries in Register.**—Where any partner or other person interested makes a protest in writing to the Registrar disputing any entry made in the Register of Firms, the Registrar shall record such protest and make a reference thereto in red ink in the remarks column against the disputed entry.

8. **The Registrar's power of inquiry and investigation.**—The Registrar may, in case of dispute, institute such inquiries or make such investigations as may in his opinion, be necessary for the proper performance of his duties under the Act.

9. **Index to the Register of Firms.**—(a) An index to the Register of Firms shall be prepared in English on loose sheets lettered alphabetically and shall contain the particulars shown in Form B annexed to these rules. A fresh index shall be prepared for each calendar year. The name of each firm shall be indexed as soon as the entries relating thereto are made in the Register of firms.

(b) After all the firms registered in a year have been indexed, the index shall be checked by the registrar who shall add a certificate in token of such check and the pages shall then be numbered in ink.

(c) The index for each year shall, after it has been checked be bound into volumes of convenient size.

10. **Acknowledgment of registration and documents.**—(a) Upon the Registration of a firm, the Registrar shall grant to the firm an acknowledgment in Form C annexed to these rules, and on the filing of any documents required to be filed under the Act, he shall grant to the person at whose instance it is filed an acknowledgment in Form D annexed to these rules.

(b) On every document filed under the Act the Registrar shall endorse the following particulars namely :—

(i) the number borne by the firm on the Register ;

(ii) the name of the firm ;

(iii) the description of the document;

(iv) the serial number of the document ; and

(v) the date of filing.

The Registrar shall also affix his signature and the seal of his office to such document.

(c) If there is no space on the document for entering the particulars referred to in sub-rule (b), the entry shall be made on a separate paper which shall made on the document itself and shall be signed by the Registrar.

11. Filing of documents.—(a) The Registrar shall examine every statement, intimation, notice or other document received by him which is required by the Act to be registered, recorded or filed and if he finds any such statement, intimation, notice or other document, to be defective or incomplete in any of the particulars required by the Act, or these rules, he shall return it to the party or firm tendering it, for the rectification or completion and until such statement, intimation, notice or other document is so rectified or completed, he shall not register, record or file the same.

(b) No statement, intimation, notice or other document in respect of which a fee is payable, shall be registered, recorded or filed by the Registrar until the fee has been paid to him and the Registrar shall, pending such payment, act as if no such statement, intimation, notice or other document had been tendered for registration, record of filing.

(c) A separate file shall be maintained in respect of each firm in which all documents relating thereto received from time to time by the Registrar shall be filed.

12. Account of and receipt for fees.—An account of all fees received in the Registrar's Office shall be maintained therein. A receipt in Form E shall be granted in respect of every fee received.

13. Inspection of the indexes to the register of firms and of original document.—(i) The indexes to the register of firms maintained by the Registrar may be inspected by any person on payment of the following fees :—

(a) for searching the index for any one year for entries relating to a single firm—one rupee.

(b) for searching the index for every other year for entries relating to the same firm—fifty paise.

(ii) All statements, notices and intimations filed by a firm under Chapter VII of the Act may also be inspected on payment of the maximum fee prescribed in the Schedule to the Act by any person on his satisfying the Registrar that he is interested in the firm.

14. Application for copies and fees for grant of copies.—(i) Every application for a copy under Section 67 of the Act shall be in writing.

(ii) For the grant of copies, other than copies from the Register of Firms the following fees shall be levied, namely :—

(a) For a certified copy of an acknowledgement of registration of a firm—one rupee.

(b) For a certified copy of or extract from any other document—Fifty paise for each hundred words or part thereof.

(iii) For the grant of a certified copy of extract from the register of firms, a fee of fifty paise for each hundred words or part thereof shall be levied.

15. Seal.—The seal used by the Registrar shall bear the words "Registrar of Firms, Kerala".

16. Preservation and elimination of registers and records.—(a) The Register of Firms and index thereto shall be preserved permanently.

(b) All other records, including the statements referred to in Section 58 of the Act, may be destroyed—

(i) in the case of a firm which has been dissolved, on the expiry of five years from the date of its dissolution ; and

(ii) in the case of a firm which, though not dissolved, has not been transacting business and has not been heard for a period of not less than seven years, in accordance with the subject to the provisions of sub-rule (c).

(c) In case falling under clause (ii) of sub-rule (b). The Registrar shall publish in the Gazette, and at the same time send by registered post to any one of the partners of the firm con-

cerned to his last known address, a notice stating that the records and statements relating to the firm will be destroyed unless cause is shown to the contrary within a period of three months from the date of publication of the notice in the Gazette. If cause is not shown as aforesaid, the records and statement may be destroyed.

17. **Translations to be furnished where original is not in English or Malayalam.**—If any document required to be filed under the Act or any portion of such document is not in the English or Malayalam language, an English or Malayalam translation of such document or portion, certified as correctly by at least one partner (or his authorised agent) shall be furnished along with each copy of such document or portion.

18. **Office hours.**—The office of the Registrar shall be open for business (Sundays and authorised holidays excepted) between the hours of 11 a.m. and 4.30 p.m. except on Saturdays, when it shall be open between 11 a.m. and 1.00 p.m.

19. **Administration report.**—The Registrar shall submit to the Government so as to reach them on or before the 1st June in each year a report on the working of the Act, during the official years ending the 31st March preceding.

20. The Travancore-Cochin Partnership (Registration of Firms) Rules, 1952 and the Madras Partnership (Registration of Firms) Rules, 1932, in their application to the territories referred to as Malabar District in Section 5 (2) of the States Reorganisation Act, 1956 (Central Act 37 of 1956) are hereby repealed :

Provided that any order made or action taken under the rules so repealed shall be deemed to have been made or taken under the corresponding provisions of these Rules.

FORM A

[See Rule 5]

Register of Firms

(Maintained under Section 59 of the Indian Partnership Act, 1932)

1. Serial number of firm.
2. Name of firm.
3. Date of Registration.
4. Duration of the firm.
5. Address — Date of change — Remarks
6. Partners.

Name of Partners	Address	Date of Joining	Date of Ceasing	Remarks

7. Principal place of business and changes therein.

Particulars regarding the place	Date of change	Remarks

8. Other places of business

Name of Place	Date of Opening	Date of Closing	Remarks

Name of Firm

S.N. of the document	Description of document	Date of Filing	Signature of Registrar

FORM B

[See Rule 9]

Index to the Register of Firms

Firm name	Name of partners	Principal places of business	Volume number	First page entry	Number borne on the Register
1	2	3	4	5	6

FORM C

[See Rule 10 (a)]

Acknowledgement of Registration of Firms

The Registrar of Firms, Kerala, hereby acknowledges the receipt of the statement prescribed by Section 68 (1) of the Indian Partnership Act, 1932. The statement has been filed and the name of the firms ..... (here enter the name of the firm) has been entered in the Register of Firms as No. ..... of ..... 19.

Registrar of Firms

(Seal)

Trivandrum

Dated the ..... day of ..... 19.

FORM D

[See Rule 10 (a)]

Memorandum Acknowledging Receipt of Documents

The Registrar of Firms, Kerala, hereby acknowledges the receipt of the undermentioned document/documents and intimates that it has/they have been filed in pursuance of the Indian Partnership Act, 1932.

(Here enter description of document/documents).

Station .....

Dated 19

Registrar of Firms

To

Shri

FORM E

[See Rule 12]

Receipt for Fees

Received from ..... the sum of rupees (in words) being the fees for

Filing statement	..	Rs.	P.
Filing notice	..		
Inspection of copy of	..		
(Number of words)	Total :		

Station .....

Date .....

Registrar of Firms

FORM I

[See Rule 3]

Filing Fee Rs. 15/-

Application for registration of firm by the name .....

Presented or forwarded to the Registrar of Firms for filing by .....

We, the undersigned, being the partners of the firm* ..... hereby apply for registration of the said firm and for that purpose, supply the following particulars, in pursuance of Section 58 of the Indian Partnership Act, 1932.

The Firm's Name

Place of business	(a)	Principal place
	(b)	Other places.

Name of partners in full	Date of joining the firm	Permanent address in full
1.		
2.		

Duration of the firm

Signature of the partners or their specially authorised agents.

Station .....

Date .....

* Here enter the name of the firm

I ..... son of ....., ... years of age of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date .....

Witness .....

Signature

I, ... son of ....., ... years of age of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date .....

Witness .....

Signature

If any partner is a minor the fact whether he is entitled to the benefits of partnership should be set out herein.

N.B.— This form must be signed by all partners or their agents specially authorised in this behalf in the presence of a witness or witnesses who must be either a Gazetted Officer, Advocate, Attorney, Vakil, Honorary Magistrate, Chartered Accountant, Income-Tax Practitioner or Registered State Auditor.

FORM II

(See Rule 3)

Filing Fee—Rs. 5/-

Statement of alteration in the name of the firm or the location of the principal place of business.

Presented or the forwarded to the Registrar of Firms for filing by .....

We, the undersigned being the partners of the firm ..... hereby supply the following particulars pursuance to Section 60 (1) of the Indian Partnership Act, 1932.

Name of Firm

Previous Name	New Name

Principal Place of business

Previous Place	New place

Station .....

Date .....

Signature of the partners or their specially authorised agents.

I, ... son of ....., ... years of age of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date .....

Witness .....

Signature

I, ... son of ....., ... years of age of ..... religion, do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date .....

Witness .....

Signature

N.B.—Strike out the item not required.

FORM III

[See Rule 4]

Filing Fee—Rs. 5/-

Intimation of change in the place of business (other than principal place of business)

Presented or forwarded to the Registrar of Firms of filing by .....

Under Section 61 of the Indian Partnership Act, 1932, intimation is hereby given that the changes, specified below have occurred in the place of business of the firm (here enter the name of the firm).

Date of change.

1. The firm has discontinued business at .....
2. The firm has begun to carry on business at .....

Station .....

Date .....

Signature of the partner or agent of the firm

N.B.—Strike out the item not required.

FORM IV

[See Rule 4]

Filing Fee—Rs. 5/-

Intimation of alteration in the name or permanent address of partner.

Presented or forwarded to the Registrar of Firms for filing by .....

Under Section 62 of the Indian Partnership Act, 1932 intimation is hereby given that the change specified below has occurred in the name and/or permanent address of partner in the firm.

Name of partner

Previous Name (in full)	New Name (in full)

Address of Partner

Previous address (in full)	Present address (in full)

Station .....

Date .....

Signature of any partner or agent of the firm.

N.B.—Strike out the item not required.

FORM V

[See Rule 4]

[Filing Fee — Rs. 5/-]

Notice of changes in the Constitution of the firm or of the dissolution of the firm.

Presented or forwarded to the Registrar of Firms for filing by .....

Under Section 63 (1) of the Indian Partnership Act, 1932 notice is hereby given that :—

(1) The Constitution of the firm ..... has been altered as follows :

Name and full address of the incoming partner and date of his joining the firm	Name and full address of the outgoing partner and date of his ceasing to be partner

Station .....

Date .....

Signature of continuing or out going partner or of his specially authorised agent.

(2) The firm .....has been dissolved with effect from the .....

Station .....

Date .....

Signature of the person who was partner immediately before dissolution or of his specially authorised agent.

N.B.:—Strike out the item not required.

FORM VI

[See Rule 4]

Notice of election by person admitted to the benefits of partnership on attaining majority.

Filing Fee—Rs. 5/-

Presented or forwarded to the Registrar of Firms for filing by .....

Under Section 63 (2) of the Indian Partnership Act, 1932 notice is hereby given that ..... admitted to the benefits of partnership in the firm having now attained majority elects to become /elects not to become a partner of the firm.

Station .....

Date .....

Signature of the person electing or of his specially authorised agent.

THE MADHYA PRADESH PARTNERSHIP RULES, 1951

[Published under Commerce and Industry Department Notification No. 4242-896-VII, dated the 2nd June, 1952, in the "Madhya Pradesh Gazette", Part IV (C), dated 6th June, 1952]

1. **Short title.**—These rules may be called the Madhya Pradesh Partnership (Registration of Firms) Rules, 1951.

2. **Definitions.**—In these rules there is anything repugnant in the subject or context—

(a) "the Act" means the "Indian Partnership Act, 1932", and

(b) "Firm" means a firm to which the Act applies ;

(c) "Registrar" means the "Registrar of Firms".

3. **Form and verification of statements under Sections 58 and 60.**—The statements submitted to the Registrar under Sections 58 and 60 of the Act shall be in Forms I and II respectively, annexed to these rules ; and shall be verified in the manner set forth in the note at the bottom of those Forms.

4. **Form of intimations and notices under Sections 61, 62 and 63.**—Intimations and notices under Sections 61, 62, 63 (1) and 63 (2) of the Act shall be in Forms III, IV, V and VI respectively, annexed to these rules with such variations as circumstances may require.

5. **Power of Registrar of make enquiries and investigations.**—The Registrar may in his discretion, institute such enquiries, or make such investigation, in respect of any matter as may, in his opinion, be necessary for the proper performance of his duties and the administration of the Act or for the settlement of any dispute arising with respect to any firm.

6. **Register of Firms.**—The Register of Firms shall be in English in Form VII annexed to these Rules. The name of and the particulars relating to, each firm shall be entered therein in the order of its registration on a separate page or pages. Each firm shall be assigned a number in a consecutive series commencing with the financial year (1st April). A note of every document filed shall be entered in the register on the page or pages allotted to the firm concerned and shall be signed by the Registrar. The pages after making the entries shall be bound in loose leaf registers in the order of the consecutive number allotted to each firm on registration.

7. **Amendment of entries in register.**—When an entry made in the Register of Firms is to be amended, the amendment shall be shown by drawing a red line through the entry and making a suitable note in the remarks column opposite to the entry concerned and the new entry shall be made at the end of the existing entry or entries with suitable cross-references.

8. **Protest against entries in Register.**—Where any partner or other person interested wishes to dispute any entry made in Registrar of Firms, he shall notify the Registrar of his dispute in writing and the Registrar shall make an entry at the end of the then existing entries and shall make a red ink reference to the disputed entry in the remarks column against the entry so disputed.

9. **Index to Register of Firms.**—(a) An index to the Register of Firms shall be prepared in English on loose sheets, lettered alphabetically, and shall contain the particulars shown in Form VIII annexed to these rules. A fresh index shall be prepared for each financial year. The name of each firm shall be indexed as soon as the entries relating thereto are made in the Register of firms.

(b) After all the firms registered in a year have been indexed, the index shall be checked by the Registrar who shall attest it in the token of such check and the pages shall then be numbered in ink.

(c) The index for each year shall, after it has been checked, be bound into volumes of convenient size.

10. **Translation to be furnished where original not in English.**—If any document required to be submitted under the Act or any portion of such document is not in the English language, an English translation of such document or portion certified as correct by at least one partner (or his authorised agent), shall be furnished along with each copy of such document submitted to the Registrar.

11. **Acknowledgment of registration and documents.**—(a) On the registration of a firm, the Registrar shall grant to the firm an acknowledgment in Form IX annexed to these rules and on the filing of any document required to be filed under the Act, he shall grant to the person at whose instance it is filed an acknowledgment in Form A annexed to these rules.

(b) On every document registered or filed under the Act, the Registrar shall endorse the following particulars :—

(i) the number borne by the firm on the register ;

(ii) the serial number of the document ;

(iii) the date of registration or filing.

The Registrar shall also affix his signature and the seal of his office to such document.

12. Filing of documents.—A separate file shall be maintained in respect of each firm, in which the documents received by the Registrar relating thereto shall from time to time be filed. No document shall be filed by the Registrar unless the fee prescribed therefor has been paid.

13. Account of and receipt for fees.—An account of all fees received in the Registrar's office shall be maintained therein in Form XI. A receipt in Form XII shall be granted in respect of every fee received.

14. Inspection of original documents.—Subject to the payment of fees prescribed in Rule 19 the Register of Firms and all other documents recorded shall be open to inspection on a written application submitted to the Registrar during business hours. The file of the documents kept in the Registrar's office shall similarly be opened to inspection by any person applying therefor, provided that the applicant satisfies the Registrar that he has sufficient interest in the contents of the documents of which he applies for inspection and that a mere inspection of the Register of Firms will not serve his purpose. All inspection of records shall be made in the presence of Registrar or some person appointed by him in that behalf. The Registrar or the person appointed by him shall not permit the applicant while inspecting documents to make or cause to be made a copy of any such document but he shall permit the applicant to take down in pencil such particulars of the document as would enable him to apply for a certified copy of any entry or portion thereof in the Register of Firms.

15. Application for copies to be in writing.—Every application for a copy of any entry on the Register of Firms or portion thereof or a copy of the acknowledgement granted under Rule 11 shall be in writing accompanied with the requisite copying fees as prescribed in Rule 19.

16. Seal.—The seal used by the Registrar shall bear the words "Registrar of Firms, Madhya Pradesh".

17. Preservation and elimination of registers and records.—

I. The following registers and papers shall be permanently retained:

(a) Register of Firms.

(b) All Registered documents of existing firms.

(c) Certificates of registration of dissolved firms.

(d) Dissolution orders.

(e) Reference to Legal Remembrancer to Government, Madhya Pradesh.

(f) Legal Rememberancer's opinions.

(g) Reference to State Government regarding amendments in the law and the replies to the same.

(h) Index Register.

II. The following registers and papers shall be destroyed after two years :

(a) Cash book.

(b) Register of fees.

(c) Papers, other than the above, of firms which have been dissolved.

(d) References to State Government other than above.

III. The following registers and papers shall be destroyed after two year from the succeeding 1st of April :

(a) Receipt book.

(b) Despatch Register.

(c) Other routine correspondence.

(d) Indents for forms, etc.

(e) Treasury receipts.

IV. The following registers and papers shall be destroyed after one years from the succeeding 1st of April :

(a) Reminders.

(b) Explanations of delay.

18. Cancellation of the registration of defunct firms.—(i) When the Registrar has reason to believe that a registered firm is not carrying on business, or is not in operation, or that it has been finally dissolved, but the prescribed injunction has not been given, he shall send by post to every partner of the firm on its last known address a letter enquiring whether the firm is carrying on business or is in operation.

(ii) If the Registrar receives an answer from any of the partner to the effect that the firm is not carrying on business or is not in operation or if he does not receive any answer

within one month from the date of the posting of the letter, he shall publish in the Madhya Pradesh Gazette and send to all the partners, by registered post a notice that at the expiration of three months form the date of that notice the name of the firm mentioned therein shall, unless cause is shown to the contrary be struck off and the firm shall be dissolved and the registration shall be deemed cancelled.

(iii) At the expiration of the time mentioned in the notice the Registrar shall, unless cause is shown previously by the partners, strike the name of the firm off the register, and shall publish notice of the fact in the "Madhya Pradesh Gazette", and on such publication the firm shall be considered to be dissolved.

[2][19. (i) **Maximum Fees**

Document or Act in respect of which the fee is payable	Maximum fee
(1)	(2)
Statement under Section 58	Five hundred rupees
Statement under Section 60	One hundred
Intimation under Section 61	One hundred
Intimation under Section 62	Fifty rupees
Notice under Section 63	one hundred rupees
Application under Section 64	Fifty rupees
Inspection of the Register of Firm under Sub-Section (4) of Section 66	Twenty five rupees
Inspection of documents relating to a firm under sub-section (2) of Section 66	Twenty five rupees
Copies from the Register of Firms	Ten rupees for each hundred words or part thereof].

Provided that the State Government may increase may the rate subject to a maximum of five per centage of the above rate in every two years.

Note : In case where the applicant requires copies of the register of firms under Section 67, early i.e., within five working days he shall file separate application along with double amount of fee & the Competent authority shall grant copies within five working days."

1. Subs. by Noti. No. 22 (ii) 5-87-XI-C dated 3-3-1989.
2. Subs. by M.P. Act No. 34 of 1998, Sec. 3.

(ii) Fees payable under the Act or these rules by a firm or a person shall be credited into the Government Treasury and the Treasury challan shall be presented or transmitted to the Registrar's office in token of such payment or the same shall be deposited in his office and receipt be obtained for such payment.

20. Submission of documents.—Documents to be lodged with the Registrar shall be printed or type-written and may be delivered to him either in person or by post. No fact shall be recorded on a mere oral notice.

21. Office hours.—The office of the Registrar shall be open for business (except on Sundays and Holidays) from 11 a.m. to 3.00 p.m.

FORM NO. I

[See Rule 3]

Application for registration of firm by the name.....

**[Filing Fee—Rs. 500/-]

Presented or forwarded to the Registrar of Firms for filing by.....

We, the undersigned, being the partners of the firm* .....hereby apply for registration of the said firm and for that purpose supply the following particulars, in pursuance of Section 58 of the Indian Partnership Act, 1932.

The firm's name*

Place of business (a) Principal place

(b) Other places

Name of partners in full	Date of joining the firm	Permanent address in full
(1)	(2)	(3)
1.		
2.		

Duration of the firm—

Station..... (1)

Date..... (2)

Signature of the partners or their specially authorised agents

*. Here enter the name of the firm.

**. Amended by M.P. Act 34 of 1998.

I.....son of.....years of age.....do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date.....

Witness .....

Signature

I, ...son of.....years of age.....do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date.....

Witness .....

Signature

If the partner is a minor the fact whether he is entitled to the benefits of partnership should be set out therein.

N.B.—This form must be signed by all partners or their agents specially authorised in this behalf in the presence of a witness or witnesses who must be either a Gazetted Officer, Advocate, Pleader, or Chartered Accountant.

FORM NO. II

[See Rule 3]

Statement of alteration in the name of the ..... firm or in the location of the principal place of business

[1][Filing Fee—Rs. 100/-]

Presented or forwarded to the Registrar of Firms for filing by.....

We, the undersigned, being the partners of the firm*.....Registration No.....Date of registration.....hereby supply the following particulars in pursuance of Section 60 (1) of the Indian Partnership Act, 1932 :

Name of the firm*.....Regd. No.....Date.....

Name of firm

Previous name	New name
(1)	(2)

Principal place of business

Previous Place	New place
(1)	(2)

Station .....

Date.....

Signature of the partners or their specially authorised agents

N.B.—Strike out item not required.

* Here enter the name of the firm.

1. Amended by M.P. Act No. 34 of 1998.

I, ... son of ..... years of age ..... do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date .....

Witness .....

Signature

I, ... son of ..... years of age ..... do hereby declare that the above statement is true and correct to the best of my knowledge and belief.

Date .....

Witness .....

Signature

N.B.—Strike out item not required.

FORM NO. III

[See Rule 4]

[1][Filing Fee—Rs. 100/-]

Intimation of change in the place of business ..... other than principal place of business

Presented or forwarded to the Registrar of Firms for filing by .....

Under Section 61 of the Indian Partnership Act, 1932 intimation is hereby given that the changes specified below have occurred in the palace of business of the firm* ..... Registration No. ..... date of Registration ..... date of change .....

1. The firm has discontinued business at .....

2. The firm has begun to carry on business at .....

Station .....

Date .....

Signature of any partner or agent of the firm

---

* Here enter the name of firm.

1. Amended by M.P. Act No. 34 of 1998.

FORM NO. IV

[See Rule 4]

[1]Filing Fee—Rs. 50/-

Intimation of alteration in the name or permanent address of partners

Presented or forwarded to the Registrar of Firms for filing by .....

Under Section 62 of the Indian Partnership Act, 1932 intimation is hereby given that the change specified below has occurred in the name and permanent address of partners in the firm* ..... Registration No. ..... and date of Registration .....

Name of Partner :

Previous name in full (1)	New name in full (2)
Address of Partner	
Previous permanent address (1)	Presented permanent address (2)

Station .....

Date .....

Signature of any partner or agent of the firm

N.B.—Strike out items not required.

FORM NO. V

[See Rule 4]

[1][Filing Fee—Rs. 100/-]

Notice of change in the Constitution of the firm or of the dissolution of the firm*

Presented or forwarded to the Registrar of Firms for filing by .....

Under Section 63 (1) of the Indian Partnership Act, 1932 notice is hereby given that—

(1) The Constitution of the firm Registration No. .....
Date of registration has been altered as follows :

Name and full address of the incoming partner and date of his joining the firm (1)	Name and full address of the outgoing partner and date of his ceasing to be partner (2)

Station .....

Date .....

Signature of the incoming, continuing or outgoing partner or of his specially authorised agent

1. Amended by M.P. Act No. 34 of 1998.

(2) The firm*

Registration No. Date of Registration has been dissolved

Station .....

Date .....

Signature of the person who was a partner immediately before the dissolution or of his specially authorised agent.

N.B.—Strike out items not required.

FORM NO. VI

[See Rule 4]

[1][Filing Fee—Re. 100/-]

Notice of election by person admitted to the benefits of partnership on attaining majority

Presented or forwarded to the Registrar of Firms for filing by .....

Under Section 63 (2) of the Indian Partnership Act, 1932 notice is hereby given that admitted to the benefits of partnership in the firm* ..... Registration No. ..... Date of Registration having now attained majority elects to become/elects not to become a partner of the said firm.

Station .....

Date .....

Signature of the person electing or of his specially authorised agent

*Here enter the name of the firm.

FORM NO. VII

[See Rule 6]

Register of Firms

(Maintained under Section 59 of the Indian Partnership Act, 1932)

1. Serial number of firm.
2. Name of firm.
3. Date of Registration.
4. Duration of the firm.
5. Address | Date of change | Remarks

(1) (2) (3)

1. Amended by M.P. Act No. 34 of 1998.

6. Partners :

Name of partners :	Address		Date of	Remarks
	Joining	Ceasing		
(1)	(2)	(3)	(4)	(5)

7. Principal place of business and changes therein :

Particulars regarding the place	Date of change	Remarks
(1)	(2)	(3)

8. Other places of business :

Name of place	Date of		Remarks
	Opeaning	Closing	
(1)	(2)	(3)	(4)

9. Name of firm* :

Serial number of the document	Description of document	Date of filing document	Signature of Registrar
(1)	(2)	(3)	(4)

FORM NO. VIII

[See Rule 9]

Index to the Register of Firms

Name of firm	Name of Partner	Principal place of business	Trade	Volume number	First page of entry	Number borne on the register
(1)	(2)	(3)	(4)	(5)	(6)	(7)

FORM NO. IX

[See Rule 11 (a)]

Acknowledgement of Registration of Firms

The Registrar of Firms, Madhya Pradesh, hereby acknowledges the receipt of the statement prescribed by Section 58 (1) of the Indian Partnership Act, 1932. The statement has been entered in Register of Firms as ;

No. of 19

SEAL

Nagpur : *Registrar of Firms*

The day of 19.

FORM NO. X

[See Rule 11 (a)]

The Registrar of Firms, Madhya Pradesh, hereby acknowledges the receipt of the undermentioned documents and of the fee noted against for the same, and intimates that ..... been ..... pursuant to Section 58 of the Indian Partnership Act, 1932.

The day of 19.

Registrar of Firms

The The 19

Forwarded to the Managing Agents/Partners of the ..... with reference to their/his letter No. Dated the .....

Registrar of Firms.

FORM NO. XI

[See Rule 13]

Register of Fee

Date of receipt	Amount received	From whom received	On what account	Date or remittance to Government Treasury
(1)	(2)	(3)	(4)	(5)
	Rs. P.			

FORM NO. XII

[See Rule 13]

Receipt for fee

Received from

the sum of rupees (in words)

being the fee for— Rs. P.

Filing statement

Filing notice

Inspection of

Copy of (number of words) _____

Total : _____

Station .....

Date .....

SUBJECT INDEX

VOLUME II

P. No.

A

Acceptance
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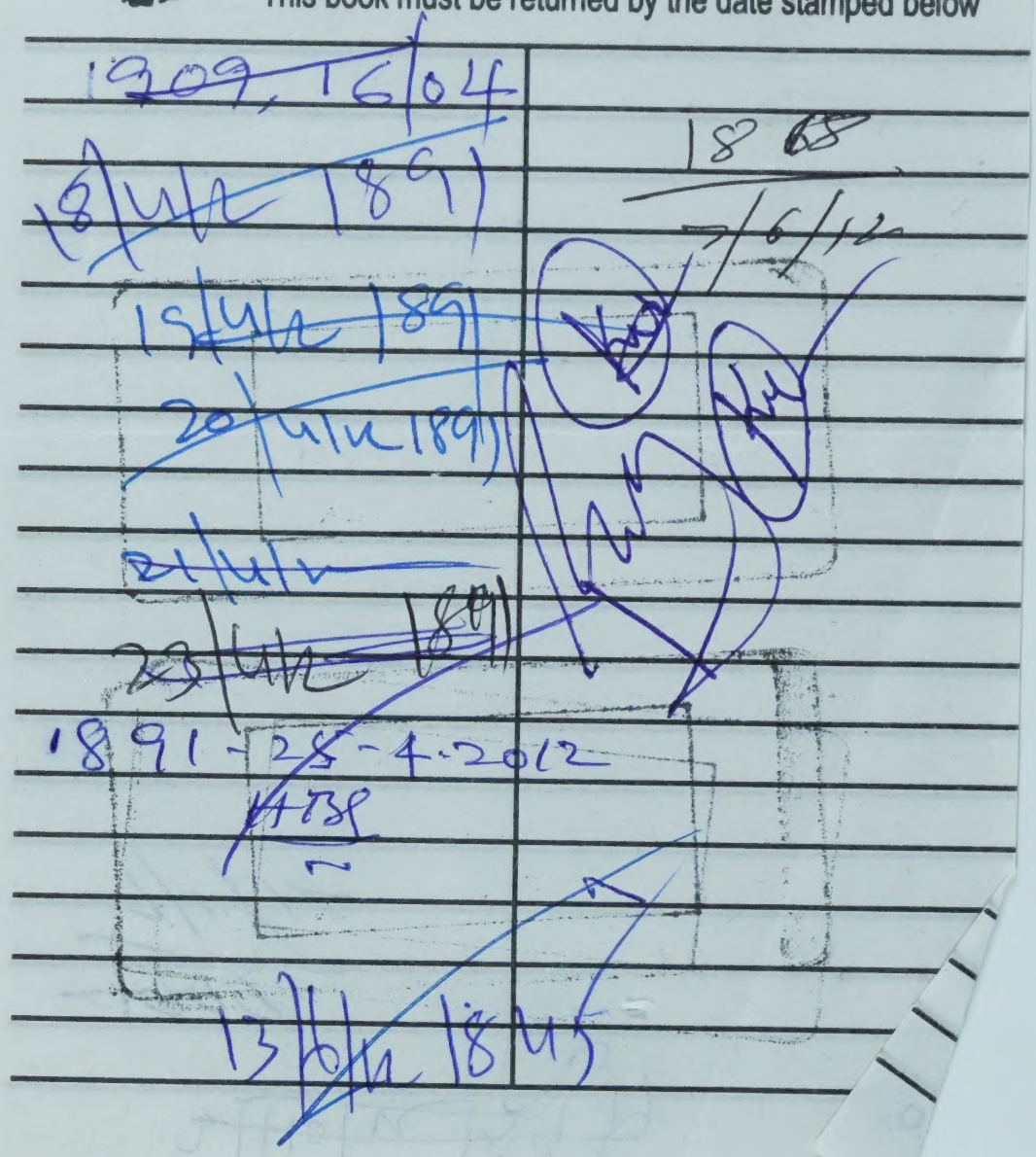
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